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# LAW'S BOX: LAW, JURISPRUDENCE AND THE INFORMATION ECOSPHERE

Paul Douglas Callister\*

*"By means of the temple, the god is present in the temple."*<sup>1</sup>

## I. INTRODUCTION

B.F. Skinner might have smiled upon the hypothesis of this Paper: that law is a child in one of his boxes, where environment and perception (as influenced by environment) profoundly affect the development of a dynamic organism. With the hope of better understanding the diversities among legal systems, this Paper brings together two related modes of analysis: first, consideration of the technological, institutional, geopolitical, and temporal realities that make up the media or "information environment," and second, study of humanity's "modes of perception" as influenced by the web of beliefs, cultures, and social relationships which accompany that information environment. The symbiotic relationship of information environment and modes of perception, particularly with reference to culture, constitute the information ecosphere or "infosphere." The conclusion of this piece is that legal infosphere—including its norms of communication, technologies, media, and unique cultural influences over perception (including epistemic presuppositions)—are significant factors in shaping legal systems. Furthermore, understanding the legal infosphere is vital in order to approach the essence of law.

For as long as it has been important to know "what the law is," the practice of law has been an information profession. However, just how the information ecosphere affects legal discourse and thinking has never been systematically studied, with minor exception.<sup>2</sup> There has been significant study of how law

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<sup>1</sup> MARTIN HEIDEGGER, *The Origin of the Work of Art*, in POETRY, LANGUAGE, THOUGHT 42 (Albert Hofstadter trans., Harper & Row 1971) (1960).

<sup>2</sup> See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509 (1992). The principal focus of *Paratexts* is on evidence, the relationship between law and fact, and how new, electronic media require new standards for documentary evidence. Along with *Paratexts*, two works by Ethan Katsch and a review by Richard Ross also consider the potential impact of electronic media on law. See generally M. ETHAN KATSH, ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989); M. ETHAN KATSH, LAW IN A DIGITAL WORLD (1995); Richard J. Ross, *Communications Revolutions and Legal Culture: An Elusive Relationship*, 27 LAW & SOC. INQUIRY 67 (2002).

From the legal information sciences perspective, Bob Berring, Director at Boalt Hall's Law Library, has been the singular voice in the wilderness, warning of the potential consequences to legal thinking (in addition to research skills) from electronic research tools. His work has been the

attempts to regulate the flow of information through copyright, trademarks, doctrines of libel and slander, prohibitions on obscenity, censorship, and so on, but little is said about how information limits, shapes, and provides a medium for law to operate.

Part II of this Paper will introduce “medium theory”—the idea that methods of communication influence social development and ideology—from the standpoint of ecological holism; in particular, by adapting Ronald J. Deibert’s theory.<sup>3</sup> Further, the definition of the theory, its limitations, and its applicability to the field of law will be explored. In effect, medium theory and ecological holism provide the methods of analysis for this Paper. Part III will examine past interaction of the legal information environment with culture, societal institutions, and web of beliefs that affect legal thinking and processes. This examination will be conducted based upon historic and pre-historic cultures that emphasized different forms of media in conducting legal affairs. For the sake of economy, this Paper will only discuss stone, clay, papyrus, and oral cultures.

The historical treatment, although not exhaustive, will present case studies illustrating particular transformations in the information (or media) environment and cultural modes of perception, and will discuss corresponding developments of the law. The examples gathered are eclectic, borrowed from an assortment of legal milieu to demonstrate the connections among the legal culture, information environment, and commonalities of perception. The use of disparate examples is representative of the ideal practice of academic law librarianship: functioning on an interdisciplinary level, bringing together diverse sources and viewpoints for consideration, hopefully initiating additional scholarly pursuit, and optimistically surveying and defining terrain for distinct new fields of study.<sup>4</sup>

In conclusion, in Part IV, this Paper relies upon Heidegger’s criticism of modern technology and thinking. Heidegger is useful because of his recognition of enframed environments. In the case of modern society, the environment is confined by technological thinking (i.e., the reduction of all things into resources to be mastered and used toward some end). The only escape is poetic contemplation of this boundary—to recognize it, look at it, contemplate it, and

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catalyst for this author’s effort to study the problem historically with respect to media environments in general. See generally Robert C. Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189 (1997); Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9 (1994) [hereinafter Berring, *Collapse*]; Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673 (2000) [hereinafter Berring, *Legal Information*]; Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15 (1987); Robert C. Berring, *On Not Throwing out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615 (1995); Robert C. Berring, *The Evolution of Research: Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000).

<sup>3</sup> See RONALD J. DEIBERT, PARCHMENT, PRINTING, AND HYPERMEDIA (John Gerard Ruggie ed., 1997).

<sup>4</sup> The eminent legal historian M.T. Clanchy unapologetically adopts a similar approach, he “draws . . . on the expertise of other scholars and consistently uses a selective method” out of necessity because of the vast historical scope and numerous ancient languages of the subject materials. M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307, at 4-5 (2d ed. 1993).

stare over its edge. In a sense, each study of the relationship of law to its information ecosphere enhances awareness of modern law's relationship to its infosphere and the system's boundaries. More importantly, recent changes in the information environment, such as the emergence of Internet and electronic databases, become more appreciable and potentially significant. The challenge is to see, by studying the past, the current boundaries of law's box and then to imagine what may lie beyond them.

## II. MEDIUM THEORY AND ECOLOGICAL HOLISM: A NEW LENS FOR HISTORICAL ANALYSIS

In short, "[t]he central proposition of medium theory is that changing modes of communication have effects on the trajectory of social evolution and the values and beliefs of societies."<sup>5</sup> Medium theory is grounded in communications theory and concerns the technological changes impacting the dissemination and preservation of information.<sup>6</sup> Under such theory, "the medium is never neutral" but has a profound effect on how information is transformed into knowledge within a society.<sup>7</sup> In the mid-twentieth century, the basic tenets of medium theory were developed by Harold Adam Innis and promulgated by Marshall McLuhan,<sup>8</sup> the original promulgator of "the Medium is the Message." While not without significant academic opposition and criticism, the basic tenets of medium theory have been widely considered throughout various disciplines.<sup>9</sup>

In 1997, Ronald Deibert, a political scientist from the Munk Centre for International Studies at the University of Toronto, modified the theory by moving away from technological determinism to emphasize the ecological and holistic nature of information media:

New technologies of communication do not *generate* specific social forces and/or ideas, as technological determinists would have it. Rather, they *facilitate* and *constrain* the extant social forces and ideas of a society. The hypothesized process can be likened to the interaction between species and a changing natural environment. New media environments favor certain social forces and ideas by means of a functional bias toward some and not others, much the same as natural environments determine which species prosper by "selecting" for certain physical characteristics. In other words, social forces

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<sup>5</sup> DEIBERT, *supra* note 3, at ix.

<sup>6</sup> *Id.* at ix-x.

<sup>7</sup> PAUL HEYER, COMMUNICATIONS AND HISTORY: THEORIES OF MEDIA, KNOWLEDGE, AND CIVILIZATION, at xiv (1988).

<sup>8</sup> DEIBERT, *supra* note 3, at 6-7; *see generally* HAROLD ADAM INNIS, EMPIRE AND COMMUNICATIONS (1950); HAROLD ADAM INNIS, THE BIAS OF COMMUNICATION (1951); MARSHALL McLUHAN, GUTENBERG GALAXY (1962); MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

<sup>9</sup> DEIBERT, *supra* note 3, at 6-7.

and ideas survive differentially according to their “fitness” or match with the new media environment—a process that is both open-ended and contingent.<sup>10</sup>

Deibert saw his approach as consistent with ecological holism—an emphasis on the nonlinear nature of human development, seeing not stages or cycles of societal evolution, but episodic change resulting from the convergence of a multiplicity of factors.<sup>11</sup>

Deibert’s theory of ecological holism does not simply view human development as a product of the environment, placing the material before the ideal; rather, it recognizes the symbiotic interactions of the two by focusing on what lies between them: culture, institutions, and media.

Ecological holism takes as its starting point the basic materialist position that human beings, like all other organisms, are vitally dependent on, and thus influenced by, the environment around them. However, it recognizes that because human beings have the unique ability to communicate complex symbols and ideas, they do not approach their environment on the basis of pure instinct (as other organisms do) nor as a linguistically naked “given,” but rather through a complex web-of-beliefs, symbolic forms, and social constructs into which they are acculturated and through which they perceive the world around them.<sup>12</sup>

The study of the web-of-beliefs, symbolic forms, and social constructs (and their interaction with the environment) constitutes the heart of ecological holism. Deibert’s objective was to focus on the role that the media, or information environment, among other factors, plays in the evolution of political and social institutions. In so doing, Deibert focused upon “distributional changes” and “changes to social epistemology” which resulted from changes in the medium of communication.<sup>13</sup> Distributional changes have to do with changes in a society’s power structure.<sup>14</sup> Changes in social epistemology have to do with the “web-of-beliefs into which a people are acculturated and through which they perceive the world around them.”<sup>15</sup> This Paper will take a different tack, considering changes to *legal systems* brought about both by transformation of the media, or information environment, and by changes in legal epistemology. Consequently, this Paper will explore how the information ecosystem, including both environment and the web-of-beliefs, impacts the determination of what the law is.

Before commencing with a description of various historic and prehistoric cultures, this Paper enumerates factors, or a heuristic framework, for consideration of various media environments and their relationship to law and

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<sup>10</sup> *Id.* at 36.

<sup>11</sup> *Id.* at 39-40.

<sup>12</sup> *Id.* at 43.

<sup>13</sup> *Id.* at 67.

<sup>14</sup> DEIBERT, *supra* note 3, at 67.

<sup>15</sup> *Id.* at 94.

legal institutions. The heuristic will not be used as the organizing principle to present information on various legal infospheres, but as a reference point that the reader may find useful when contrasting different legal information ecosystems, and that this Paper may note from time to time. The heuristic may be thought of in terms of a conceptual framework, first proposed by Ronald Deibert, and adapted here for purposes of studying the legal information ecosphere.

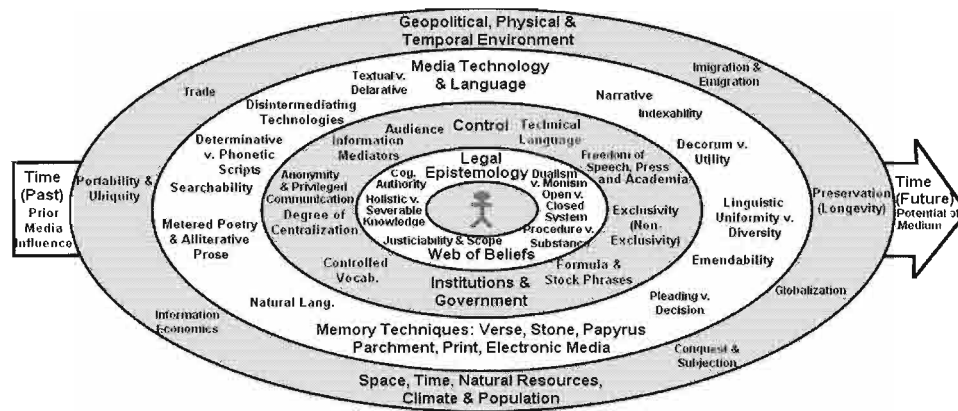


Figure 1—Model of Legal Information Ecosystem (based on Ronald Deibert's model).<sup>16</sup>

Niche in the Information Ecosystem	Factor	Description
Legal Epistemology or "Web-of-Beliefs"	Dualism vs. Monism	Is the legal system emulating the spiritual world or is it solely concerned with the natural? Does the divine or a natural order dictate law?
	Open vs. Closed System (all-inclusive)	Is the system complete (as in a civil system) or is it accepted that it is constantly changing?
	Procedure vs. Substance	Is the emphasis for "capturing" law in media or memory on procedures, decisions or both?

<sup>16</sup> Cf. DEIBERT, *supra* note 3, at 38, fig.2.

Niche in the Information Ecosystem	Factor	Description
	Justiciability, Scope and Precedent	What issues may be heard before a court? Does the matter in controversy limit judicial decisions? Can a decision serve as precedent? What may be relied upon in any decision—the holding, a range of related issues, etc.?
	Holistic vs. Severable Knowledge	Is legal knowledge severable from other disciplines of knowledge or is it interrelated and inseparable from other fields? Is law connected to fate?
	Cognitive Authority	Who or what are the sources recognized as legal authority in a given society? What are the trusted resources that present the law?
<b>Control (Institutions and Government)</b>	Technical (Specialized) vs. Common Language	Has a special jargon and usage developed for the communication of legal information and is it controlled by a particular class?
	Freedom of Speech, Press and Academia	Is legal communication and research protected speech?
	Exclusivity vs. Non-Exclusivity	In some cultures, scribal classes or poetic bards captured written and formal communication to the exclusion of all others. Is there a single source of legal authority?
	Formula and Stock Phrases	Are legal transactions and the administration of justice accomplished through set forms of speech or written communication?
	Controlled Vocabulary	Is legal information accessed through a controlled vocabulary system or hierarchy of concepts developed by human editors, indexers and abstracters?

Niche in the Information Ecosystem	Factor	Description
	Anonymity and Privileged Communications	Can legal information be accessed anonymously and can legal consultations be kept private?
	Information Mediators	Is legal information mediated? Is it accessed through human beings: editors, scribes, indexers, librarians, catalogers, annotators, emendators, etc.?
	Audience	Does specific medium target certain audiences and segments of society? Does it do so to the exclusion of others?
<b>Media Technology and Language (Memory Techniques: Verse, Stone, Papyrus, Parchment, Print, Electronic Media, etc.)</b>	Narrative	Is story-telling used with legal information to facilitate memory retention and provide instruction?
	Indexability	Can legal information be indexed in a particular medium? Is it being indexed?
	Decorum vs. Utility	Is legal information presented in a fashion to impress current and future citizens or is it presented strictly in the most convenient form possible?
	Linguistic Uniformity vs. Diversity	How linguistically diverse are the various classes in a society? Is there a separate language for courts and government administration? Are there different scripts for writing?
	Emendability	Is the medium (such as parchment) subject to scribal annotation and is the ultimate presentation in stratum of authors and texts?
	Pleading vs. Decisions	Is the emphasis in legal literature on pleadings and procedure or the facts of the specific case and ultimate decision?
	Natural Language	Is access (indexing and searching) accomplished through computer language algorithms (based upon the rarity of terms and tracking actual usage in the law)?



<b>Niche in the Information Ecosystem</b>	<b>Factor</b>	<b>Description</b>
	Metered Poetry and Alliterative Prose	Is there use of poetic meter, rhyme or alliteration? Besides their aesthetic appeal, metered poetry and alliterative or repetitive prose styles facilitate memory, particularly in oral environments.
	Searchability	Can legal materials be researched through full-text searching?
	Determinatives vs. Phonetic Alphabet	Does the use of silent markers in written scripts, such as determinatives, ideograms or other devices, hide meaning, thus favoring literate and scribal classes? Does the script promote broad understanding, even to auditory audiences, by being completely phonetic, such as the Greek alphabet?
	Disintermediating Technologies	Have technologies functioned to mitigate and undermine the role of human intermediators—librarians, indexers, abstractors, attorneys, etc.?
	Textual vs. Declarative	Is legal material presented in textual sentences with complex development and presentation or as lists of imperatives?
<b>Geopolitical, Physical and Temporal Environment</b>	Immigration and Emigration	Are immigrant populations assimilated into the legal traditions of new host countries? Do they bring separate and independent legal systems with them?

Niche in the Information Ecosystem	Factor	Description
	Preservation (Longevity)	Some media provide optimum longevity, such as stone and metals, which are designed for preservation over lengthy periods of time and even the eternities (from a religious standpoint). Other materials such as wax are designed for temporary (and even recycled use). Some media do not easily migrate from one format to another. What kinds of media are present and how do they function to meet concerns of longevity, preservation and technology migration?
	Globalization vs. Isolation	How are changes in trade barriers, travel and communications affecting law and legal information?
	Conquest and Subjugation	How does conquest and subjugation of a nation affect its legal system and the legal system of the new masters?
	Information Economics	How is information packaged, assigned economic value, licensed, traded, and exchanged? Is it only accessible to the rich? Is it supported with public funds?
	Portability and Ubiquity	Portable and ubiquitous media can cross great distances (for instance to administer empires) and be accessed from anywhere by anyone, such as promised by the Internet. Is the legal information portable or ubiquitous?
	Trade	How has trade affected the supply of resources for various media as well as legal materials (books, databases, documents, etc.)?

Niche in the Information Ecosystem	Factor	Description
Time (Past and Future)	Prior Influences	Often the prior media (for example, oral verse or stone) will influence the style of writing in subsequent media (papyrus or parchment). Poetic recitations or canned formulas addressing the needs of an oral culture (for the sake of memory) find their way into subsequent written media writings in more tangible media. What prior influences affect the current legal information environment?
	Potential of Medium	To what extent are the full potentials of technology and new social organizations being realized? How stable are legal institutions and media environments?

### III. Information Ecospheres and Law

This Paper will survey various eras in history to find examples, and hopefully commonalities, of the ways oral cultures and early forms of publication influenced legal thought and the web-of-beliefs that helped shape legal institutions. It will divide the topic into several information ecospheres: stone, clay tablets, papyrus, and oral verse. For the sake of economy, parchment, print, and electronic environments have not been included. However, the reader should recognize the generality of the discussion, and that even within a particular type of information ecosphere as categorized herein, there may be numerous subtleties and variations.

Because of the breadth of the subject, this Paper will confine itself to Western legal traditions and their historical roots in the Near East.

#### A. Law as Set Forth on Stone—“That All May See and Know” in Classical Greece

Classical Greece is the ancient Western civilization that depended upon stone as the medium of law. Although stone was a prevalent medium of expression in Egypt, few legal texts can be found.<sup>17</sup> Rome depended upon

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<sup>17</sup> See *infra* notes 179-80, 211 and accompanying text.

papyrus for the administration of its far-flung empire.<sup>18</sup> The Mesopotamian cultures, with notable exceptions, primarily depended upon clay tablets and papyrus.<sup>19</sup> It is the Greeks, in their Classical Period, who relied upon stone for complete expression of law. The use of stone compliments Greek perceptions about democracy and the ubiquitous role of its citizens. The legal information ecosystem of classical Greece is a harmonious relationship of stone and democratic ideals.

Consider, for instance, the ancient Greeks of the fifth century B.C. Their government and legal institutions functioned with comparatively small bureaucracy, and with little record-keeping.<sup>20</sup>

[I]n so far as [the Greek city-state] did try to enforce or extend its power through the written word, it did this almost overwhelmingly by means of public, visible and usually inscribed record, rather than hidden archival documents . . . . [T]hose establishing the law were concerned to impress on the citizenry the importance of the stone version—very seldom is there any mention of other kinds of written documents.<sup>21</sup>

The role of publishing in stone, usually on *stelae*, seems to have been one of memorialization and impression.<sup>22</sup> In fact, even when there were original documents,

there was a tendency to consider the published texts rather than the originals to be in some sense the official texts—and as late as *c.* A.D. 200 Argos sent to another state ‘the copy of the *stele*’. [Greek o]rators often cite[d] a text from a *stele* (and often indicate its location) . . . .<sup>23</sup>

The finality and importance of *stelae* became so prominent that it even affected the cityscape of Athens, making it look like a cemetery.<sup>24</sup>

<sup>18</sup> INNIS, *EMPIRE AND COMMUNICATIONS*, *supra* note 8, at 7 (“The conquest of Egypt by Rome gave access to supplies of papyrus which became the basis of a large administrative empire. . . . [M]aterials that . . . emphasize space favour centralization and systems of government less hierarchical in character.”).

<sup>19</sup> See *infra* notes 118-22 and accompanying text.

<sup>20</sup> Rosalind Thomas, *Literacy and the City-state in Archaic and Classical Greece*, in *LITERACY AND POWER IN THE ANCIENT WORLD* 49 (Alan K. Bowman & Greg Woolf eds., 1996). “The lack of any bureaucracy may be connected as much to the privileged position of the citizen in the *polis* as to the general Greek approach to state records and the epigraphic habit.” *Id.* at 50.

<sup>21</sup> *Id.* at 49.

<sup>22</sup> The same is true of ancient Crete, where literacy was notably less. See P.J. Rhodes, *Public Documents in the Greek States: Archives and Inscriptions Part II*, 48 *GREECE & ROME* 136, 141 (2001).

<sup>23</sup> *Id.* at 136 (citations omitted).

<sup>24</sup> P.J. Rhodes, *Public Documents in the Greek States: Archives and Inscriptions Part I*, 48 *GREECE & ROME* 33, 36 (2001) (“[B]y the end of the classical period the Athenian Acropolis will not have been the romantic sight we like to imagine but will have looked like a cemetery, with *stelai* set up wherever there was room.”).

Despite their natural ruggedness, *stelae* are subject to amendment by erasure and chiseling out,<sup>25</sup> and the act of demolishing *stelae* may have as much importance as their original inscription.<sup>26</sup> Consequently, despite the use of stone, Greek law functions as an open system. Besides the inherent difficulty in amending such texts, the form of publication of *stelae* does not always facilitate ease of use among the masses:

[B]y no means all Greeks, even all Athenians, will have had a sufficient degree of literacy to be able to read long and complicated texts, that the *stoichedon* style, with letters spaced regularly on a grid, no spaces between words, and lines ending whenever their quota of letters had been used, will not have made reading easy even for those who had a reasonable degree of literacy; that some texts were so located that the upper part, at least, could not be read without climbing a ladder; and in terms of cost-effectiveness many texts seem unlikely to have justified their publication.<sup>27</sup>

The use of *stelae* and “*scriptio continua* ma[kes] vocalization practically unavoidable,” a “sounded experience.”<sup>28</sup>

While chiseled *stelae* may not be the most efficient means of wide dissemination, they are carved and erected “for whoever wishes to see” and “so that all may know.”<sup>29</sup> Indeed, their publication is thought to be associated with democracy itself.<sup>30</sup> This is not to suggest widespread literacy among the Greek populace, but at least public officials can check the accuracy of the law without relying upon secretive archives.<sup>31</sup> Reading, in fact, is a task delegated to slaves and encouraged in “moderation, so as not to become a vice.”<sup>32</sup>

In contrast to the permanency of *stelae*, archival documents other than stone are viewed as ephemeral and “dispensable once the transaction to which they referred was complete.”<sup>33</sup> Contracts are “wiped off” and financial decrees are destroyed.<sup>34</sup> The use of archives for storing and referring to written documents is also problematic because public archives are “dispersed” and “uncentralised.”<sup>35</sup>

<sup>25</sup> Rhodes, *supra* note 22, at 136-37.

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at 140.

<sup>28</sup> Jesper Svenbro, *Archaic and Classical Greece: The Invention of Silent Reading*, in *A HISTORY OF READING IN THE WEST* 44 (Guglielmo Cavallo & Roger Chartier eds., Lydia G. Cochrane trans., Univ. of Mass. Press 1999) (1995).

<sup>29</sup> Rhodes, *supra* note 22, at 141.

<sup>30</sup> Thomas, *supra* note 20, at 44.

<sup>31</sup> *See* ERIC A. HAVELOCK, *PREFACE TO PLATO* 39 (1963).

<sup>32</sup> Svenbro, *supra* note 28, at 46.

<sup>33</sup> Rhodes, *supra* note 22, at 139. *See also id.* at 138.

<sup>34</sup> *Id.* at 138.

<sup>35</sup> Thomas, *supra* note 20, at 35. “[T]here was no sole source of documentary authority and to talk of a ‘central state archive’ is probably to dignify and bureaucratise a more disparate and haphazard system . . . . The idea that public archives regularly authorised private documents even in the Hellenistic world is much exaggerated.” *Id.* at 36.

Besides functioning as decorum, the practical use of *stelae* can be seen from at least one account of a Greek trial. During a murder trial between 400 and 380 B.C., the defendant, Euphiletus, implores the clerk to read, from the “pillar of the Court,” the Law of Solon pertaining to a defense against a murder charge in the event of catching an adulterer in the act, as well as certain provisions regarding rape.<sup>36</sup>

The permanency and seeming inflexibility of an epigraphic legal code, like the Law of Solon, is balanced and complimented by the function of Greek *dicasts* (somewhat like modern juries). *Dicasts* represent the citizens of Athens.<sup>37</sup> They make no distinction between issues of law and fact, deciding both.<sup>38</sup> The oath of the *dicast* promises, “I will judge according to the laws and the decrees of the Athenian people and the senate of the Five Hundred. If there are no laws applicable to the case I will decide according to the best of my judgment without fear or animosity.”<sup>39</sup> No rationale for decisions is given, and consequently no body of precedent develops.<sup>40</sup> In a sense, the human *dicasts*, with their independence, provide a flexibility that stone cannot provide. Likewise, stone, with its sense of permanence and timelessness, provides stability that *dicasts*, who lack the ability to make precedent, cannot provide.

The lack of reliance upon precedent comports well with a legal system emphasizing stone text. Stone text is limited in the amount of information that it can hold. Clay tablets (which hold more information than stone) held approximately 34 characters per inch, compared to 101 characters per inch in a typical nineteenth-century novel.<sup>41</sup> To facilitate the widespread adoption and use of a system of precedent, which tends to be quite voluminous, requires a denser legal medium than stone. Consequently, the information ecosphere of the time does not easily support reliance upon precedent.

In many respects, the defining characteristic of the Classical Athenian legal system is the ubiquitous role of the Athenian citizen. In such a legal system, legal information has to be readily available for the wider populous. The average male citizen serves in the assembly, senate, and *dicast*, and as prosecutor in public suits when duty and personal discretion so dictate.<sup>42</sup> “[A]nyone who please[s] (ἐξήν τῷ βουλομένῳ) [may] prosecute.”<sup>43</sup> In strikingly similar fashion, the law is published on *stelae*, “so that it shall be possible for whoever wishes to

<sup>36</sup> Kathleen Freeman, *On the Killing of Eratosthenes the Seducer*, in *MURDER OF HERODES AND OTHER TRIALS FROM THE ATHENIAN LAW COURTS* 48-49 (special ed. 1995). On the use of secretaries to read documents aloud, see Rhodes, *supra* note 22, at 142.

<sup>37</sup> ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 72 (1927).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 73.

<sup>40</sup> *Id.* at 74-75.

<sup>41</sup> PAUL CONWAY, *PRESERVATION IN THE DIGITAL WORLD*, at 6 fig.1, 10 fig.5 (1996).

<sup>42</sup> See BONNER, *supra* note 37, at 33, 35, 64, 73.

<sup>43</sup> *Id.* at 64. The exception for general standing to prosecute is in instances of homicide when the privilege is reserved for near relatives. *Id.* at 44, 57. However, homicide is served by private, rather than public suits. *Id.* at 59.

know [όπος άν είδέναι τόι βολομένοι].”<sup>44</sup> The evils of failing to publish law and the virtues of equal access to law are likewise noted in verse:

No worse foe than the despot hath a state  
Under whom, first, can be no common laws,  
But one rules, keeping in his private hands  
The law: so is equality no more.  
But when the laws are written, then the weak  
And wealthy have alike but equal right.  
Yea, even the weaker may fling back the scoff  
Against the prosperous, if he be reviled;  
And, armed with right, the less o’ercomes the great.  
Thus Freedom speaks: “What man desires to bring  
Good counsel for his country to the people?”  
Who chooseth this, is famous: who will not,  
Keeps Silence. Can equality further go?  
More—when the people piloteth the land,  
She joyeth in young champions native-born.<sup>45</sup>

Publication of law is essential to Greek democracy, and failure to do so is equated with tyranny.

The “knowing” Greek citizen is the important functionary of government. In stark contrast to the modern jury, no attempt is made to remove jurors (*dicasts*) with personal knowledge from serving.<sup>46</sup> *Dicasts* have the right to ask questions and express their feelings.<sup>47</sup> In a similar vein, the defendant’s life is an open book, subject to review by all.<sup>48</sup> Even the defendant’s relatives and friends may be considered as evidence of his character.<sup>49</sup> Essentially, the idea that courts are autonomous from social influences originated in Rome, and is alien to Greek thinking.<sup>50</sup> “There is certainly no systematic attempt at Athens to distinguish between those bodies which undertake political deliberations and those which exercise legal judgment . . . .”<sup>51</sup> In essence, a different set of epistemological assumptions operates in the legal system of Greece’s Classical Age.

The close connection between the information ecosphere and law is seen in the distinction between public suits (*γραφαί*) and private actions (*δίκαι*).<sup>52</sup>

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<sup>44</sup> Rhodes, *supra* note 24, at 35; *see also* Rhodes, *supra* note 22, at 139.

<sup>45</sup> Euripides, *Suppliant*, in 1 EURIPIDES: PLAYS 212-23 ll. 429-43 (A.S. Way trans., 1956), *quoted in part in* BONNER, *supra* note 37, at 31.

<sup>46</sup> BONNER, *supra* note 37, at 77.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 78.

<sup>49</sup> *Id.*

<sup>50</sup> S.C. Todd, *The Language of Law in Classical Athens*, in MORAL WORLD OF THE LAW 17, 22 (Peter Coss ed., 2000).

<sup>51</sup> *Id.* at 22.

<sup>52</sup> *See* BONNER, *supra* note 37, at 44.

Alternative meanings of *γραφαι* are *writing*, *writ* or *indictment*.<sup>53</sup> Thus, public suits are conceptually linked with publication and writing. To make a matter subject to public suit is in essence to make it subject to publication or writing, in the sense of “for all to see or know.”

Part of the reason for reliance on stone during the classical period is its suitability to facilitate the transition from an oral to a written culture. Despite the advantages that we may take for granted as a result of written literacy, the Greeks do not necessarily see writing as superior. Socrates expresses his reservations:

If men learn this, it will implant forgetfulness in their souls: they will cease to exercise memory because they rely on that which is written, calling things to remembrance no longer from within themselves, but by means of external marks; what you have discovered is a recipe not for memory, but for reminder.<sup>54</sup>

The important thing is the position that writing, whether on stone or other medium, takes in Greek society. Greek citizens occupy the centerpiece of legal decision-making, and writing is used for the sake of transparency “for all to see or know.” Writing is a means of remembrance and equal access. It is the human component that is ultimately essential. Indeed, the imprecision of legal terms, which are characteristically inscribed on Greek *stelae*, necessitates lengthy discussion as to their meaning.<sup>55</sup> For instance, “in the absence of any legal definition [for the crime of *hubris*], the question of whether the defendant’s behavior in a particular instance constituted *hubris* was open for discussion in each case on the basis of general principles rather than legal ones . . . .”<sup>56</sup> Statements of law are evidence for consideration, not final rules for the resolution of disputes.<sup>57</sup> Indeed, this lack of technical exactness may be an intentional effort to bolster Athenian democracy by leaving power, via interpretive latitude, in the hands of the *dicasts* or general citizenry and encouraging their moral education through engaging them in legal processes and reasoning.<sup>58</sup> The result of

<sup>53</sup> See S.C. Todd, *Glossary of Athenian Legal Terms* (Michael D. Brauw ed., March 16, 2003), [http://www.stoa.org/projects/demos/article\\_law\\_glossary](http://www.stoa.org/projects/demos/article_law_glossary).

<sup>54</sup> PLATO, PHAEDRUS 274-75 (R. Hackforth trans., 1952); see also CLANCHY, *supra* note 4, at 296-97. Interestingly, Derrida and others make the case for supremacy of speech over writing. See JACQUES DERRIDA, *Exergue*, in *OF GRAMMATOLOGY* 3 (Gayatri Chakravorty Spivak trans., 1976) (“[T]he history of truth, of the truth of truth, has always been . . . the debasement of writing, and its repression outside ‘full’ speech.”); see also J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 755-56 (1987); Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091, 1098 (1997); Marianne Sadowski, Note, “*In an Evil Hour*”: *Confessions, Narrative Framing, and Cultural Complicity in Law and Literature*, 34 CONN. L. REV. 695, 703 (2002).

<sup>55</sup> Todd, *supra* note 50, at 26.

<sup>56</sup> *Id.* (*hubris* appears to be some form of assault).

<sup>57</sup> See *id.* at 29-30.

<sup>58</sup> *Id.* at 27 (“Isocrates claims that proliferation of laws and the search for *akribēia* (‘precision’) was to miss the real function of law, which was to be general and morally educative.”) (citing Isocrates §§ 7.33, 7.39-40).



widespread engagement in legal processes is that “‘the language of the street was the language of law’ and also more assertively . . . ‘the language of law was the language of the street.’”<sup>59</sup> Consequently, *stelae* may serve as an excellent medium for imprecise statements of the law and for familiarizing the Greek citizen with law, enabling and fostering legal and moral reasoning. Greek legal thinking bears an affinity with its medium.

Even the Greek alphabet, appearing around the eighth century B.C.,<sup>60</sup> facilitates Classical Greek values of openness and democracy. The Greek alphabet is the first purely phonetic alphabet.<sup>61</sup> Unlike other ancient scripts, it represents vowels as well as consonants,<sup>62</sup> and, consequently, rejects silent determinatives and ideograms that may have previously kept meanings and their nuances hidden from listening audiences.<sup>63</sup> Indeed, *scriptio continua* necessitates oral reading,<sup>64</sup> and semantic extraction follows vocalization.<sup>65</sup> As such, the Greek alphabet is the least secretive and most democratic script in the ancient world; hence, it is commonly referred to as “demotic,” meaning “of or belonging to the people.”<sup>66</sup>

As far back as the fourth century B.C., the Greeks distrust documentation as evidence.<sup>67</sup> Instead they rely heavily upon ceremony—again to impress the memory—and human witnesses:

[S]o much of social behaviour and deportment had to be ceremonial, or had to be recorded ceremonially, which may amount to very much the same thing.

Procedures have to be observed, and are recorded as operations made up of distinct acts precisely defined, which must follow each other in a certain

<sup>59</sup> *Id.* at 32 (citations omitted) (Todd qualifies this statement as an oversimplification).

<sup>60</sup> See Ernst Grumach, *The Cretan Scripts and the Greek Alphabet*, in *WRITING WITHOUT LETTERS* 45, 65 (W. Haas ed., 1976).

<sup>61</sup> James Barr, *Reading a Script Without Vowels*, in *WRITING WITHOUT LETTERS* 71, 75-76 (W. Haas ed., 1976) (Greeks were the first to create phonetic markers for each segment of a word, not just consonants or syllables).

<sup>62</sup> See Grumach, *supra* note 60, at 65-66. Other ancient languages, such as Arabic and Hebrew, provide for the expression of vowels at a later stage of development by the optional addition of “a series of points or marks above and below” the consonantal script. Barr, *supra* note 61, at 76.

<sup>63</sup> For discussion of the problem of determinatives in Egyptian texts, see *infra* notes 189-204.

<sup>64</sup> See *supra* note 30 and accompanying text.

<sup>65</sup> See Barr, *supra* note 61, at 82-84 (applying similar analysis to “pointed” and “unpointed” texts, the former of which functioned as a phonetic alphabet).

<sup>66</sup> 3 OXFORD ENGLISH DICTIONARY 188 (reprinted 1978) (1933). Derrida hints at the problem with non-phonetic languages: “To dispossess the people of their mastery of the language and thus of their self-mastery, one must suspend the *spoken* element in language.” DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in *OF GRAMMATOLOGY*, *supra* note 54, at 170; see also *infra* notes 207-10.

<sup>67</sup> HAVELOCK, *supra* note 31, at 55 n.15 (“the king’s statement in Aeschylus, *Supplikes* strongly implying that an oral promise and the oral memory that preserves it are more reliable than tricky documentation”).

order. Thus, when Achilles [of Homer's *Iliad*] digresses in order to describe the staff of authority which he dashes on the ground, the digression furnishes a piece of tribal law but it also illustrates an item of tribal technique, simple to be sure, but precise for all that. The staff must be properly prepared and ceremoniously handled . . . . An oral culture felt the need of a ritual conservation of such procedures.<sup>68</sup>

Thus, Homer may function as an informative source of legal procedure,<sup>69</sup> “as a sort of tribal encyclopedia,”<sup>70</sup> preceding by several centuries the more limited memorialization function of the fourth-century *stelae*, and as a guide to the “overall ‘management’ of life.”<sup>71</sup>

Another Greek scholar connects law to its poetic, oral origin through linking *nomos*, translated as *law* or *custom*, and its cognate *nemein*, often translated as *read*, to poetic recitation:

[T]he verb *nemein* stands at the centre of a lexical family whose members all signify ‘to read’. One might even wonder whether *nomos* [law], the active noun formed from *nemein*, might not have the basic meaning of ‘reading’ . . . . It is true that the dictionaries contain no hint of such a meaning for *nomos*, which is ordinarily translated as ‘law’. Nothing, that is, except for the *nomoi* of the birds of Alcman, a poet of the seventh century B.C. . . . . The *nomoi* of Charondas, one of the major legislators of archaic Greece, ‘were chanted’, according to one ancient author.<sup>72</sup>

For the ancient Greeks, law is intrinsically connected to reading, and not just any reading—verbal reading, recitation, and poetic chanting.<sup>73</sup> Referring to the poets’ connection to law, the *Theogony* is sometimes translated as beginning: “They sing the laws and ways of all.”<sup>74</sup> As poetic chanting, the law or *nomos* cannot be reduced to written statute, but refers more broadly to custom, or that which is “promulgated orally.”<sup>75</sup> One interpretation of Plato’s *Laws* is that “solemn custom often prevails over that of statute.”<sup>76</sup> Custom, as promulgated orally in the medium of Homer’s *Iliad*, is an interweaving of both private and public codes of conduct.<sup>77</sup> In addition, the relationship of orality to stone is also in keeping with Greek sensibilities that statuary, *stelae*, and other inscribed

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<sup>68</sup> *Id.* at 80.

<sup>69</sup> *See id.* at 80-81.

<sup>70</sup> *Id.* at 66.

<sup>71</sup> *Id.* at 80.

<sup>72</sup> Svenbro, *supra* note 28, at 40-41 (citations omitted).

<sup>73</sup> *See id.* (“The law had a vocal distribution, based at first on memory, later on writing.”). In contrast, ancient Rome does not share the Greek linguistic connection between law and orality. Roman law is firmly based upon writing. *Id.* at 41.

<sup>74</sup> HAVELOCK, *supra* note 31, at 62.

<sup>75</sup> *Id.* at 63.

<sup>76</sup> *Id.* at 62-63.

<sup>77</sup> *See id.* at 76.

objects speak, rather than simply functioning as epigraphs to be read.<sup>78</sup> Finally, the use of “*scripto continua* made vocalization practically unavoidable.”<sup>79</sup>

Sparta, a subculture within Greece, functions entirely without written law through the aid of its lawgiver, Lycurgus.<sup>80</sup> “Writing, then, is not necessarily part of the identity or ideal of the Greek *polis* and one can excuse political thinkers from not associating cohesive power of the *polis* with writing when there lay before them the example of Sparta—according to popular rumor, Spartans were illiterate.”<sup>81</sup> Indeed, Spartan law appears to have been unwritten, obtained by Lycurgus from the oracle at Delphi. “Lykourgos attached such importance to this office that he brought an oracle from Delphi about it, which they call a rhetra.”<sup>82</sup> The reference to “offices,” “oracles,” and “rhetra” or *ρήτρα* (cognate of “rhetoric”) emphasizes the oral, as well as divine nature of Spartan law. The relationship of law to oracles is also seen in earlier Mesopotamian cultures.<sup>83</sup>

In the end, Classical Greece functions in a legal infosphere characterized by openness, decorum, democratic ideals, non-technical terminology, and an immediate proximity to an oral, Homeric culture that emphasizes memory, mental prowess, and poetic cadence. The use of stone facilitates a disintermediated legal infosphere where all had a duty to participate and transparency functioned as an ideal. During the fourth century B.C., stone serves to impress the solemnity of democratic duty, provides transparency, offers stability, and inculcates law into everyday life, thus removing the need for mediation from bureaucratic and scribal classes. Nonetheless, stone *stelae* only play a limited role within the larger context of Greek oral culture and dependence on poets such as Homer for guidance in the overall management of daily affairs. Finally, even the alphabet supports Greek ideals, facilitating complete oral expression and disavowing silent determinatives, which hide meaning.

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<sup>78</sup> See generally Svenbro, *supra* note 28, at 46-50.

In a culture that practises oralized reading, any inscribed object is necessarily a “speaking object,” independent of its structure as an utterance (on the condition, obviously that it finds a reader) . . . . [However, it] seems wiser . . . to reserve the term “speaking object” for objects that use the metaphor of the voice for their own purposes [such as the case of the statuette which uses a verb indicating that it answers vocally].

*Id.* at 48.

<sup>79</sup> *Id.* at 44.

<sup>80</sup> HAVELOCK, *supra* note 31, at 55 n.15; see also Thomas, *supra* note 20, at 37.

<sup>81</sup> Thomas, *supra* note 20, at 37.

<sup>82</sup> See DOUGLAS M. MACDOWELL, SPARTAN LAW 4 (1986) (citing and translating Plutarch’s *Lykourgos*); see also Svenbro, *supra* note 28, at 41 (“We know from Plutarch that it was forbidden in Sparta to set down the law in writing.”).

<sup>83</sup> See *infra* notes 127-30 and accompanying text.

### B. Diorite and Clay—Law in Mesopotamia

Preceding Classical Greece, the information ecosphere of Mesopotamia, particularly Babylon, is a paradox that incorporates clay, one of the softest of writing surfaces, diorite, which is one of the hardest,<sup>84</sup> and papyrus. Famous legal “codes,” such as the Hammurabi, are both products of reformers and gifts received from divinity. The “codes” are neither codes in the sense of comprehensiveness, nor case law digests. Such documents are arguably amendments of the law and notable decisions. Knowledge is seen as holistic, yet the remaining specimens of Mesopotamian law represent only fragments of functioning legal systems, despite appearances to the contrary. The environment seems to be both disintermediated (allowing the common peasant to approach the law of the king) and mediated through an extensive scribal class, experts in both writing and the technical language of law. Perhaps the truth is found in the attempted reconciliation of such a disparate system: the legal infosphere functions to evidence or at least promote the perception that justice is being administered in the land.

Babylonian law illustrates the paradox. Babylon’s administrative system is sophisticated, involving higher and lower courts. It de-emphasizes the role of priests.<sup>85</sup> Yet, religion plays an important role. Babylon’s most renowned lawgiver, Hammurabi

claimed to have received the laws from the god of justice . . . . The king was the servant and not the source of law. Law guided the ruler and protected the subject. Law was regarded as a divine decree, the oracular decision of a deity, and was adapted to the old [Sumerian] laws in a system of legislation rather than a code.<sup>86</sup>

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<sup>84</sup> See 1 THE BABYLONIAN LAWS 41 (G.R. Driver & John C. Miles eds., 1st corrected ed. 1956).

<sup>85</sup> INNIS, EMPIRE AND COMMUNICATIONS, *supra* note 8, at 38-39.

<sup>86</sup> *Id.* However, the notion that God dictated the law to Hammurabi, or that Hammurabi claimed as much, is disputed by some scholars.

[The engraving on the diorite stelae] does not support the view either that the god is dictating the Laws to the king or that the king is offering them to the god. What the god is perhaps offering to the king is the circle and sceptre as indicative of his sovereignty, by virtue of which he promulgates the Laws.

1 THE BABYLONIAN LAWS, *supra* note 84, at 28 n.4. Nevertheless, the relationship of the divine to Hammurabi’s laws is made clear elsewhere. In the prologue to his “code,” Hammurabi “describes himself as a prince ‘who has restored the ordinances and laws of the Annunaki,’ the gods of the netherworld who determined the fates of the living and tried the dead.” *Id.* at 5 (citations omitted). Thus, the gods are attributed as the ultimate source of law.

As in ancient Egypt,<sup>87</sup> the king is the mediator of God, and perhaps even the scribe of the oral decrees of God. In contrast to the Greeks (perhaps, with the exception of Sparta),<sup>88</sup> the Babylonian emphasis is on mediation.

The relationship of Hammurabi's law to the divine also implicates a holistic epistemology: "The Babylonian conception of Canonicity . . . that the sum of revealed knowledge was given once for all by the antediluvian sages,' necessarily posits the existence of the Primordial Book that contains everything that was, is, and is to come . . . ."<sup>89</sup> Supreme sovereignty of the world is linked to possession of this book.<sup>90</sup> Indeed, whoever has the tablets has the right to determine fate.<sup>91</sup> Besides the connection to authority, the implication is that, for the Babylonian, anything divinely revealed came as part of a whole: "They decide the destiny of the Universe, they express the law of the whole world, they contain supreme wisdom, and they are truly the mystery of heaven and earth."<sup>92</sup> The king thus possesses the "mystery of heaven and earth" and knows everything.<sup>93</sup> Yet in stark contrast to the completeness of the King's knowledge, Hammurabi's laws, and other Mesopotamian "codes," are anything but complete systems, such as civil codes or even exhaustive case digests common in non-civil law countries.<sup>94</sup> Furthermore, the law of Hammurabi is claimed as his own and is argued by some to be secular in character.<sup>95</sup> How, then, can the apparent incongruity be reconciled?

<sup>87</sup> See *infra* notes 144-45 and accompanying text.

<sup>88</sup> See *supra* notes 80-82 and accompanying text.

<sup>89</sup> HUGH W. NIBLEY, *Genesis of the Written Word*, in NIBLEY ON THE TIMELY AND THE TIMELESS 114 (7th prtg. 1988) (1978) (citing W.G. Lambert, *Ancestors, Authors, and Canonicity*, 11 J. CUNEIFORM STUD. 1, 9 (1957)).

<sup>90</sup> *Id.* at 113 ("[T]he supreme sovranity [sic] of the universe is connected with the tablets of destiny, the possession of which could give even a robber possession of the rulership of the world.") (citing Geo Widengren, *The Ascension of the Apostle and the Heavenly Book*, 7 UPPSALA UNIVERSITETIS 10-11 (1950)).

<sup>91</sup> Geo Widengren, *The Ascension of the Apostle and the Heavenly Book*, 7 UPPSALA UNIVERSITETIS 11 (1950) ("[T]he divine assembly is summoned for fixing the fate by the ruler of gods, who casts the lots by means of the tablets of destiny.").

<sup>92</sup> *Id.* at 11.

<sup>93</sup> *Id.* at 12.

<sup>94</sup> See MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 4 (Piotr Michalowski ed., Writings from the Ancient World Series vol. 6, 1995).

None of the collections [of Mesopotamian "codes" including the Hammurabi] is comprehensive or exhaustive, and it is clear that none attempts to set out a complete "law of the land;" but it is not clear what conclusions follow. Certainly, a lack of comprehensiveness does not, in itself, detract from the legal import or applicability of a set of laws.

*Id.*

<sup>95</sup> See 1 THE BABYLONIAN LAWS, *supra* note 84, at 39 ("Hammu-rabi himself claims to have written them. Their general character, too, is completely secular . . . ."). But see *infra* notes 100-02 and accompanying text.

An understanding of the apparent paradox may be found in the prologue to Hammurabi's laws, which never claim to be a thorough restatement or codification of the law, but to function as evidence of the justness of Hammurabi's reign. The purpose of the inscriptions of Hammurabi's law "is to show by the list of Hammu-rabi's achievements how he has unified the land, thereby making the promulgation of a fresh collection of laws both necessary and possible, to emphasize his divine commission to enforce law and order, and the propriety of centralizing this work in Babylon."<sup>96</sup> In other words, Hammurabi's law evidences his divine authority to rule and reign. A key component of authority to rule, and legitimacy in suppressing civil disturbances, is asserting that justice has been served. This point is brought out in the epilogue of Hammurabi's laws:

Hammurabi, after pacifying the country, has written and promulgated these in the interest of its inhabitants and that he has set up the monument on which they are inscribed in the temple of Marduk in Babylon in order that anyone who has been wronged may read them and so learn the law applicable to his case and that he may thereafter remember him with gratitude."<sup>97</sup>

Not only do inscriptions allow Hammurabi's subjects direct access to the law, or at least a sampling thereof, they also evidence the justice of Hammurabi's reign.<sup>98</sup> The memorialization of Hammurabi's law in diorite makes sense—after all, "the application of justice was the highest trust given by the gods to a legitimate king."<sup>99</sup>

As further evidence of their symbolic importance, *stelae* facilitated "covenant" rituals among Hittite and Semitic peoples, whereby law is introduced to a community.<sup>100</sup>

The pillar symbolizes the sanctity within which the state envelops itself. The king or the prophet enters the temple (or ascends the mountain); the law is revealed to him there; he is given the tablets of the law (or the "tablets or decrees" in Mesopotamia . . . ); he then returns to a ritually prepared community and writes the law in some form. . . . In the case of the "primordial" experience at Sinai, Moses erected pillars in front of which he brought the people under covenant.<sup>101</sup>

Thus, Hammurabi's law is quite properly inscribed on *stelae* for the purpose of subjecting the people to new law. Challenging the notion that Hammurabi's law

<sup>96</sup> 1 THE BABYLONIAN LAWS, *supra* note 84, at 41.

<sup>97</sup> *Id.*

<sup>98</sup> ROTH, *supra* note 94, at 71 ("The laws of this composition, inscribed on imposing black stone stelas, stand as evidence of Hammurabi's worthiness to rule.").

<sup>99</sup> *Id.* at 5.

<sup>100</sup> See John M. Lundquist, *Temple, Covenant, and Law in the Ancient Near East and in the Old Testament*, in *TEMPLES OF THE ANCIENT WORLD: RITUAL AND SYMBOLISM* 284-86 (Donald W. Parry ed., 1994).

<sup>101</sup> *Id.* at 286 (citations omitted).

was entirely secular is its relationship to Babylonian temples: “The prologue to the Code is virtually one continuous litany of Hammurapi’s temple-related bequests, cleansings, rebuildings, and rededications.”<sup>102</sup> Not surprisingly, the origin of the earliest Mesopotamian writing is also at the temple.<sup>103</sup> The Hammurabi Code bears the same relationship to religion, temples, and heavenly revelation as other Semitic writings.

The paradox surrounding the Hammurabi Code, specifically its secular incompleteness in relation to divine wholeness, and related Mesopotamian law collections likewise manifests itself in the confusion among modern scholars as to its exact function, as well as its origin. Some scholars view the Code as originating in the practicalities of administration, as “codifications of existing practice, providing precedents,”<sup>104</sup> and yet others view the Code as having more academic origins, “as products of the scribal schools, and as manifestations of the intellectual processes that developed other scientific treatises.”<sup>105</sup> The question is what were the Hammurabi “codes”—codifications of precedents and practice, scholarly restatements, or actual ordinances. Hammurabi’s laws have been referred to as a “collection of rules,”<sup>106</sup> “a series of amendments and restatements of parts of the law,”<sup>107</sup> “a series of amendments to the common law of Babylon,”<sup>108</sup> an “adapt[ation of] old laws in a system of legislation rather than code,”<sup>109</sup> a set of regulations “compared with the English ‘Statutes of the Realm,’ [and] somewhat like the headnotes to a reported case, and . . . compared with a Digest of Case-law or a collection of records.”<sup>110</sup> The text of the Hammurabi laws provides some insight:

<sup>102</sup> *Id.* at 281. “The Hammurapi stele depicts Hammurapi standing before Šamaš in a clearly ritual setting, receiving the tokens of authority; this indicates that the Babylonia scribes compiled the laws of the Code . . . in the chief temple complex of Babylon, Esagila.” *Id.* *But see supra* note 95 and accompanying text.

<sup>103</sup> *See* HENRI FRANKFORT, *THE BIRTH OF CIVILIZATION IN THE NEAR EAST* 55 (Barnes & Noble 1968) (1951). Interestingly, as in Egypt, writing appears all at once. *Id.* at 56 (“We are confronted with a true invention, not with the adaptation of pictorial art.”). For discussion of the sudden emergence of Egyptian hieroglyphs and their sacred origin, see *infra* note 144 and accompanying text.

<sup>104</sup> ROTH, *supra* note 94, at 4.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 71.

<sup>107</sup> 1 *THE BABYLONIAN LAWS*, *supra* note 84, at 45.

<sup>108</sup> *Id.* at 41.

<sup>109</sup> INNIS, *EMPIRE AND COMMUNICATIONS*, *supra* note 8, at 32.

<sup>110</sup> 1 *THE BABYLONIAN LAWS*, *supra* note 84, at 48.

It is not, however, suggested that a decided case had any authority in the English sense of the word or bound subsequent judges, but there is some evidence that records of decisions were written either by the court or by a scribe or registrar and were deposited in charge of an official archivist.

*Id.* For comparison with Egyptian Hermopolis Code, see *infra* notes 219-21 and accompanying text.

May any king who will appear in the land in the future . . . observe the pronouncements of justice that I inscribed upon my stela. May he not alter the *judgments* that I have rendered and the *verdicts* that I gave . . . . If that man has discernment, and is capable of providing just ways for his land, may he heed the *pronouncements* I have inscribed upon my stela, may that stela reveal for him the *traditions*, the *proper conduct*, the *judgments* of the land that I rendered, the *verdicts* of the land that I gave . . . .<sup>111</sup>

Assuming accuracy in the translation, Hammurabi's emphasis on judgments, verdicts, pronouncements, traditions, and "proper conduct" suggests that his "code" is actually a vehicle for communicating case decisions. Perhaps even more significantly, the laws contain a distinctive emphasis on honoring the traditions of the past with respect to future court decisions.

Despite the Hammurabi Code's unmitigated promotion of past legal decisions, the thousands of records of actual decisions offer no evidence that doctrines of *stare decisis* have any application.<sup>112</sup> Besides the lack of references to Hammurabi's laws in daily legal transactions, the failure of the Hammurabi laws to be comprehensive is also a problem.<sup>113</sup> Hammurabi's laws consist of only some 300 provisions.<sup>114</sup> The omissions in the laws have been discussed at length by other scholars, and include, among other things, the failure to address arson (while addressing looting a house on fire), the absence of laws regarding treason (while penalizing conspiracy), the failure to consider defamation of a man (while addressing scorn of a married woman or priest), and the failure to discuss laws of sale.<sup>115</sup> This conspicuous lack of comprehensiveness also suggests that the Hammurabi laws are limited to the actual cases dealt with, and perhaps particularly to those legal issues that needed reform.<sup>116</sup> In any event, the Babylonian legal system has only been captured in a limited sense, in tangible, written media.

Besides the notable examples of Hammurabi's laws in diorite,<sup>117</sup> the media of the Sumerian and Babylonian civilizations and their successors emphasizes

<sup>111</sup> ROTH, *supra* note 94, at 135 (emphasis added) (quoting para. xlvii, ll. 59-94 of the epilogue).

<sup>112</sup> *Id.* at 5 ("In numerous studies of a range of legal situations, little correspondence has been found between the provisions in the law collections and contemporary practice. Furthermore, no court document or contract makes a direct reference to any of the formal law collections."); *see also* 1 THE BABYLONIAN LAWS, *supra* note 84, at 24 ("The relation, however, of the texts of this class so far published to the Sumerian and Babylonian Laws is generally very slight; they exhibit neither close correspondence nor striking differences."); *id.* at 52 ("There is not a single case in the thousands of legal documents and reports which have been preserved in which reference is made to the wording of the text of the laws.").

<sup>113</sup> 1 THE BABYLONIAN LAWS, *supra* note 84, at 53 ("As, too, the Laws are not exhaustive in the manner of a European code of laws, so they are not imperative . . .").

<sup>114</sup> ROTH, *supra* note 94, at 71 ("between 275 and 300 law provisions").

<sup>115</sup> 1 THE BABYLONIAN LAWS, *supra* note 84, at 47.

<sup>116</sup> *Id.* at 45 ("There is therefore no attempt to deal with the law exhaustively and the subjects with which he [Hammurabi] deals are chosen simply because in his opinion they call for amendment or require to be emphasized by republication.").

<sup>117</sup> ROTH, *supra* note 94, at 73.



clay,<sup>118</sup> which can be baked to make permanent records (to be both a temporary and permanent record is a property perhaps unique to clay).<sup>119</sup> Later, in the time of the Assyrian ruler Tiglath-Pileser, papyrus becomes prevalent, facilitating the administration of, and communication over, vast territory—something for which clay tablets are not particularly well adapted.<sup>120</sup> In addition, Mesopotamian civilizations write upon wax and metal.<sup>121</sup>

Clay tablets also possess another important property. They can be “sealed” to ensure preservation, authenticity or secrecy.<sup>122</sup> Seals are placed on envelopes that encapsulate, or at least cover, the document to obscure it from view. In fact, to read a sealed document, the envelope has to be broken.<sup>123</sup> Secrecy, rather than openness, is an attribute of legal knowledge. “[T]hy judgement is secret knowledge . . .” is part of the praise given to a Mesopotamian king.<sup>124</sup> The “tablets of destiny,” containing the law and all knowledge, are kept not in a clay envelope, but in a receptacle, often translated as a “bag,” but actually a device that seals them to the king’s breast.<sup>125</sup> In the end, in ancient Mesopotamia as elsewhere, knowledge is power, and law is an indissoluble part of the whole, to be kept safe and secret in the king’s bosom. Consequently, it is not surprising that there is no complete codification of the subject, and that what remains of Hammurabi’s laws is but a fragment, evidencing the King’s authority and justice.

In many respects, tablets of the law, or destiny, serve as a proxy for something quite alien to the modern mind, but fundamental to the ancient mind:

In the Chamber of Destiny, where the oracle consultation . . . takes place, the divine assembly is summoned for fixing the fate by the rule of the gods, *who casts the lots by means of the tablets of destiny*. We now understand why these tablets are given various names: the Tablets of Destiny, the Tablets of

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<sup>118</sup> For examples of the Ur-Nammu and Hammurabi Law Codes written in clay tablets, see The Shoyen Collection: Checklist of Manuscripts, §§ 8.1-8.2, <http://www.nb.no/baser/schoyen/5/5.4/#8.1> (last visited Jan. 3, 2006). See also The British Museum: Compass Collections Online, *Cyrus Cylinder*, <http://www.thebritishmuseum.ac.uk/compass/> (search “Cyrus cylinder”) (last visited Jan. 3, 2006).

<sup>119</sup> INNIS, EMPIRE AND COMMUNICATIONS, *supra* note 8, at 28.

<sup>120</sup> *Id.* at 40; see also J.N. POSTGATE, FIFTY NEO-ASSYRIAN LEGAL DOCUMENTS 6 (1976) (“As early as the reign of Sargon we hear of the palace scribe receiving rolls of papyrus . . .”).

<sup>121</sup> ROTH, *supra* note 94, at 1. Paper and leather are also used starting midway through the first millennium B.C. Chalcedony Cylinder Seal: Achaemenid Persian Empire, About 6th-4th Century BC, <http://www.thebritishmuseum.ac.uk/compass/> (last visited Jan. 3, 2006) (search “Chalcedony cylinder seal Hillah”).

<sup>122</sup> “This sealing of the tablets is the regular Mesopotamian procedure of preserving the written document from any modification. It is the manner of making the legal document inviolable.” Widengren, *supra* note 91, at 12.

<sup>123</sup> See State Hermitage Library, *Mesopotamian Written Records in the Hermitage*, [http://www.hermitagemuseum.org/html\\_Er/12/2003/hm12\\_1\\_16.html](http://www.hermitagemuseum.org/html_Er/12/2003/hm12_1_16.html) (last visited Jan. 3, 2006). See also Oriental Inst., Univ. of Chi., *Clay Tablet and Envelope* (Nov. 12, 1997), [http://oi.uchicago.edu/OI/MUS/HIGH/OIM\\_A11878\\_72dpi.html](http://oi.uchicago.edu/OI/MUS/HIGH/OIM_A11878_72dpi.html).

<sup>124</sup> Widengren, *supra* note 91, at 12.

<sup>125</sup> *Id.*

Wisdom, the Law of Earth and Heaven, the Tablets of the Gods, the Bag with the Mystery of Heaven and Earth. All these names reflect various aspects of these mysterious tablets. They decide the destiny of the Universe, they express the law of the whole world, they contain supreme wisdom, and they are truly the mystery of heaven and earth.<sup>126</sup>

For the ancients, law was the flip side of destiny, or fate, which are both unknown except by the gods, and whomever they commission as messenger, in the form of the king.<sup>127</sup>

In essence, law and fate are a sealed book determined by lot through the tablets. That is not to say that the law is indeterminate (*lot* also denotes *divine ordinance* or *oracle*)<sup>128</sup> or arbitrary, but that only an oracle or seer can read from the tablets of law.<sup>129</sup> Indeed far from being arbitrary, for the ancient mind law is fundamental to the “transformation of a chaotic universe into a cosmos.”<sup>130</sup> Being accessed by a seer, what is set down is not fixed or limited, but an ongoing medium for divine guidance.

Scribal classes play an important role with respect to clay tablets and the infosphere. Clay tablet legal texts “entered (or sometimes were composed for) the curricula of the schools where scribes were trained in the ancient and accepted formal traditions of their craft.”<sup>131</sup> The roles of the scribes that these schools produce varies:

Most students would later use the lessons learned from these [clay tablets of law and legal forms which they recopied] to draft the daily contracts of local life. But the rare and fortunate scribes might be called upon to help *collect, organize, and publicize* a larger formal collection of laws and cases . . . . One such collection is that promulgated under the name of King Hammurabi of Babylon about 1750 B.C.E., which was copied and recopied in the scribal centers for over a thousand years.<sup>132</sup>

Apparently, the scribes do more than copy and study law, they are responsible for its form, preservation, publication, and ultimate survival. A substantial number of scholars view the collection of laws as more than mere “copy-work” but as “the intellectual processes that developed other scientific treatises, including such

<sup>126</sup> *Id.* at 11 (emphasis added).

<sup>127</sup> For discussion on the theme as messenger, see *id.* at 16, 19 (“Mesopotamian king is really looked on as the Sent One”). See also *id.* at 16 (“By means of oracle consultation . . . the king is led on the paths of righteousness.”).

<sup>128</sup> *Id.* at 10-11 n.2.

<sup>129</sup> For discussion of the King as seer, see Widengren, *supra* note 91, at 13-16. Parallels are also drawn with the Israelite kings. “[T]he Israelitic king possesses divine wisdom not only by reading the heavenly tablets or book, but also—exactly like the Mesopotamian ruler—by receiving direct revelations from his god.” *Id.* at 30.

<sup>130</sup> See Lundquist, *supra* note 100, at 282-83 (“The temple creates law and makes law possible. It allows for the transformation of a chaotic universe into a cosmos.”).

<sup>131</sup> ROTH, *supra* note 94, at 1.

<sup>132</sup> *Id.* at 2 (emphasis added).

topically diverse treatises as the god lists, tree lists, professions lists, mathematical lists, star lists, omen lists, pharmacopoeia, etc.”<sup>133</sup> Still others see the scribal works as codifications or summaries of precedent, or apologia for royal governance.<sup>134</sup>

The relationship of scribal schools, custom, and revealed law, as originally obtained by divine ascension of the king, is summed up by one scholar:

The true nature of the codes [Hebrew and Mesopotamian] is spelled out at the moment of revelatory expression following the exit of the king/prophet from the temple: do justice, protect the widow and orphan. It would be *after this that royal scribes would elaborate revelatory utterances, along with the central core of the received tradition, into full-fledged code.*<sup>135</sup>

Apparently, law is revealed in compacted form, perhaps as a type or model, which is ready for elaboration and extension under the right conditions. For example, the concise maxims of the Hebrew Ten Commandments are immediately elaborated in the Biblical *Leviticus*. In any event, the scribal schools of Mesopotamia have a role to play in the process. A final, interesting addition of the scribes, and an indication of their function in conceptual organization of the law, is the employment of rubrics or headings in three later, presumably clay, editions of Hammurabi’s laws and in contrast to *stelae*, which lack such features.<sup>136</sup> This again demonstrates the importance of scribal schools and media—both constituting part of the legal infosphere—to the intellectual organization and conception of the law.

As a medium, clay is particularly well-suited for oral dictation to students, and consequently the cultivation of scribal classes. Evidence of such practice exists among tablets of Sumerian Laws, some of which may have actually been drafted in Sumerian, by later Babylonian students who are learning their craft:

A corroboration of the view that these tablets are only copies of precedents for the teaching of law-students [rather than official records or restatements by learned scholars] may be found in the unusually large number of mistakes that can be detected in them . . . [T]here are also errors of the eye and of the ear. These last errors are due chiefly to the use of the wrong homonyms, but they are especially important as showing that the writers were taking down the text from dictation, which was certainly a method of instruction used in the schools.<sup>137</sup>

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<sup>133</sup> *Id.* at 4 (citations omitted).

<sup>134</sup> *Id.* (citations omitted).

<sup>135</sup> Lundquist, *supra* note 100, at 277-78 (emphasis added).

<sup>136</sup> ROTH, *supra* note 94, at 75-76 (“No rubrics are included in the complete monumental stela, and their introduction in . . . late Old Babylonian manuscripts suggests a self-reflective scholastic tradition, engaged in organizing and studying the law collection as a whole.”).

<sup>137</sup> 1 THE BABYLONIAN LAWS, *supra* note 84, at 14 (citations omitted). The editors also opine that the “chaotic” arrangement of the subjects in the text is a result of the original, pedagogical purposes of the tablets. *Id.* at 14-15.

The student author of the tablet is likewise noted to have a Semitic rather than a Sumerian name, although the text is in Sumerian, suggesting that in the Babylonian period, Sumerian functioned as a scholarly, legal language, similar to Latin in England until the late eighteenth century.<sup>138</sup> This evidence comports with the opinion that the Hammurabi Code has not been copied from these earlier tablets of Sumerian law—since the tablets are fragmentary, befuddled translations—but developed with the aid of earlier codes, of unknown origin.<sup>139</sup> The problem is complicated by the fact that Hammurabi's code itself is neither complete nor exhaustive.<sup>140</sup> The search for a complete “code” from which the Hammurabi Code is copied may begin with a false assumption and is unnecessary, since the Code, even if stated only in part, serves an essential function as an emblem of the king's divine authority.<sup>141</sup> The point is that the most famous of all Mesopotamian laws, the Hammurabi Code is promulgated in an environment dominated by scribal schools, perhaps working from earlier codes, of which only fragmentary evidence remains.

In the final analysis, the legal infosphere of ancient Babylon appears to be riddled with contradictions. It is both spiritual and, on the surface, secular. However, looking deeper, imperial authority has assumed the traditional role of the priests, and law makes order in the cosmos from chaos. Laws are written on both hard diorite and soft clay. The nature of the various collections of laws are difficult to characterize; they have elements of case decisions, but also are thought of as amendments to existing law in a form of decree. However, some conclusions may be drawn. The diorite *stelae* function as ritual centers for covenant making and memorials of the law, or rather, that law and justice are being administered in the kingdom, that the king reigns as a seer with divine authority, and that the law is available to all.

As well as facilitating the commerce of daily life, clay tablets eventually support scholasticism, including systemic organization of the law as a whole, and development of a special legal terminology and language. However, the Babylonian legal system is open-ended. Law is set down only when it needs to be amended or emphasized, but the broader Babylonian notion of law is far greater than what is recorded in its clay tablets and monuments, which contain many omissions.

Fundamentally, in the natural law perspective, law in Mesopotamia is something apart from its written form. But modern-day notions of natural law are inadequate to describe its function. For the ancient mind, law can neither be reduced to derivation from rational principles nor to positive legislation. It is

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<sup>138</sup> *Id.* at 13-14.

<sup>139</sup> Since the earlier Sumerian laws were neither organized nor complete, Hammurabi could not “have used them as they stand, but he may well have used the original collections from which they are selected; for every lawgiver uses existing material, he does not invent a code of laws *de novo* but amends existing law and introduces new conceptions to meet new conditions.” *Id.* at 15.

<sup>140</sup> See *supra* notes 113-16 and accompanying text.

<sup>141</sup> See *supra* notes 96-102 and accompanying text. Nonetheless, Hammurabi's laws may represent a step forward from earlier Sumerian laws. 1 THE BABYLONIAN LAWS, *supra* note 84, at 15 (stressing the “hotchpotch” and “miscellaneous” nature of earlier, Sumerian laws).

revealed. Regardless of the incomplete representations in stone and the king's secret tablets of destiny, the law is already complete, an inseparable part of knowledge, and even fate. Despite their limited use to capture the whole of Mesopotamian law, diorite *stelae* and clay tablets each function as suitable media given the metaphysical stance and societal expectations of the times.

### C. Papyrus—a Mediated Legal Infosphere in Ancient Egypt

Ancient Egypt, in contrast to classical Greece,<sup>142</sup> exalts the *mediation* of legal information and processes. Egyptian communication is characterized in two ways: first, the mode of communication (as well as governmental decrees) emanate from the gods; and second, time is not a limitation. As in Mesopotamia, the king, and later, the scribal classes, mediate between the gods and man:

Writing . . . is par excellence “the King's Secret” which gives him all advantage over his fellows and the ability to rule them. The technique of writing is the foundation of empires, for only the written document can overcome the limitations of space and carry a ruler's word and authority out of sight and beyond the hills, and even defeat the inroads of time on human memory by preserving the words of command and judgment for unlimited number of years. The king describes himself as the mediator and scribe of the god in heaven in the administration of empire: “I sit before him, I open his boxes, I break open his edicts, I seal his dispatches, I send out messengers.”<sup>143</sup>

Writing is not simply mediated by the pharaoh and his scribes; it is what enables him to mediate between the gods and the people. Not only do the Egyptians see their king as the god's scribe, but the medium itself is also associated with the divine, and its origins are deemed to be miraculous, appearing all at once.<sup>144</sup> So central is writing that it defines the Egyptian society. “The circumscription of

<sup>142</sup> See, e.g., *supra* notes 44-45 and accompanying text.

<sup>143</sup> NIBLEY, *supra* note 89, at 112-13.

<sup>144</sup> See *id.* at 110-11. The birthplace of hieroglyphs appears to be the “sacerdotal school of Heliopolis.” GEORG STEINDORFF, EGYPT 24 (1943) (“The step [from picture writing to syllabic or phonetic writing] which the Egyptians took was as short as it was decisive.”). Nibley also notes:

The tombs of the First Dynasty “show that they had a well-developed written language [and] a knowledge of the preparation of papyrus . . . .” “For though hieroglyphics appear all at once in the world as an Egyptian invention cir. 3000 B.C.,” hieratic, the cursive writing of the same symbols was also in *use just as early*.

NIBLEY, *supra* note 89, at 105 (emphasis added) (citing ALEXANDER SCHARFF & ANTON MORTGAT, ÄGYPTEN UND VORDERASIEN IM ALTERTUM 45-46 (1950) (“Von der I. Dyn. an sind die Ägypter im Besitze der Hieroglyphenschrift . . . . [From the First Dynasty, the Egyptians were in possession of Hieroglyphic writing . . . .]”). In Mesopotamia, writing appears just as suddenly. See *supra* note 103.

writing is part of society's definition of itself . . . ."<sup>145</sup> Scribes surround the Egyptian Pharaoh. "[E]verything is carefully written down; even in battle the King's secretary is beside him taking notes; every royal remark is written down and then gathered into 'Daybooks' or 'Memorandabooks' . . . ."<sup>146</sup> In essence, law is captured from the divine, and it comes in a constant stream.

The shift from Egyptian monarchy to feudalism in about 2160 B.C. (the Middle Kingdom) "coincides with a shift in emphasis on stone as a medium of communication or as a basis of prestige, as shown in the pyramids, to an emphasis on papyrus."<sup>147</sup> However, illustrating the symbiotic and evolutionary nature of the infosphere, it is not technological innovation causing the change. The presence of both epigraphic writing on stone and cursive script on papyrus is found from Egypt's inception.<sup>148</sup> Something besides the invention of a new technology, such as cursive, hieratic script on papyrus, dictates its prevalence and use in society. Consistent with Deibert's theory of ecological holism, one Egyptologist observes, "changes in writing often imply or reflect changes in society. . . . Writing may then change a society, but it need not do so in a programme of expansion. More probably it is devised in response to gaps perceived in the non-literate system."<sup>149</sup> Societal changes correlate to, but are not always driven by, transformations in the information ecosphere.

The new governmental system—in this case, representing a shift away from monarchy—found a suitable home (information environment) in the medium of Egyptian papyrus, initially in Hieratic, and later governments in Demotic and Coptic. With greater use of papyrus, administrative regulation, including religious prescription and sanctions increased, also resulting in a significant number of lawsuits, as evidenced by Egyptian records on papyrus.<sup>150</sup> By the time of the Middle Kingdom "all sorts of subsidiary material come to swell the sources at the historian's disposal, stories, moralizing tractates, judicial documents, letters, and accounts."<sup>151</sup> However, the increased survival rate of documents from later dynasties can also explain the increased evidence of papyrus documents, which are fragile in nature.<sup>152</sup> Nonetheless, this change evidenced in the information environment, as manifested in the kind of documents, is not completely explained simply by reference to probability of survival.

In the Early Kingdom, prayers and biographical inscriptions dominate the literary landscape.<sup>153</sup> The prime medium is stone, particularly carvings in tombs

<sup>145</sup> John Baines, *Literacy and Ancient Egyptian Society*, 18 *MAN* 572, 574 (1983).

<sup>146</sup> NIBLEY, *supra* note 89, at 113.

<sup>147</sup> INNIS, *EMPIRE AND COMMUNICATIONS*, *supra* note 8, at 17. *But see infra* note 151 and accompanying text.

<sup>148</sup> *See supra* note 144.

<sup>149</sup> Baines, *supra* note 145, at 574.

<sup>150</sup> INNIS, *EMPIRE AND COMMUNICATIONS*, *supra* note 8, at 28.

<sup>151</sup> SIR ALAN GARDINER, *EGYPT OF THE PHARAOHS: AN INTRODUCTION* 60 (1978).

<sup>152</sup> *Id.*

<sup>153</sup> *See generally* MIRIAM LICHTHEIM, *ANCIENT EGYPTIAN LITERATURE: A BOOK OF READINGS* 15-80 (1973).

and *stelae*. For example, the inscriptions on a “false door” in the tomb of Nefer-Seshem-Re from the Sixth Dynasty are described as follows:

[I]t came to be used for brief autobiographical statements . . . . These affirmations became increasingly formulaic, and the limited space of the false-door lent itself to capsuled formulations. The stylization of these catalogs of virtues also meant that they were not told in the prose of the narrative autobiography, but were recited in symmetrically patterned phrases of the orational style.<sup>154</sup>

Like the Greeks,<sup>155</sup> there is a connection in Egypt between stone and orality. “A notable feature of Egyptian texts [from the Early Kingdom] is that the majority are written in a kind of metre. . . . Its principles could go back beyond written texts into oral culture, but the system . . . is probably a product of dynastic times.”<sup>156</sup> Nonetheless, the compression of legal communication through pat formulas, stylization, and symmetry are the hallmarks of oral verse, or an oral tradition capitalizing on mnemonic devices.<sup>157</sup> Quite remarkably, despite the confined space, the text on the false door is written twice, repetition also facilitating memory, in the manner of oral cultures.<sup>158</sup>

Another connection between Egyptian writing and its base in orality is the conceptual and mythological nature of Thoth, who is not only the Egyptian god of writing and language, but also the “measurer” or “reckoner of time.”<sup>159</sup> Thoth is thus identified with the rhythmic and repetitive—for example, the cycles of the moon and the heavens.<sup>160</sup> Indeed, Thoth is represented as the baboons who marked the rising of the sun.<sup>161</sup> Interestingly, Thoth is married to Maāt, the Egyptian goddess of justice, and presides as judge in the dispute among the gods Horus, Isis, and Set.<sup>162</sup> Thus, in the Egyptian mind, writing is inextricably linked with measuring time, suggesting the poetic metered structure, and is most appropriately inscribed in tombs to mark the eternities.<sup>163</sup> Writing is also fundamental to the Egyptian’s conception of law and justice.<sup>164</sup> Finally, it should be noted that Thoth is connected to secret knowledge or magic, and in one

<sup>154</sup> *Id.* at 17.

<sup>155</sup> See *supra* notes 54-82 and accompanying text.

<sup>156</sup> Baines, *supra* note 145, at 579 (arguing that the complexity of the written metre suggests written origin, with perhaps some elements descending from an earlier, oral culture).

<sup>157</sup> See *infra* notes 262-70 and accompanying text.

<sup>158</sup> See LICHTHEIM, *supra* note 153, at 17; see also INNIS, EMPIRE AND COMMUNICATIONS, *supra* note 8, at 13, 18.

<sup>159</sup> E.A. WALLIS BUDGE, THE EGYPTIAN BOOK OF THE DEAD: THE PAPYRUS OF ANI, at cxviii (Dover Unabridged Republication 1969) (1895).

<sup>160</sup> *Id.*

<sup>161</sup> See STEPHEN QUIRKE, ANCIENT EGYPTIAN RELIGION 32 (1992).

<sup>162</sup> See BUDGE, *supra* note 159.

<sup>163</sup> A similar relationship between metered structure and time is found with respect to English pleadings. See *infra* notes 312-18 and accompanying text.

<sup>164</sup> See QUIRKE, *supra* note 161, at 66, fig.37 (depiction of Thoth recording the weighing of the scales of justice, upon which sits a baboon).

instance, when a “magic” book is misappropriated, the wrath of the gods is incited.<sup>165</sup> The theme of seizing a divine book of knowledge, conceptually related to law, which enabled dominion over the world, is also a motif found in ancient Mesopotamia.<sup>166</sup> Time, writing, knowledge, justice, and law all spring from the same primordial soup in the web-of-beliefs constituting the ancient Egyptian mind.

Despite the prevalence of stone writing in early Egyptian dynasties, papyrus is also evident in early Egypt, but the kinds of text occurring in such media are remarkably different. From the Sixth Dynasty, the papyrus texts are not devoted to the autobiographical or prayers for the dead, as are stone texts, but to instructional or “wisdom literature.”<sup>167</sup> Remarkably, the structure of the text contrasts markedly with texts written in stone. For instance, in the *Instruction of Ptahhotep*, the text is marked by imperatives and counsel beginning with the proverbial “if”:

If you meet a disputant in action  
Who is your equal, on your level,  
You will make your worth exceed his by silence,  
While he is speaking evilly,  
There will be much talk by the hearers,  
Your name will be good in the mind of the magistrates.<sup>168</sup>

This contrasts starkly with the stone texts from the same dynasty, which are dominated with lists of declarative statements of accomplishments (for example, “I have done justice for its lord, I have satisfied him with what he loves”)<sup>169</sup> and prayers beginning with the invocation “may” (for example, “May offerings be given . . .”).<sup>170</sup> Thus, here is an example from the same Egyptian dynasty where a difference in information medium—papyrus versus stone—correlates with a difference of text in terms of style, although still in verse, and function.

Egyptian wisdom texts of the Sixth Dynasty are strikingly similar to what has been identified as the first, possibly only Egyptian law code, *The Demotic Code of Hermopolis West*, also on papyrus, but which dates apparently from the Twenty-Fourth Dynasty, 730-715 B.C., or the Third Intermediate Period.<sup>171</sup>

[T]here exists a collection of laws from Hermopolis (the so-called “Hermopolis Legal Code”) that may date from the first millennium B.C. Indeed, it represents the first concrete evidence for written laws in ancient

<sup>165</sup> FERGUS FLEMING & ALAN LOTHIAN, *THE WAY TO ETERNITY: EGYPTIAN MYTH* 55, 111, 117-21 (Stephen Adamson et al. eds., 1997).

<sup>166</sup> See *supra* notes 90-93 and accompanying text.

<sup>167</sup> See LICHTHEIM, *supra* note 153, at 134.

<sup>168</sup> *Id.* at 64, ¶ 3 (footnotes omitted).

<sup>169</sup> *Id.* at 17, ¶ 1.

<sup>170</sup> *Id.* at 16, ¶ 2.

<sup>171</sup> For a chronology of Egypt, see JOSEPH SCOTT & LENORE SCOTT, *EGYPTIAN HIEROGLYPHS FOR EVERYONE* 88-89 (1968).



Egypt and appears to date from the 24th Dynasty (c. 700 B.C.). Our copy is probably from the third century B.C. It is the only extant Egyptian analogue to the great law collections from Mesopotamia. And, like its Mesopotamian cousins, it may be a collection of case decisions (or summaries) rather than a law “code” per se.<sup>172</sup>

Like the Egyptian wisdom literature of the Sixth Dynasty, the Hermopolis Code is peppered with conditional “if” statements whose predicate is tied to certain pleadings, much more like case rulings of actual controversies than more general decrees or statutes. For example, consider the following two statements from the Code: “If a man sues a man saying, ‘he cultivated my field by force . . . .’” and “[i]f a man brings action against a man saying, ‘he dug at the foot of my house, he caused my house to fall’ . . . .”<sup>173</sup> Both conditional statements bear relationships to specific facts and connect to a “saying” or pleading. This is consistent with the *Tale of the Eloquent Peasant*, which emphasizes the importance of pleading as a prerequisite to judgment.<sup>174</sup>

As additional evidence that the Hermopolis Code is more akin to a case digest than a body of statutes, consider the following passage: “he is *judged* with him that held back his house [from being built] *according to what is written in the law*.”<sup>175</sup> The reference to other written law in the context of judgment, which is occurring in the present, is remarkable. This type of statement corresponds to many case decisions, which in the moment of judgment refer to other established

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<sup>172</sup> RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 9 (2002) (footnotes omitted). Having examined a translation of the Hermopolis Code, the author is uncertain exactly how VerSteeg reaches his conclusion that the text is a collection of case summaries, but finds the suggestion fascinating and plausible. Indeed the Hermopolis Code is a remarkable document, stressing procedure, similar to form books and statements of the law used for instruction in the nineteenth and early twentieth century and to books of writs common in Great Britain after the conquest. Compare GIRGIS MATTHA, *THE DEMOTIC LEGAL CODE OF HERMOPOLIS WEST* (1975), with CLANCHY, *supra* note 4, at 67.

The lawbook ascribed to the justiciar Glanvill (composed in the 1180s) is structured around the common forms of the new writs and explains how each of them is to be used. The structure of Glanvill’s book underlines Weber’s observation that “[b]ureaucratic administration means fundamentally the exercise of control on the basis of knowledge. . . .” Like the *Dialogue of the Exchequer*, with which it is contemporary, Glanvill’s work serves as an insider’s handbook for the royal bureaucracy.

CLANCHY, *supra* note 4, at 67 (citing MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 339 (Talcott Parsons ed. & trans., 1947)). In any event, the Hermopolis Code is not a code book of legislative enactments or even decrees. Rather it functions to formalize administration of justice with the consequence of increasing the power of the administrative bureaucracy.

<sup>173</sup> MATTHA, *supra* note 172, at 19 l. 9, 38 ll. 20-21.

<sup>174</sup> See *infra* notes 214-16 and accompanying text.

<sup>175</sup> MATTHA, *supra* note 172, at 35 ll. 20-21 (emphasis added).

authority to resolve a specific issue of law. As final evidence of its connection to particular disputes and emphasis on pleading, the Hermopolis Code contains many sample forms, such as “Year so-and-so, month so-and-so. So-and-so, son of So-and-so, serves a summons upon So-and-so, son of So-and-so, saying that he (defendant) gave So-and-so, son of So-and-so (plaintiff), a writing . . . .”<sup>176</sup> Such forms seem to be written for the benefit of the judge, going hand in hand with guidelines for decisions with reference to specific facts; in other words, the pleading determines the outcome.

Not only is the suggestion of case law, or “practitioner’s handbooks” with digests,<sup>177</sup> in the Hermopolis Code remarkable, but the near complete absence of codes or any other law collections in earlier periods is nothing short of astounding, especially given the durability of stone and the survival of so many hieroglyphic and hieratic texts from earlier periods.<sup>178</sup> “There is, indeed, no certain indication that any form of codified law existed before the Third Intermediate Period [1085–715 B.C.],<sup>179</sup> and the earliest preserved set of laws from the Ptolemaic Period [the Hermopolis Code] has the appearance rather of a practitioner’s handbook than a code proper.”<sup>180</sup> In short, the development in Egypt of legal literature of any kind does not make any significant appearance until later dynasties, when hieratic on papyrus, rather than epigraphic

<sup>176</sup> *Id.* at 21-22 ll. 12-17 (a sample of a “summons with respect to a house that is not released to the man to whom it was sold”).

<sup>177</sup> See C.J. Eyre, *Crime and Adultery in Ancient Egypt*, 70 J. EGYPTIAN ARCHAEOLOGY 92 (1984); see also Janet H. Johnson, *The Legal Status of Women in Ancient Egypt*, in *MISTRESS OF THE HOUSE, MISTRESS OF HEAVEN: WOMEN IN ANCIENT EGYPT* 175, 177 (Anne K. Capel & Glenn E. Markoe eds., 1997) (describing the Hermopolis Legal Code as “not an actual ‘law code’ but a collection of ‘case law’ dealing with specific (and sometimes quite minute) details”).



<sup>178</sup> See generally VERSTEEG, *supra* note 172, at 7-9. But see Baines, *supra* note 145, at 578 (stating that in the early Old Kingdom, the only apparent use for *stelae* was for royal decrees). The discrepancies between Baines and other scholars’ observations about the beginning of Egyptian law are noted here and elsewhere. See *infra* note 180. VerSteeg is a law professor writing about Egyptology. Baines is an Egyptologist writing about law. Baines’ statements about the earliest legal texts may also be at odds with those of his fellow Egyptologist, C.J. Eyre. See *infra* note 180 and accompanying text.

<sup>179</sup> See SCOTT & SCOTT, *supra* note 171.

<sup>180</sup> Eyre, *supra* note 177, at 92 (1984) (footnotes omitted). But see VERSTEEG, *supra* note 172, at 9 (discussing recent findings of codes from the Twelfth Dynasty). Interestingly, the presence of the twelfth-century code (dealing with fugitives) was discovered on papyrus (presumably a copy from a later period), and not on stone. In addition, another scholar claims that the Third and Fourth Dynasties still in the early period brought increasing use of continuous text on monuments, including legal and biographical inscriptions, and the *stelae* in the Old Kingdom were exclusively used for inscription of royal decrees. Baines, *supra* note 145, at 577-78. Earlier *stelae* emphasized brevity and decorum and were in no sense literary or “continuous” texts, rather than epigraphic lists. *Id.* at 576-77. According to the same scholar, the Old Kingdom legal documents may have included court proceedings, citations of precedent, and law code. *Id.* at 589. Whether *stelae* bore legal inscriptions is less important than when such engravings had the characteristics of significant literature, being continuous texts. Disparities about the onset of legal texts in Egypt has been noted elsewhere. See *supra* note 178.

hieroglyphs, were the more common form. As in the case of Egyptian wisdom literature,<sup>181</sup> the use of papyrus corresponds to the emergence of the Hermopolis Code.

In addition to the chronological association, the term “law” bears an etymological relationship to the term “papyrus.” Hieroglyphic and hieratic signs functioned in three principal ways: as phonograms, as ideograms, and as determinatives. Some signs provide all three functions. Ideograms stand for a specific idea. Determinatives, used in conjunction with other signs and often without any phonetic component, clarify subtleties of meaning and signal that the preceding signs should be read for their phonetic, rather than ideographic content.<sup>182</sup> For instance, the determinative for *law* (𓄏𓄏𓄏) is a depiction of a papyrus scroll tied with a string in the middle.<sup>183</sup>

Sign	Determinative	Hieroglyphic	Hieratic
Scroll	Writing, Abstract Concepts		

Other concepts bearing the determinant of the scroll are *praise, office, function, profession, inherit, inheritance, duty, tomb, excellence, success, gift, custom, practice, procedure, greatness, rate of payment, collect, heap (of riches), rations, salary, message, reality, command, impressiveness, ancestor, tribute, decree, guide, direct, Maāt (goddess of Justice and wife of Thoth), true (correct or proper), bear witness, perfection, learn, know, wise (man), grow, flourish, magic, team, thing, property, rich, evolution, development, advice, writing, teach, teaching, situation, conduct, fine, special, noble, wisdom, inaccessible (secret), form, manner, character, high (arrogant), build, complete, show respect, sentence (of speech), worship, rule (verb), plan, wealth, presence, found, dowered, ruled, judged, decreed, adoration, established, crowned, inspection, known, journeying, concealed, offering, belongings, perfect, accountant, hidden, shareth, homage, bond, beginning, creator, established, keeper, book, strength, image, avenger, watching, and guardians.*<sup>184</sup> Similarly, while not using a *scroll* as a determinative, *land register* uses the determinative of a binding tie (𓄏), which binds the scroll, and which is a determinative of the concept of *papyrus scroll*.<sup>185</sup>

Papyrus, or at least determinative symbols of it, dominated legal functions. One funerary relief from about the fourteenth century B.C. “depicts the vizier

<sup>181</sup> See *supra* notes 168-69 and accompanying text.

<sup>182</sup> See JAMES P. ALLEN, MIDDLE EGYPTIAN: AN INTRODUCTION TO THE LANGUAGE AND CULTURE OF HIEROGLYPHS 3 (2000).

<sup>183</sup> *Id.* at 462. Hieratic also used determinatives and is visually similar to hieroglyphic text. See *id.* at 6. See also STEPHEN FREYER, BASIC LESSONS IN HIERATIC: LESSON 2—COMMON DETERMINATIVES, <http://home.prcn.org/sfryer/Hieratic/lesson2.html> (last visited Jan. 3, 2006).

<sup>184</sup> See ALLEN, *supra* note 182, at 453-72. For *rule, plan, and wealth*, see MARK COLLIER & BILL MANLEY, HOW TO READ EGYPTIAN HIEROGLYPHICS 157, 159-60 (1998). See also BUDGE, *supra* note 159, at 2, 4-5, 8-9, 13-14, 21-23, 25, 27-31, 38, 42, 47, 52 (for all terms after *wealth*).

<sup>185</sup> Compare ALLEN, *supra* note 182, at 445, with *id.* at 457.

sitting in his judgement hall in front of four tables each with ten rolls on it.”<sup>186</sup> In the *Book of the Dead*, the judgment is described, as transliterated: “Now those *guardians* who give *judgment* the apes are Isis [and] Nephthys.”<sup>187</sup> Both *guardians* and *judgment* use the determinative of the scroll. The reference to the apes appropriately ties into Thoth, lord of writing and judgment, measurer of time, whose symbol is the ape.<sup>188</sup>

Besides legal concepts using the determinative of the papyrus scroll, the scroll is also used for a host of superlatives (*greatness, perfection, nobility, etc.*), concepts relating to property and prosperity (*thing, wealth, etc.*), and even *reality* itself.<sup>189</sup> For the Egyptian mind, as molded by written language,<sup>190</sup> and in contrast to the Classical Greeks, the essence of their everyday commerce, societal structure, and existence was graphic in nature, and particularly dependent upon the medium of papyrus rather than stone. The point is all the more striking considering that numerous examples from hieroglyphs (primarily used with stone) that use the determinative of the scroll (writing upon which would have been in hieratic) for so many abstract, including legal, concepts.

The Egyptians did use determinatives derived from speaking signs for certain key legal concepts: *petitioner, answer, summon, prayer, thinking, recite, and bequeath* are represented, not with a scroll or other sign linked to writing, but with a determinative signifying *speaking* (𓂏) or that which comes out of the mouth.<sup>191</sup> While writing upon papyrus and speaking bear etymological relationships to law, this author finds no reference to legal concepts using a determinate signifying *stelae*, for which there is such a determinative and ideographic sign, (𓂏),<sup>192</sup> or otherwise suggesting epigraphic writing.

An interesting issue raised by the ancient Egyptian's use of determinatives and ideograms, which may seem foreign to modern minds schooled in purer phonetic scripts, is whether spoken Egyptian could adequately express the legal, political and economic concepts of its day (since it lacked the conceptual richness provided by such silent markers).<sup>193</sup> Since we have little other evidence of the linguistic breadth or depth of the spoken language (the subtleties of expression

<sup>186</sup> MATTHA, *supra* note 172, at xi (description but no illustration).

<sup>187</sup> BUDGE, *supra* note 159, at 52 (emphasis added).

<sup>188</sup> *See id.* at cxviii.

<sup>189</sup> Indeed, the most common determinative is that of the papyrus scroll. *See* COLLIER & MANLEY, *supra* note 184, at 6.















<sup>190</sup> “Minds are formed by language . . . .” JEAN JACQUES ROUSSEAU, *ÉMILE* 73 (Barbara Foxley trans., J.M. Dent & Sons 1911) (1780), *cited in* DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in *supra* note 54, at 170. Significant criticism has been aimed at the influence of written language in relation to the spoken word. *See infra* notes 207-09 and accompanying text.

<sup>191</sup> *Compare* ALLEN, *supra* note 182, at 423, *with id.* at 457, 460-61, 465, 467, 469, *and* COLLIER & MANLEY, *supra* note 184, at 159.

<sup>192</sup> ALLEN, *supra* note 182, at 438.

<sup>193</sup> From the modern perspective, consider the problem of adequately vocalizing various mathematical, economic and scientific formulae and notations. Derrida was critical of such technical scripts. *See infra* notes 207-08 and accompanying text.

that are not adequately captured phonetically in writing), this question may be impossible to answer. Sometimes, determinatives may have been omitted from inscriptions.<sup>194</sup> However, in a number of instances, the phonetic pronunciation would render many words, expressed in hieroglyphs, as homonyms.<sup>195</sup>

Hieroglyphs	Shared Phonograms	Shared Phonetic Pronunciation	Meaning
		<i>ššmw</i>	(noun) situation, procedure, conduct
		<i>ššmw</i>	(noun) leader, guide, pilot
		<i>ht</i>	(noun) thing, property
		<i>ht</i>	(noun) fire
		<i>wḏ</i>	(verb) command
		<i>wḏ</i>	(noun) stele
		<i>wḏ</i>	(noun) decree

The preceding table illustrates that a number of concepts expressed as hieroglyphs are homonyms with respect to their pronunciation, at least with respect to the phonograms extracted from the hieroglyphs. For instance, the concept *property* has the same phonograms as *fire*. In spoken Egyptian, *property* may or may not be the same as *fire* (vowel sounds and inflections are not typically captured in the phonetic content of the hieroglyphs).<sup>196</sup>

The point is that one cannot distinguish phonetically between the two when hearing the hieroglyphs or hieratic signs read out loud.<sup>197</sup> A scribe orally reading

<sup>194</sup> See COLLIER & MANLEY, *supra* note 184, at 5.

<sup>195</sup> See ALLEN, *supra* note 182, at 457, 464, 468 (for examples from following table).

<sup>196</sup> See SCOTT & SCOTT, *supra* note 171, at 40-41.

<sup>197</sup> In modern scripts, numerals, such as 1, 2, and 3, are often ideograms, lacking a phonetic component, which enables them to have meaning in many languages. See Grumach, *supra* note 60, at 48. Similarly, “John sells fish” and “John is selfish” create audible confusion, especially if “John is” is pronounced as the contraction “John’s.” See W. Haas, *Writing: The Basic Options, in WRITING WITHOUT LETTERS* 177 (W. Haas ed., 1976). What is different in Egyptian hieroglyphs and hieratic is the use of silent determinatives, also known as “semantic markers” to help facilitate meaning. See *id.*

from hieroglyphs or hieratic would have to find some way of conveying the subtleties of meaning to his audience.<sup>198</sup> In essence, the process of semantic interpretation must precede vocalization—the exact opposite of reading with the Greek alphabet.<sup>199</sup> Even if the oral reader made the effort to convey to his audience the general meaning of the determinative (through vowel sounds, inflections, or other vocalizations), the etymological relationship among terms written with identical, but unspoken, determinatives—and hence, subtleties of meaning arising from those relationships—is lost on the hearer. For instance, consider the relationship of *law* (𓂏𓂏𓂏, pronounced *hp*) to *thing* (𓂏𓂏𓂏, pronounced *ht*),<sup>200</sup> which is lost without the visual clue of the determinative. The ancient scribe has a distinctive intellectual advantage over his illiterate audience because of his ability to access the visual clues of the written script.

Interestingly, the general function of scroll (𓂏) as a determinative is to indicate abstraction.<sup>201</sup> For the ancient Egyptian, abstract thought is associated with the written medium, and in particular, papyrus. Such a worldview stands in stark contrast to that of the Classical Greeks, as typified by Socrates, who emphasize the supremacy of oral dialogue and dialectic reason.<sup>202</sup> If indeed determinatives limit the expression of abstract and legal concepts to written form, then tremendous control over the legal system may be exercised by the scribal classes,<sup>203</sup> especially in light of the fact that probably less than one percent of the Egyptian population was literate.<sup>204</sup> It is not surprising that Egyptian writing is associated with mystery and secrecy.

Efficiency in reading and writing any language is enhanced by familiarity, not by decomposing groups into constituent elements, so that these insights were more useful for being concealed from others. The practice of learning to read from whole phrases [as in ancient Egyptian scripts] must have helped their concealment, and the perceptions of the inventors [of writing] were probably confined to themselves and a few others.<sup>205</sup>

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<sup>198</sup> Besides hieroglyphic and hieratic scripts, ancient Hittite, Babylonian cuneiform, and perhaps Cretan Linear B also use determinatives in combination with phonetic signs (and are hence referred to as ideo-phonetic scripts). See Grumach, *supra* note 60, at 48-49, 51, 63. The adaptation of the Phoenician alphabet in ancient Greece (in mid-eighth century B.C.) to a purely phonetic alphabet, capable of expressing vowels as well as consonants, without the need of ideograms and determinatives, is a truly remarkable innovation. See *id.* at 65-66.

<sup>199</sup> See *supra* note 65 and accompanying text.

<sup>200</sup> See ALLEN, *supra* note 182, at 462, 464.

<sup>201</sup> See COLLIER & MANLEY, *supra* note 184, at 6 (“Although such [abstract] words could not easily be represented by a picture, they could be written down, for example on papyrus, thus acquiring a tangible physical form.”).

<sup>202</sup> See *supra* note 54 and accompanying text.

<sup>203</sup> See Baines, *supra* note 145, at 581 (on role of scribal classes and “images of Egypt as a land dominated by priests”).

<sup>204</sup> *Id.* at 584.

<sup>205</sup> *Id.* at 587.

Predictably, the Egyptian hieroglyph for *hidden* also includes the determinative of the scroll.<sup>206</sup>

The linguist and philosopher Derrida has noted the enslaving power of written language, particularly one that deemphasizes orality: “To dispossess the people of their mastery of the language and thus of their self-mastery, one must suspend the *spoken* element in language. Writing is the very process [sic] of the dispersal of peoples unified as bodies and the beginning of their enslavement . . . .”<sup>207</sup> The danger is the diversion of “presence of thought [from] speech” to “the sign of the thing itself.”<sup>208</sup> For Derrida, the removal of discourse from public, vocal spheres to technical writing (particularly writing which cannot be fully expressed through oral communications, such as mathematics, economics or scientific notation) is the beginning of popular enslavement. While such anti-establishment sentiments might be readily expected from a French-educated philosopher, about the same time, the eminent British legal historian and diplomatist M.T. Clanchy entertained similar criticisms in his monumental work on the evolution of English legal documents: “[I]t is language itself which forms mentalities, not literacy . . . . Morally and psychologically, depending on the circumstances, literacy may liberate or it may confine.”<sup>209</sup> In any event, the information environment of ancient Egypt, emphasizing papyrus and use of non-phonetic determinatives and ideograms has significant implications for access to legal information and process for the general population.<sup>210</sup>

Aside from the physical medium—papyrus versus stone—the forms of Egyptian legal literature, already demonstrated to have included pleading forms and summary rulings, may have been quite diverse, even including narrative tales and fiction. Moreover, modern scholars may not have recognized Egyptian legal literature for what it was. For example, consider this statement: “Of the latter Egypt has left a considerable body in the form of didactic and quasi-philosophical wisdom literature, but of actual Egyptian laws only a few isolated examples have been preserved from the Pharaonic Period.”<sup>211</sup> Modern scholars

<sup>206</sup> See, e.g., BUDGE, *supra* note 159, at 22 (“I see the concealed things”), 25 (“in the land [of the] hidden”) (both examples use the determinative of the scroll to denote the *hidden*).

<sup>207</sup> DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in OF GRAMMATOLOGY, *supra* note 54, at 170.

<sup>208</sup> DERRIDA, “. . . *That Dangerous Supplement . . .*”, in OF GRAMMATOLOGY, *supra* note 54, at 144.

<sup>209</sup> CLANCHY, *supra* note 4, at 9. Citing Max Weber, Clanchy likewise observed the tendency of bureaucracies to exercise control through knowledge. See *id.* at 67; see also *supra* note 171.

<sup>210</sup> Similar criticisms have been made about the use in modern sciences of technical symbols which are non-phonetic or at least difficult to render into plain English. See DERRIDA, *The End of the Book and the Beginning of Writing*, in OF GRAMMATOLOGY, *supra* note 54, at 10 (“[T]he practice of scientific language challenges intrinsically and with increasing profundity the ideal of phonetic writing and all its implicit metaphysics . . .”).

<sup>211</sup> Eyre, *supra* note 177, at 92 (footnotes omitted) (“In this [ancient Egyptian law] differs radically from the other legal systems of the Ancient Near East, where the numerous codes stand at the centre of attention.”); see also Aristide Théodoridès, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT 291, 308 (J.R. Harris ed., 2d ed. 1971) (“We have, after all, collections of Sumerian, Akkadian, Hittite, and Neo-Babylonian laws—but nothing of the kind from Egypt.”); *id.*

recognize wisdom literature, but its relationship to ancient law is not always appreciated. Other cultures, such as the early Celts, possess a rich body of gnomic literature, which is hard to separate as a distinctive legal resource.<sup>212</sup> The problem is that some modern scholars may mistakenly dismiss forms of literature as not constituting “law.”<sup>213</sup>

Modern scholars do mine literary tales for evidence of law and social norms.<sup>214</sup> For example, in *The Tale of the Eloquent Peasant* (from the Middle Egyptian Dynastic period), an Egyptian peasant, Khunanup, is entrapped on the way to the market by a local land tenant, Nemtynakhte, and loses all of his goods. Nemtynakhte blocks the pathway to the market by spreading cloth over the road, forcing Khunanup to pause and consider trespassing over the Nemtynakhte’s adjoining field or wading into the Nile. In the meantime, Khunanup’s donkey takes a mouthful of barley from Nemtynakhte’s field, eventually resulting in the seizure of Khunanup’s goods. Khunanup eventually makes a series of nine petitions to the High Steward of Ninsu, who, with the advice of the King, insists upon the continued pleadings and has them transcribed because they are so eloquent and instructive. In the end, Khunanup is awarded all of Nemtynakhte’s goods and home in judgment.<sup>215</sup> Even if fiction,<sup>216</sup> the tale functions in a number of important ways in Egyptian society. It reaffirms the importance of justice, rhetoric, artful pleading, and equality before the law.<sup>217</sup>

The relationship of fiction to ancient law may help resolve other mysteries. For instance, the most frequent categorization of ancient legal collections is that of “code,” but as already noted, the Hermopolis Law Code is considered by some

at 291 (“The Nile valley has given us no code, nor any copious theoretical treatises . . . .”); VERSTEEG, *supra* note 172, at 8-9; JOHN A. WILSON, *THE CULTURE OF ANCIENT EGYPT* 172 (1951).

<sup>212</sup> See *infra* notes 319-34 and accompanying text.

<sup>213</sup> For similar discussion of Greek use of Homer as a source for law, see *supra* notes 68-71 and accompanying text.

<sup>214</sup> See, e.g., VERSTEEG, *supra* note 172, at 15-17, 28-35, 180-85 (*The Tale of the Eloquent Peasant*); see also Eyre, *supra* note 177, at 92 (“One of the most fruitful lines of enquiry into the functioning nature of a society is the attempt to juxtapose what can be seen from specific examples of the actual working of social relations with the formal statements of the society’s ideals found in its laws and moralistic literature.”).

<sup>215</sup> See VERSTEEG, *supra* note 172, at 15-17 (general account), 28-29 (repetitive petitions are required because of their excellence). “[T]he [magistrate] is so delighted with this unlearned man’s eloquence that he reports it to the king; and on the king’s orders the magistrate goads the peasant to continue pleading until the poor man is completely exhausted. Only then does he receive justice and ample rewards.” *Id.* at 15 n.60.

<sup>216</sup> The fact that much of the literature is fiction does not appear to be a problem for modern scholars—at least historians:

If it be asked where our best historical material is to be found, our answer may seem to be almost a contradiction in terms; it is to be found in Egyptian fiction, where the authors were able to depict existing conditions and to vent their feelings with a freedom impossible when the predominant intention was that of boasting.

GARDINER, *supra* note 151, at 61, cited in VERSTEEG, *supra* note 172, at 12 n.52.

<sup>217</sup> VERSTEEG, *supra* note 172, at 28-35.



to be case law rather than a proper code.<sup>218</sup> However, “case law” does not appear to be a completely adequate description either. The doubts of a noted Egyptologist, close to the text, are revealed in the following statement about the Hermopolis Law Code: “A book of case law (if that is what this document is, rather than a theoretical document defining a system that may never actually have existed as such) could be copied long after it was out-of-date . . . .”<sup>219</sup> It is neither code, nor case law, nor an exhaustive treatise. Why so much trouble in identifying the character and use of the Hermopolis Law Code? Perhaps, because it is none of the above. Even more perplexing, the same troubled Egyptologist notes: “The same is true of other ancient Near Eastern documents (e.g., the Mesopotamian ‘Code of Hammurabi’), which are frequently referred to as law codes.”<sup>220</sup> The inescapable suspicion is that ancient law collections do not fit nicely into categories familiar to modern legal scholars.

Having considered the medium and textual form of Egyptian literature, its function needs to be considered. Some have argued that Egyptian viziers (at least in later periods) made use of precedent, including records of cases—for example, “it is pointed out that the records of all judgments are kept in the vizier’s archives, where they could certainly have been consulted . . . .”<sup>221</sup> A specific instance from the Thirteenth Dynasty is noted from Egyptian text, although probably copied in the Eighteenth Dynasty: “See, it is a *maxim* found in the ‘collection of Memphis.’”<sup>222</sup> Another example, apparently from the same text: “Such (therefore) are the *prescriptions*. See, the parchment from the vizier’s office is brought to you, so that you may know all the *measures* (?) of justice in this (matter).”<sup>223</sup> The “prescriptions” on the parchment could have been codes or other non-precedent, but given the relative lack of evidence of such law, this is less likely. The reference to “maxims,” “prescriptions,” and “measures” suggests again a failure to find suitable translations in light of modern notions of law, and once again highlights the gnomic nature of Egyptian law, which may be mistakenly identified as purely “wisdom literature” rather than legal in nature.

Another Egyptologist identifies an instance of the use of precedent in the New Kingdom:

<sup>218</sup> See *supra* notes 172-80 and accompanying text.

<sup>219</sup> Johnson, *supra* note 177, at 215 n.18.

<sup>220</sup> *Id.* at 215 n.19; see also *supra* notes 94-116 and accompanying text.

<sup>221</sup> Théodoridès, *supra* note 211, at 308 (citing R.O. Faulkner, *Installation of the Vizier*, 41 J. EGYPTIAN ARCHAEOLOGY 18-29 (1955) and Aristide Théodoridès, *A Propos de la Loi dans L’Egypte Pharaonique*, 14 REVUE INTERNATIONALE DES DROITS DE L’ANTIQUITÉ 107, 148-51 (1967)). Not only were records available, but viziers were instructed to consult them rather than imposing their own will. “See, men say of the vizier’s chief scribe, ‘Scribe of Justice’ is said of him. And as for the office in which you judge, there is a spacious room in it full of [the records (?) of all (past)] judgements . . . . Do not your [own will] in matters whereof law is known . . . .” R.O. Faulkner, *Installation of the Vizier*, 41 J. EGYPTIAN ARCHAEOLOGY 22-23 (1955) (footnotes omitted).

<sup>222</sup> Théodoridès, *supra* note 211, at 307-08 (emphasis added).

<sup>223</sup> *Id.* at 307 (emphasis added).

For example, at the end of P. Turin 2021, a New Kingdom document concerning inheritance following a second marriage, it is stated: "And the vizier gave an order to the priest and scribe of the mat . . . of the Tribunal of the Temple of [King] Ramesses III, Ptahemheb, saying: 'Let this arrangement which I made be written in the Registry of the Temple Ramesses III!' And a copy was made for the Grand Tribunal of Thebes before numerous witnesses."<sup>224</sup>

Here a decision is recorded at the order of vizier to preserve evidence of what is decided. Furthermore, records of decisions are not kept simply to document the past, but as an aid to the future.

As for the office in which you [as vizier] hold audience, it includes a large room which contains [the records] of [all] the judgements, for he who must practise justice before all men is the vizier . . . . *Do not act as you please in cases where the law to be applied is known.*<sup>225</sup>

Assuming the translation is accurate, it appears there is evidence not just that records are kept in the event of subsequent litigation between the same parties, but as a source of law.

In many fundamental respects, the use of precedent comports with "Egyptian reverence for the past" which was "without parallel elsewhere in the world."<sup>226</sup> The contrast with our own day is striking: "We believe that the world needs to be improved . . . ; they believed that the world needs to be maintained, and therefore to be stabilized by governmental imposition of order from above."<sup>227</sup> Religion and the temple figure centrally in the fight to preserve order: "An Egyptian temple is a machine for the preservation of the universe, a technical operation that requires technical staff and knowledge."<sup>228</sup> Not surprisingly, the origin of Egyptian writing is traced to the temple. "It is in [the] temples that we find the first signs of . . . writing."<sup>229</sup> Writing is the priesthood of the ancient temples. The writing system itself may be credited with bringing to fore the Egyptian's sense of order, including history and past. "Enumerative, chronological lists of them [deceased kings] developed with writing itself and came to have their own ideological purpose . . . ."<sup>230</sup> In short, the use of written precedent fits the Egyptian outlook on the world and their information ecosphere.

<sup>224</sup> Johnson, *supra* note 177, at 215 n.25. Johnson is clearly committed to the notion of precedent in ancient Egypt: "Egyptian judges based their decisions on traditions and precedent and kept copies of their decisions." *Id.* at 177 (footnotes omitted).

<sup>225</sup> Théodoridès, *supra* note 211, at 309 (emphasis added).

<sup>226</sup> VERSTEEG, *supra* note 172, at 66-67 (citing GARDINER, *supra* note 151, at 56). For a general discussion of legal precedent in Egypt, see ANDREA McDOWELL, JURISDICTION IN THE WORKMEN'S COMMUNITY OF DEIR EL-MEDINA (1990).

<sup>227</sup> Byron E. Shafer, *Introduction*, in JOHN BAINES ET AL., RELIGION IN ANCIENT EGYPT: GODS, MYTHS, AND PERSONAL PRACTICE 1, 3 (Byron E. Shafer ed., 1991).

<sup>228</sup> QUIRKE, *supra* note 161, at 70.

<sup>229</sup> FRANKFORT, *supra* note 103, at 55 (cited in NIBLEY, *supra* note 89, at 110).

<sup>230</sup> Baines, *supra* note 145, at 576.

Not only does a change of emphasis in the format of publication—from stone to papyrus—correlate with the appearance of legal literature, but spoken language itself plays a role as a medium for the law, having substantive impact at least with respect to choice-of-law issues. Ancient Egypt is a land of constant foreign influx, particularly in its later dynasties. It struggles with choice-of-law issues, adapting a custom common of many cultures to apply law based upon family or national origin, with a significant modification:

Egyptians were clearly bounded by their own laws, but the archives of Elephantine suggest that the Jews kept their own family traditions. This was no doubt convenient, but what happened when such traditions conflicted with Egyptian laws, as for example in a mixed marriage? And what about criminal law, which one would imagine to have been the same for everyone, regardless of origin? . . . A comparison with Ptolemaic Egypt, where these problems recurred in an acute form, suggests one solution: treat cases by the language in which the various documents were written.<sup>231</sup>

Thus, the medium—in this case, the language of applicable documents—becomes a simple means for determining choice of law.

In contrast to other cultures, ancient Egyptians do not appear to use technical terms for legal documents or functions.<sup>232</sup> “[U]nlike the ancient Romans who created specialized legal vocabulary and terminology, the Egyptians generally used ordinary, everyday words and phrases to record, describe and explain legal matters. The ancient Egyptians used commonplace language for legal documents and had only a few imprecise technical terms relating to law.”<sup>233</sup> This fact correlates with Egyptians’ more holistic approach to knowledge, and perhaps helps explain the relative lack of recognizable legal literature from Egypt, including confusion with didactic wisdom literature.<sup>234</sup> However, can a language be both capable of significant abstraction in the written form and at the same time be non-technical, employing every-day vocabulary? Such observations about the non-technical character of legal writings are incongruous with the implications of a language using non-phonetic signs such as determinatives and ideograms, which raise questions about the ability of the spoken language to fully express abstract, if not purely legal, concepts, and strengthen the control of scribal classes.<sup>235</sup> Perhaps, the mysterious nature and subtleties of meaning, made possible only through written determinatives and ideograms, are ultimately counterbalanced by restricting technical vocabulary and emphasizing common terms. The disparity of potential meaning between

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<sup>231</sup> John Ray, *Literacy in Egypt in the Late and Persian Periods*, in *LITERACY AND POWER IN THE ANCIENT WORLD* 58-59 (Alan K. Bowman & Greg Woolf eds., 1st paperback ed. 1996).

<sup>232</sup> Théodoridès, *supra* note 211, at 291 (commenting on legal deeds), 317 (“Everyday vocabulary could therefore embrace legal notions, with the result that one must beware of concluding from the apparent absence of technical terms that there were no judicial concepts.”).

<sup>233</sup> VERSTEEG, *supra* note 172, at 4 (footnotes omitted).

<sup>234</sup> See *supra* note 211 and accompanying text.

<sup>235</sup> See *supra* notes 182-209 and accompanying text.

writing and orality may ultimately handicap the development of a more technical legal vocabulary.

Despite the lack of specialized legal terminology, written language, with its ability to nonetheless facilitate abstraction, does function to stratify Egyptian society and limit administrative control to the upper, especially the priestly, classes. "The scribe had the full qualifications of a special profession and was included in the upper classes of kings, priests, nobles, and generals, in contrast with peasants, fishermen, artisans, and laborers. Complexity favored increasing control under a monopoly of priests and the confinement of knowledge to special classes."<sup>236</sup> Ultimately, the control Egypt's intricate writing system affords, which can only be supported by priestly classes, limits Egypt's expansion of empire and power of the monarchy.<sup>237</sup> Ancient Egypt is limited by its graphic boundaries into relative isolation.<sup>238</sup> The Hermopolis Code, whose nature can be compared to early English books of writs, facilitates the centralization of power in priestly classes through emphasis on technical knowledge.<sup>239</sup>

Bureaucratic administration means fundamentally the exercise of control on the basis of knowledge . . . . This consists on the one hand in technical knowledge which, by itself, is sufficient to ensure it a position of extraordinary power. But in addition to this, bureaucratic organizations, or the holders of power who make use of them, have the tendency to increase their power still further by the knowledge growing out of experience in the service. For they acquire through the conduct of office a special knowledge of facts and have available a store of documentary material peculiar to themselves.<sup>240</sup>

While Egyptian knowledge is holistic, it is mediated and given technical and procedural significance by priestly and scribal classes through writing.

Ptolemaic Egypt eventually influences additional transition of the Egypt's administrative language of Egypt from Hieratic to Demotic Greek. A number of factors influence the transition to Greek (as well as use of papyrus and writings in general), including conquest, mutual self-interest, and even tax breaks:

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<sup>236</sup> INNIS, *EMPIRE AND COMMUNICATIONS*, *supra* note 8, at 24.

<sup>237</sup> *Id.* at 24-25.

<sup>238</sup> Baines reflects on Egypt's linguistic isolation:

[I]t is clear that Egypt, the largest centralised state of its time, was set off from its neighbours by its writing. The less powerful, closer neighbours were not literate, and powerful but distant states used a different script. . . . [The script] was never adapted to writing other languages until a few forms were adopted in the Sudan . . . in the 3rd century, B.C . . . .

Baines, *supra* note 145, at 576.

<sup>239</sup> See *supra* note 172.

<sup>240</sup> MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 339 (Talcott Parsons ed. & trans., 1947).

Through education . . . and tax-breaks, the new Greek rulers encouraged the adoption of their language within the administration of Egypt. At the same time Egyptian priests and scribes had everything to gain by collaboration and adaptation . . . . Within the Ptolemaic bureaucracy the speedy spread of Greek and apparent multiplication of records made on papyrus will have served a purpose for those involved, both for the ruling power and for those who were in its instruments. Mutual interest is an important feature of the development and the increase in what was now written down reinforced the interdependence of ruler and ruled.<sup>241</sup>

Greek influence also impacts Egyptian legal customs. Egyptians adopt a system of notaries and an official registry, replacing a procedure calling for sixteen witnesses of contracts.<sup>242</sup>

The impact of stone and later papyrus, when combined with complicated forms of Egyptian writing, including non-phonetic signs, ensures that there would always be mediators (the priestly class) controlling legal information and procedures. True, stone gives way to papyrus, and ostensibly, less central forms of government, but even with changes in administration and spoken language, the medium preserves the function of the mediators as sacred protectors of the law and transactors of business. In keeping with Deibert's holistic approach, one Egyptologist notes: "Literacy [and presumably the advent of writing] is a response more than a stimulus. It may be a necessary precondition for some social and cognitive change, but it does not cause such change."<sup>243</sup> On the one hand, language becomes an important factor in determining applicable law to the diverse peoples inhabiting cosmopolitan Egypt. On the other hand, Egyptian scribes find they can capture a variety of languages in both their writing systems and media, thus preserving their roles. For ancient Egypt, media is an essential component of its stability—preserving a civilization from changing deities, invaders, and spoken languages.

#### **D. A Mediated, Oral Legal Infosphere—out of the Celtic and Icelandic Mist**

Law in oral cultures is fascinating and challenging to study because, ultimately, it is only the transition from oral to written customs that is observed. From the Anglo-American perspective, the richest harvest is yielded from the literature of Iceland and Ireland—two nations whose histories are intertwined as a result of trade and Nordic invasions. Somewhat less abundant is the literature from other British nations and the continent, although interesting insights into the effect of media, within a given culture, upon law also exist. The nature of the Celtic and Icelandic legal infospheres is founded in cultural memory, where poets

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<sup>241</sup> Dorothy J. Thompson, *Literacy and Power in Ptolemaic Egypt*, in *LITERACY AND POWER IN THE ANCIENT WORLD* 77-78 (Alan K. Bowman & Greg Woolf eds., 1st paperback ed. 1996).

<sup>242</sup> *Id.* at 82.

<sup>243</sup> Baines, *supra* note 145, at 593 ("As with any invention, full realisation of its possibilities comes very slowly, if at all.").

and bards orally transmit custom and law. Such a tradition favors the use of precedent and comports with later English traditions of pleading.

Like the Egyptian and Mesopotamian civilizations, legal information is mediated, but until the introduction of Christianity and monasticism, not through a scribal class. Rather, it is mediated through the *filid*, a druidic class of bards and poets. Similar to Egyptian hieroglyphs, Celtic media, as expressed in the form of poetic verse, is concerned with the Eternal. However, unlike Egyptians, Mesopotamians, and Greeks, the Celts and Icelanders rely upon memory and mnemonic devices rather than the written word, despite its availability to them. The reliance upon memory and oral tradition lends itself to a more undifferentiated or holistic approach with respect to law's relationship to other branches of knowledge, and perhaps, ultimately, a deference to precedent and formulistic forms of pleading.

Law in ancient Ireland illustrates the fundamental function of media as a means to preserve memory, transverse space, and control information. Some may question whether oral forms of communication can function as a true medium, at least in a technological sense; however, the use of poetry and storytelling techniques by classes of bards functions in much the same way as any other form of medium.

"The Place of this Poem" begins the *Senchus Mor*,<sup>244</sup> the ancient Irish legal tract dating from 438 to 441 A.D.,<sup>245</sup> and so launches an extraordinary text at odds with the widely-held belief that the common law tradition commences with Glanville and Henry II.<sup>246</sup> The "Poem" is not all in verse, probably being closer to the "rhythmical alliterative prose" used in Celtic sagas.<sup>247</sup> In Irish sagas and

<sup>244</sup> 1 HIBERNIÆ LEGES ET INSTITUTIONES ANTIQUÆ (ANCIENT LAWS AND INSTITUTES OF IRELAND) 4 (2000) [hereinafter ANCIENT LAWS OF IRELAND]. The literal place of the poem is Teamhair, an ancient Irish meeting place for important assemblies. *Id.* The *Senchus* is also known as the *Senchas*. *Id.*

<sup>245</sup> Although the date of the *Senchus* is fixed by W. Neilson Hancock, the Royal commissioner in charge of the 1864 edition, in the edition's preface, that date is subject to much criticism by the esteemed scholar, D.A. Binchy. *Compare id.* at xi, with D.A. BINCHY, THE LINGUISTIC AND HISTORICAL VALUE OF THE IRISH LAW TRACTS 16-17 (1943), in 29 PROC. BRIT. ACAD. 195 (1946) (soundly criticizing the use of middle Irish in a new introduction and the historical improbability of St. Patrick being a contemporary of the events surrounding the recording of the *Senchus*).

<sup>246</sup> KURT VON S. KYNELL, SAXON AND MEDIEVAL ANTECEDENTS OF THE ENGLISH COMMON LAW 1-2 (2000) (citing PAUL BRAND, THE MAKING OF THE COMMON LAW 77 (1992) and HALSBURY'S LAWS OF ENGLAND 219 (4th ed. 1974)). Derivative records of certain ancient legal texts (known as the *Damweintiau I and II* and the *Book of Iorwerth*) also provide support for case law in the British Isles as early as the tenth century. See Alred Rhys Wiliam, *Introduction* to LLYFR IOWERTH: A CRITICAL TEXT OF THE VENEDOTIAN CODE OF MEDIEVAL WELSH LAW, at xxiv, xxix, xxxii (Alred Rhys Wiliam ed., 1960). Like the *Senchus*, the various Welsh legal texts are subject to gloss, significantly increasing their length. *Id.* at xxiii-iv. For instance, the first section of the *Senchus* (the murder trial of Nuada Derg) has 260 lines, but an additional 632 lines of gloss, another 256 lines of gloss on the gloss, and 232 lines from footnotes, with each successive gloss expressed in smaller fonts. *Id.* The transition from oral verse to parchment, as experienced by the *Senchus*, overshadows original material with gloss.

<sup>247</sup> See BINCHY, *supra* note 245, at 13-14.

epics, prose is used with the narrative, but verse with dialogue.<sup>248</sup> Interestingly, in the *Senchus*, it is not just any dialogue that is put into verse, but the judgment itself.<sup>249</sup> Much more of the *Senchus* may have been verse than we have today. “To whatever extent the *Senchus Mor* underwent the process described with regard to another Brehon Law manuscript, already referred to, as being translated from hard original Gaelic into fair Gaelic of the thirteenth century, the versification of the original text would be disturbed.”<sup>250</sup> Scholars have identified additional passages of the *Senchus* that evidence meter, and were originally in verse,<sup>251</sup> but are not in poetic form today. Further complicating the picture, the text is found in layers or strata because of the numerous glosses and emendations made by subsequent scribes and scholars. One translator complains that the glosses “are written up and down, over and hither, and carried into the margin in the most irregular and unsatisfactory manner.”<sup>252</sup> Regardless of its eclectic form, the ancient text, particularly its oldest elements, is poetic and does contain genuine verse.<sup>253</sup>

The “Poem’s cause” is a murder trial of Nuada Derg, who killed one of St. Patrick’s charioteers in what was perhaps a botched attempt on the venerable saint’s life.<sup>254</sup> The account is notable because judgment is given, per divine instruction, not by St. Patrick, but to St. Patrick’s choice among the *Brehons* of Ireland.<sup>255</sup> The judgment is pronounced by the *Brehon* Dubhthach Mac ua Lugair, the royal poet of the island, whose sentence is given in some 60 lines of verse.<sup>256</sup>

Yea, every living person who inflicts death,  
Whose misdeeds are judged, shall suffer death.  
He who lets a criminal escape is himself a culprit;  
He shall suffer the death of a criminal.  
In the judgment of the law which I, as a poet, have received,  
It is evil to kill by a foul deed;  
I pronounce the judgment of death,  
Of death for his crime to every one *who kills*.  
Nuada is adjudged to Heaven,

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<sup>248</sup> PETER BERRESFORD ELLIS, A BRIEF HISTORY OF THE DRUIDS 200-01 (2002). Similar literary forms are used in ancient Sanskrit and Welsh. *Id.*

<sup>249</sup> *See, e.g.*, 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 9-13.

<sup>250</sup> W. Neilson Hancock, *Preface to the 1865 Edition*, in ANCIENT LAWS OF IRELAND, *supra* note 244, at xli.

<sup>251</sup> *Id.* The other legal manuscript referred to is a legal tract bearing “a statement that it was changed from hard original Gaelic and put into fair Gaelic.” *Id.* at xxxvi.

<sup>252</sup> *Id.* at xxxiii (quoting Dr. O’Donovan, a principal translator of the *Senchus*).

<sup>253</sup> *See id.* at xxxix-xli.

<sup>254</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 2-7.

<sup>255</sup> *Id.* at 7.

<sup>256</sup> *Id.* at 7-13.

And it is not to death he is adjudged.<sup>257</sup>

The outcome of the case, in addition to punishing the murderer, results in an exhibition to St. Patrick of all Irish “judgments and all the poetry of Erin, and every law which prevailed among the men of Erin, through the law of nature, and the law of the seers, and in the judgments of the island of Erin, and in the Poets.”<sup>258</sup> Modern notions of dicta and confining decisions to the matter at hand have no application here. In two instances from the *Senchus*, a single suit produces a plethora of law far beyond what was needed to resolve the case at hand.<sup>259</sup> In ancient times, such a system may have been more economical—a decision has to produce a system of rules or doctrines to avoid revisiting related issues later and to promote judicial economy.

At the recitation of the *Senchus* in about 438-441 A.D., the preservation of the law is credited to the poets, writing, and nature:

The *Senchus* of the men of Erin: What has preserved it? The joint memory of two seniors, the tradition from one ear to another, the composition of poets, the addition from the law of the letter, strength from the law of nature; for

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<sup>257</sup> *Id.* at 13. A glossator explains the apparent contradiction of being adjudged to Heaven and not to death as “the culprit was put to death for his crime and his soul was pardoned *and sent to heaven.*” *Id.*

<sup>258</sup> *Id.* at 15-17. Later emendators explain the three-fold foundation of the law as the (i) “composition of the poets” or what is preserved by the “thread of poetry,” (ii) “law of the letter” or from the Bible, and (iii) “law of nature” or that part of the law that governs Pagans but which cannot be reconciled with the word of God. *Id.* at 38-39.

<sup>259</sup> As mentioned above, the first section of the *Senchus* deals with the slaying of St. Patrick’s charioteer, resulting in a conference and recitation of the laws. See *supra* notes 254-58 and accompanying text. The second section (also in the first volume) deals with the seizure of milk cows and the killing of a female bondservant. See 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 65. The resolution of the matter results in a complete exposition of the laws of distress (with gloss comprising some 240 pages), most of which appears to be well beyond what is needed to resolve the issue. *Id.* at 65-305. Later volumes of the ANCIENT LAWS AND INSTITUTES OF IRELAND, which contain other laws besides the *Senchus*, tend to be more exhaustive and less dependent (at least in the written record) on a case or controversy for their inception. Interestingly, these laws originate at a later date. See, e.g., 3 ANCIENT LAWS OF IRELAND, *supra* note 244, 83-547 (note the lack of a matter or controversy in the record as a basis for setting down the law other than the separate wounding of the two law-givers, Cormac and Cennfaeladh, such that they had time to devote to the administration and recording of law). The *Senchus* was set down in writing in about 438 to 441 A.D., several years after St. Patrick’s arrival in 432 A.D. See Hancock, *supra* note 250, at xi; Richard T. Oakes, *Introduction to Senchus Mor*, in ANCIENT LAWS OF IRELAND, *supra* note 244, at vi. In contrast, the Book of Aicill was set down in about 642 A.D. *Introduction to the Book of Aicill*, Richard T. Oakes, *Introduction to Senchus Mor*, in ANCIENT LAWS OF IRELAND, *supra* note 244, at vi at lxxvii. Perhaps, the intervention of Christianity, Latin influences (including Roman law) and monasticism explain the change over the two centuries. See *infra* notes 307-08 and accompanying text.



these are the three rocks by which the judgments of the world are supported.<sup>260</sup>

In the gloss that accompanies the text, both memory and poetry are referred to as the “preserving shrine” of the *Senchus*.<sup>261</sup> The custodians who preserve the law belong to a class of poetic druids known as *filid*, whose teachings are transmitted from “ear to ear,” and whose cultural medium is almost exclusively oral.

[T]he older custodians of the legal lore were the *filid*, the professional men of learning who were much more than ‘poets’ (as the word is generally translated) in that they were credited with supernatural wisdom and powers. We might expect, therefore, that much of the law that was ‘transmitted from ear to ear’ should have been cast in verse. And in effect it is no mere coincidence that very frequently in the tracts a quotation from the oldest stratum is prefaced by the words *amail arindchain fēnechas*, ‘as the *fēnechas* sings (or ‘recites’) it’.

In the *fēnechas* we have, I believe, the first precipitation in writing of the oral tradition of the schools, most of it in a primitive form of verse or in rhythmical alliterative prose like the ‘rhetorics’ preserved in some of the sagas.<sup>262</sup>

Attesting to the resilience of verse and alliterative prose is the fact that corruptions of legal tracts like the *Senchus* as introduced by successive scribes, glossators and emendators could be identified because of the metrical structure still present in the text.<sup>263</sup> In addition, the *Annals of Ulster*, dating from 444 A.D., but unwritten until the fifteenth century, accurately identifies some eighteen astronomical events between 496 and 884 A.D., when checked by modern calculations.<sup>264</sup> Some scholars have argued that law, when dependent on memory, is flexible and amenable to necessary change,<sup>265</sup> however, poetic verse is remarkably stable. “Students of Gaelic classic verse are often amazed by the consistency of the product over several centuries.”<sup>266</sup> In some instances, verse

<sup>260</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 31.

<sup>261</sup> *Id.* at 37, 39.

<sup>262</sup> BINCHY, *supra* note 245, at 13. The Greeks also sang their laws and customs. *See supra* notes 72-75 and accompanying text.

<sup>263</sup> *Id.* at 13, 14 (“[I]t [legal verse] has its uses for the modern student also, since the metre often enables him to emend a corrupt manuscript reading.”).

<sup>264</sup> ELLIS, *supra* note 248, at 204.

<sup>265</sup> *See* M.T. Clanchy, *Remembering the Past and the Good Old Law*, 55 HIST. 165, 172 (1970). “Memory, that ‘marvelous instrument of elimination and transformation’ as March Bloch calls it, is continually changing. Hence Plucknett is able to conclude that customs were ‘instruments for legal change rather than the fossilized remains of a remote past.’” *Id.* (citing, among others, MARC BLOCH, FEUDAL SOCIETY 113-14 (L.A. Manyon trans., 1961) and THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 307-08 (5th ed. 1956)).

<sup>266</sup> Derick S. Thompson, *Gaelic Learned Orders and Literati in Medieval Scotland*, 12 SCOT. STUD. 57, 74 (1968).

may make law too rigid.<sup>267</sup> Besides the stability of verse as a medium, the *filid* who preserved its use are notably conservative.<sup>268</sup> The verse composed for legal texts has “a utilitarian rather than a literary value, having been composed primarily for mnemonic purposes.”<sup>269</sup> The poet’s role is that of a remembrancer and often includes functions alien to those of modern poets. “The poet in an illiterate society is not only a creative artist. He is a mnemotechnician who preserves ‘the useful by binding it in verse.’”<sup>270</sup>

Interestingly, the literature contains both aphorisms and precedents—“the traditional decisions of real or (much more probably) mythical judges in what we may call ‘leading cases.’”<sup>271</sup> The presence of case law in the *Senchus* prior to the universally accepted beginning of the common law with Glanville is remarkable. Besides aphorisms and precedents, verse has also been used for legal descriptions of real property in Scotland.<sup>272</sup> Indeed, in Gaelic Scotland, professions of law, medicine, and the church are occupied by the poetically inclined (the *filid*), and the disciplines of history, genealogy, and science are likewise dependent on verse.<sup>273</sup> “Were poetry to be suppressed . . . with no history, no ancient lays [possibly, ‘laws’],<sup>274</sup> save that each had a father, nothing of any man would be heard hereafter.”<sup>275</sup> Indeed, not only is knowledge of ancient Irish preserved by the *filid*, but it is controlled by them. “Until Patrick came only three *classes* of persons were permitted to speak in public in Erin, *viz.* a Chronicler, to relate events and tell stories; a Poet, to eulogize and satirize; a Brehon, to pass sentence from the precedents and commentaries.”<sup>276</sup> The *filid* as a class of druids probably could write, but to reduce knowledge to writing was anathema “for not only did they thus surround their teaching with that atmosphere of mystery which exercises so potent a spell over the human mind, but they ensured that it could

<sup>267</sup> See Clanchy, *supra* note 265, at 175.

<sup>268</sup> See Seán Mac Airt, *Filidecht and Coimgne*, 28 ÉRIU 139, 141, (1958).

<sup>269</sup> BINCHY, *supra* note 245, at 14. For discussion of common meters, see *id.*

<sup>270</sup> Clanchy, *supra* note 265, at 169 (footnote omitted).

<sup>271</sup> BINCHY, *supra* note 245, at 15.

<sup>272</sup> Thompson, *supra* note 266, at 60. Similar to the isolation of species in the Galapagos Islands, as described by Darwin, a Scottish *Breve* (a kind of Gaelic judge) on the Isle of Lewis manages to continue his practice well into the seventeenth century, long after the practice of native judges (representing Gaelic traditions) has disappeared elsewhere in Scotland. One *Breve* is credited as the “author of succinct and pithy verses which define the boundaries of lands on the West Side of Lewis.” *Id.* at 59-60.

<sup>273</sup> See generally *id.*

<sup>274</sup> One of the translations of “lay,” although an obscure one, is “law.” See 6 OXFORD ENGLISH DICTIONARY, *supra* note 66, at 123 (“law; esp. religious law”); see also *infra* note 335 (describing the lays comprising the *Senchus*). Even if the definition of “lay” as found here refers to poetry, the context suggests that Celtic verse included history, genealogy and other topics in addition to law. *Id.*

<sup>275</sup> Thompson, *supra* note 266, at 71 (quoting the Irish poet Giolla Brighde Mhac Con Midhe).

<sup>276</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 19. After St. Patrick’s arrival, Christian priests (“the man of white language, i.e. of the Gospel”) were also granted the privilege of speaking in public. *Id.*

never be effectively controverted.<sup>277</sup> Interestingly, from the Druids' point of view, law reduced to writing is less, rather than more, stable.

Given the Druids' aversion to writing, the recitation of their arts, including law, it is all the more remarkable that St. Patrick recorded it.<sup>278</sup> The idea of recitation of the law is one that merits examination. The transmission of the law from the poets to St. Patrick is described by glossators in the *Senchus* as an "exhibition."<sup>279</sup> It is also described as "the great recital . . . which the poets inscribed on flagstones."<sup>280</sup> Given the negative criticism of the translations by glossators of the *Senchus*,<sup>281</sup> and the principal use of flagstone for paving—although also used for inscribing memorial stones—a plausible alternative interpretation may be that poets recited *upon* (or even among) the flagstones.<sup>282</sup> "The place of this Poem" is identified explicitly in the text as Teamhair and Rathguthaird "where the stone of [St.] Patrick is at this day."<sup>283</sup> The *Rath* in *Rathguthaird* means, "[a]n enclosure (usually of a circular form) made by a strong earthen wall, and serving as a fort and place of residence for the chief of a tribe; a

<sup>277</sup> T.W. ROLLESTON, *CELTIC MYTHS AND LEGENDS* 84 (Dover Publ'ns, Inc. ed., 1990) (2d rev. ed. 1917).

<sup>278</sup> 1 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at 15.

<sup>279</sup> *Id.* at 38 n.1, 39.

<sup>280</sup> *Id.* at 38 n.1.

<sup>281</sup> BINCHY, *supra* note 245, at 4 ("down to the year 1920 hardly a single law tract had been translated with reasonable accuracy"), 18 ("glossators did not always understand the text"), and 28 ("We have already seen how failure to distinguish the text from the later glosses and commentaries has been responsible for much confusion on the linguistic side."); *see also* Hancock, *supra* note 250, at xlii-xlvi (discussing unreliability of translations and challenges in reconstructing the text, often using for printing the glosses in later, more readable, dialects).

<sup>282</sup> Irish scribes did, however, write on stones. In the Book of Aicill (dating two centuries after the *Senchus*), an account of writing the laws in a "paper book" (after first transcribing them on slates or tablets) is noted to also have been translated as a "chalk book." 3 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at 89 n.4; *see also* KYNELL, *supra* note 246, at 84-85; ROLLESTON, *supra* note 277 at 234 (lost staves of wood or "staff-book" may have recorded the *Tain*); Mac Airt, *supra* note 268, at 146, 148 (ogham-stones were used for memorials, boundaries, chronicles, and *coimgne* (*see infra* text accompanying notes 327-29 for discussion of *coimgne*)). Nonetheless, after the time of St. Patrick, when the *Senchus Mor* is being transcribed, oghamic writings on stone are being translated into Latin (rather than oghamic). *See id.* at 85. The copy we have today descends from texts written in a Fenian dialect of ancient Irish. 1 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at xlii. St. Patrick is noted to have burned many books of the Druids, some of which may have been written in oghamic on wood rods. *See* ELLIS, *supra* note 248, at 165. If true, transcribing the *Senchus* onto stone in oghamic runs counter to trends of the time.

A survey of 150 oghamic stones on the Isle of Man reveals that they are by tradition relatively small and arguably—assuming the same conditions hold true in Ireland—incapable of holding significant amounts of text. *See* P.M.C. KERMODE, *CATALOGUE OF THE MANKS CROSSES WITH THE Runic INSCRIPTIONS AND VARIOUS READINGS AND RENDERINGS COMPARED* 57-60 (2d ed. 1892). *See also* the photo illustrating oghamic stone and the difficulty inherent in using it for recording significant text (the marks are on the edges of the stone making the edges the only suitable place for inscription) in *WHAT LIFE WAS LIKE AMONG DRUIDS AND HIGH KINGS: CELTIC IRELAND AD 400—1200*, at 32 (Denise Dersin et al. eds., 1998).

<sup>283</sup> 1 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at 3.

hill-fort,<sup>284</sup> and *Senchus* scholars note the remarkable number of *raths* in the region.<sup>285</sup> Recitation and recording the *Senchus* “among the stones” would also correlate with the statement from the *Senchus* proper that “Nine persons [a holy number]<sup>286</sup> were appointed to arrange this *book*.”<sup>287</sup> In any event there is reason for questioning the interpretation of emendators that the *Senchus* is *originally* written on stone as a medium.

Besides the conflicting accounts of producing a “book” and writing upon stone, alternative explanations arise about the “inscription [of the *Senchus*] upon stones.” Gaelic peoples tend to promulgate their laws on hills. For instance, the Manx gather annually at Tynwald Hill:

This Court was always held *sub dio*, after the ancient manner of all the northern nations, where the king or lord, seated on the summit of a mount, or venerated barrow, and attended by the chiefs and elders of the land, promulgated his laws and ordinances, which were received by the surrounding multitude with awful silence and attention.<sup>288</sup>

Like the Manx, and as noted in the epic Irish poem, *The Battle of Mag-Rath*, the Irish *filid* also recite on “hills of assembly.”<sup>289</sup> One of the three compilers of the

<sup>284</sup> 8 OXFORD ENGLISH DICTIONARY, *supra* note 66, at 165.

<sup>285</sup> Hancock, *supra* note 250, at xxviii-xxxi.

<sup>286</sup> KEVIN CROSSLEY-HOLLAND, *Introduction, in* THE NORSE MYTHS, at xxiv-xxv (1980) (retold by Kevin Crossley-Holland). Nine is also the number of petitions in the Egyptian *Tale of the Eloquent Peasant*. See *supra* note 215 and accompanying text. Apparently, *Cormac's Glossary*, another important Irish legal text from ninth or tenth century B.C., refers to the *Senchus* as the “knowledge of the nine.” Hancock, *supra* note 250, at xl.

<sup>287</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 17 (emphasis added). It is unlikely that the Gaelic word for “book” was confused with “flagstone” or is etymologically related (which would explain the conflicting accounts of producing both a book and writing on flagstone). The ancient Gaelic word for book in the *Senchus* is *liubairse*, which differs from *lecaib*, used for flagstone. Compare *id.* at 16, 17, with *id.* at 38. See also ALEXANDER MACBAIN, AN ETYMOLOGICAL DICTIONARY OF THE GAELIC LANGUAGE (2d rev. ed. 1911), available at <http://www.ceantar.org/Dicts/MB2/index.html> (under *lebhhar*, noting that ancient Irish for book was *lebor*). It differs slightly from *libur* used in the *Book of Aicill* for “book,” but is clearly related. See, e.g., 3 ANCIENT LAWS OF IRELAND, *supra* note 244, at 83. “Book” or *libur* as used in the *Book of Aicill* is compounded with *cairt* to form *cairtliubair* translated as “paper book” but, as noted by commentators, also translated as “chalk book” in other versions. Compare *id.* at 89, with *id.* at 88 n.4. *Cairt* apparently means “bark (of a tree)” and in ancient Gaelic also meant, “parchment.” It is akin to the Latin *cortex*, meaning bark and its root *qert* derives from the Sanscrit *kart* meaning to cut. HARPER'S LATIN DICTIONARY: A NEW DICTIONARY 475 (E.A. Andrews ed., 1879) (under *cortex*); MACBAIN, *supra* (under *cairt*). Consequently, the *Book of Aicill*, similar to the *Senchus*, is written on material cut out of either bark, parchment (animal skin), or paper, but probably not stone.

<sup>288</sup> JAMES JOHNSON, VIEW OF THE JURISPRUDENCE OF THE ISLE OF MAN 4 (1811). The Irish held their courts on “a hill called *Cnoc an Eric*, viz. the *Hill of Pleas*.” *Id.* at 5 (citing Macqueen on the Western Isles).

<sup>289</sup> See Mac Airt, *supra* note 268, at 152 n.1 (citing the O'Donovan's edition of the *Battle of Mag-Rath*).

*Breithne Neimhidh* (also a significant work of Brehman law) is Athairné, “described as an insolent satirist from the Hill of Howth.”<sup>290</sup> The ancient Irish have similar traditions and gather at their *raths*.<sup>291</sup> Elevated places such as hills and stones are part of the promulgation of law for the Gaelic peoples.

Finally, in the manner of both Manx and Irish, the early Icelanders likewise incorporated an idea of an annual recitation:

The Law Council [at the annual Althing] was originally comprised of the thirty-six godis, along with two thingmen for each, and the Lawspeaker, who was the highest authority in the Commonwealth, elected by the Law Council for a term of three years. It was the duty of the Lawspeaker to recite the entire procedures of the assembly and one-third of the laws of the country every year. He presided over the meetings of the Law Council and ruled on points of legal interpretation.<sup>292</sup>

Specifically, it is the “Law Rock” a “raised spot at the Althing” where the “Lawspeaker” recites the law code.<sup>293</sup> Interestingly, glossators of the *Senchus* use the image of three rocks to describe the foundational basis for ancient Irish law.<sup>294</sup> Finally, note that Irish High-Kings are crowned upon the Stone of Destiny at Tara.<sup>295</sup> Rocks and stones have always stood for authority, law and government in Celtic and Icelandic traditions, and consequently, a recitation on the stones is symbolically significant, and may be a better interpretation of how the *Senchus* is originally recorded.

The lawspeaker’s task of reciting the law must have been an onerous one. One scholar observes: “If the oral law was only one-fourth as extensive as the surviving manuscripts, this task would require a prodigious memory in addition to expert knowledge.”<sup>296</sup> The ancient Icelandic *Grágás*, recorded in the twelfth century A.D., made provision to ensure that the speaker was well versed in his task.<sup>297</sup>

<sup>290</sup> ELLIS, *supra* note 248, at 166 (emphasis added).

<sup>291</sup> 8 OXFORD ENGLISH DICTIONARY, *supra* note 66, at 165 (entry for *rath*) (quoting Edmund Spencer, “There is a great use amongst the Irish to make greates assembyes together upon a rath or hill.”).

<sup>292</sup> THE SAGAS OF ICELANDERS: A SELECTION 737 (Örnólfur Thorsson ed., 2000) [hereinafter THE SAGAS OF ICELANDERS]; *see also* JESSE L. BYOCK, FEUD IN THE ICELANDIC SAGA 216 (1982).

<sup>293</sup> THE SAGAS OF ICELANDERS, *supra* note 292, at 750-51. In Icelandic, *lögsögumadur* or *lögmadur* is translated as “lawspeaker” and literally means “the man who recites the law.” *Id.* at 751.

<sup>294</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 39 (“For these are the three rocks by which the judgments of the world are supported.”).

<sup>295</sup> *See* ROLLESTON, *supra* note 277, at 105. Apparently, the stone was lent to Scotland for the crowning of Fergus the Great in the sixth century, but was never returned. Instead it ended up in England, as the Stone of Scone, or the Coronation Stone in Westminster Abby. *Id.*

<sup>296</sup> WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 18 (1990).

<sup>297</sup> *Id.* at 188.

And if his knowledge does not stretch so far, then before reciting each section he is to arrange a meeting in the preceding twenty-four hours with five or more legal experts, those from whom he can learn the most; and any man who intrudes on their talk without permission is fined three marks.<sup>298</sup>

While the evidence that early Icelandic law is poetic is not explicit, there is ample suggestion that early law existed in much the same information environment as the earlier Irish *Senchus*. Medieval Norse poets are the most valued members of society: for instance, of King Harald of Norway during the early tenth century, it is said in Icelandic saga literature: "Of all his followers, the king held his poets in the highest regard, and let them sit on the bench opposite his high seat."<sup>299</sup> What we would regard as primitive legal pleadings is often delivered in verse. Egil, one of Iceland's most prominent literary, and historical, figures, maintains his claim to inheritance through his wife, alleged to be born from a slave (otherwise disqualifying his claim):

This man pinned with thorns [brooches] claims  
that my wife, who bears my drinking-horn,  
is born of a slave-woman . . . ;  
Spear-wielder, my brooch-goddess [wife]  
is born to an inheritance.  
This can be sworn to, descendant  
of ancient kings: accept an oath.<sup>300</sup>

In another saga, the *Saga of the Confederates*, verse is used at important moments during the dispute and to preserve the memory of a judgment. In being granted selection of judges from among the plaintiffs, Ofeig, a prominent thingman and father of the defendant, recites his selection of judge:

I'd the option just now  
of able judges:  
now the one thing [thingman or member of the assembly] left  
is the wolf's tail [*i.e.*, the worst choice].<sup>301</sup>

When the result is favorable to Ofeig and his son, he again turns to verse: "Now I want to recite you a verse, so that more people will remember this Althing and the outcome of this case."<sup>302</sup> Facilitating remembrance of the outcome of the case is the primary motive for resorting to verse.

The nature of Gaelic and Icelandic poetic jurists needs to be explored. First, it should be noted that this is another instance when translation fails us.

<sup>298</sup> 1 LAWS OF EARLY ICELAND: GRÁGÁS 10 (Andrew Dennis et al. trans., 1980) [hereinafter GRÁGÁS].

<sup>299</sup> *Egil's Saga*, in THE SAGAS OF ICELANDERS, *supra* note 292, at 15.

<sup>300</sup> *Id.* at 98.

<sup>301</sup> *The Saga of the Confederates*, in THE SAGAS OF ICELANDERS, *supra* note 292, at 489.

<sup>302</sup> *Id.* at 491.

The Gaelic term *fili* or *filid* is sometimes translated as “bard” or “poet,” but it is not an exact fit.<sup>303</sup> It is true that the *filid* in rendering judgments behaved like poets: “[I]t is significant that Cormac Mac Airt [an early *fili*], when preparing his legal decisions was wont to retire for reflection to a darkened hut in the same way as later bardic students and poets.”<sup>304</sup> However, originally *filid* provides multiple functions—including king, jurist, poet, literary editor, historian, genealogist, etc.—which are eventually divested into differing fields of specialization.<sup>305</sup> In essence, *filid* are the sources of all branches of knowledge. In addition, even after branches of learning have separated, the roles among the various functionaries are subject to drifting.

It is clear that in Ireland, from early Christian times, there was a re-distribution of the functions of the learned orders, and there seem to have been subtle shifts from time to time in the lines of demarcation between poets, historians, chroniclers and other men of learning. By the twelfth century, for instance, it is evident that the *fili* had begun to intrude on the bard’s territory, and was taking over some of the bardic subject-matter especially praise-poetry, and was using the metres which the bards had developed.<sup>306</sup>

One modern scholar concludes that this division of function is impacted by three major forces in Irish history—conversion to Christianity, Norse invasions and the Norman conquest.<sup>307</sup> The Norse and Norman invasions interrupt the influence of

<sup>303</sup> Mac Airt, *supra* note 268, at 141 (“[T]he character of the *fili* is an evolutionary one, and the equation of the term with ‘poet’ (even in sixteenth-century connotations) is apt to be misleading.”).

<sup>304</sup> *Id.* at 140; *see generally* Thompson, *supra* note 266.

<sup>305</sup> Mac Airt, *supra* note 268, at 140-42; *see generally* ELLIS, *supra* note 248, at 167-250.

<sup>306</sup> Thompson, *supra* note 266, at 70. An account from the emended text of the *Senchus* illustrates how the shift between classes of bards and poets took place:

Obscure, indeed, was the language which the poets spoke in that disputation [regarding dispute at Emhain Macha], and it was not plain to the chieftains what judgment they had passed.

“These men,” said the chieftains, “have their judgments and their knowledge to themselves. We do not, in the first place, understand what they say.” “It is evidently the case,” said Conchobhar; “all shall partake in it from this day forth, but the part of it which is fit for these *poets* shall not be taken from them; each shall have his share of it.”

The poets were then deprived of the judicature, except their proper share of it, and each of the men of Erin took his own part of the judicature . . . .”

<sup>1</sup> ANCIENT LAWS OF IRELAND, *supra* note 244, at 19; *see also* Mac Airt, *supra* note 268, at 140-41.

<sup>307</sup> *See* Mac Airt, *supra* note 268, at 140. The influence of the Norse in Scotland is suspected to influencing the relatively early decline of the *Brehon* in Scotland (prior to their counter-parts in Ireland). *See* Thompson, *supra* note 266, at 75.

the *Brehons*, at least in Scotland. Christianity introduces monasticism, and with it emphasis on monasteries and scriptorium—and the production of parchment for purposes of writing.<sup>308</sup> It may also be impacted by another significant force, the increasing use of writing. With the end of the *filid*, a change in the infosphere, not only is that knowledge fragmented, but it is also made subject to classification and indexing. “Once the *fénechas* had been committed to writing, the work of expanding and classifying it under various headings began in the schools and continued for at least a century.”<sup>309</sup> Thus, the evolution of law has to consider not only the influences of conquering parties and changes in worldview and fundamental institutions, but the relationship to the medium of expression, or in its totality, the infosphere.

Despite the advent of conquering forces, Christianity, and monasticism, the influence of the *Senchus* and *filid* extends well beyond their time into the age of writing. During the time that poets were “deprived of the[ir] judicature” in Ireland in favor of other classes of professional remembrancers, “the measure of pleading-times, breathings, and speech” is determined.<sup>310</sup> As one glossator explains, “The time allowed for advocates was divided by breathings, about eighteen being considered equivalent to a minute.”<sup>311</sup> Certainly poetic meter facilitates keeping within rigid time parameters. With the onset of the age of written procedure, the issue of timing (or “counting”) holds over from the earlier age. Indeed, a prominent scholar has argued that professional pleaders, after the Norman Conquest, descended from *Brehons*.

From about the middle of the century the forms of pleadings begin to be written down to enable “a young man to learn how he shall speak”. Henceforward the law student learned to “count” from books instead of from hearing. “Counting” in the old way became increasingly unnecessary, but it was retained as a symbol of the pleader’s art.<sup>312</sup>

Whether pleadings are in the form of countings or metered verse, the issue is the same: efficient use of time balanced with traditional means of preserving legal procedure.

Further evidencing the relationship of *Brehons* to future developments in pleading and practice is the etymological relationship of breath or breathings and *Brehon* (the ancient Irish legal poet, remembrancer and judge). The Oxford English Dictionary gives the etymological history of *Brehon* as “ad. Irish breathamh or breitheamh, pl. breitheamhuin (pronounced breovin), in OIr. brithem, gen. brithemon ‘judge’, f. breth judgment.”<sup>313</sup> However, *breth* is also

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<sup>308</sup> For an account of the literary impact of Irish monasticism, see generally THOMAS CAHILL, *HOW THE IRISH SAVED CIVILIZATION: THE UNTOLD STORY OF IRELAND’S HEROIC ROLE 147-96* (1995).

<sup>309</sup> See BINCHY, *supra* note 245, at 15.

<sup>310</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 19.

<sup>311</sup> *Id.* at 18 n.2.

<sup>312</sup> Clanchy, *supra* note 265, at 175 (citations omitted).

<sup>313</sup> 1 OXFORD ENGLISH DICTIONARY, *supra* note 66, at 1087.



used historically in the same context as *breath*.<sup>314</sup> Anciently, the *Brehon* is the “breather” of judgments, and pleadings. His breath has to be measured. Metered verse facilitates this role.<sup>315</sup>

The original English (Norman) pleader, after the Conquest, serves a similar function as the Irish *Brehon*. The pleader is referred to

in French as a *conteur* and in Latin as a *Narrator*. The claim is called a *conte*, a *narratio*, or a “tale” in English. So the pleader’s art is described in the same terms as that of the medieval minstrel, the “singer of tales”. This could be a coincidence. On the other hand it may indicate the pleader’s original function as an illiterate remembrancer using the poetic technique of the singer of tales to recall the forms of his “tales” or pleadings and make them sound right. In the few surviving fragments of early English pleadings rhythmical and alliterative formulas are very evident.<sup>316</sup>

The connection between English (Norman) pleadings and tales suggests that early English legal history may have had much in common with Ireland. The use of meter finds place in Shakespear’s *Henry V*, in the scene where the Bishop of Canterbury rebuts French legal claims to Henry’s lands in Saxony.

Yet their own authors faithfully affirm  
That the land Salice is in Germany,  
Between the floods of Saala and of [Elbe];  
Where, Charles the Great having subdu’d the Saxons,  
There left behind and settled certain French;  
Who holding in disdain the German women  
For some dishonest manners of their life,  
Establish’d then this law: to wit, no female  
Should be inheritrix in Salique Land . . . .<sup>317</sup>

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<sup>314</sup> *Id.* at 19 (under entry for *abide*, no. 17) (citing Miles Coverdale’s 1535 translation of Job 19:17); *see also id.* at 192 (under entry for *agrise*, no. 2) (citing John Wycliff’s 1382 translation of the same verse of Job).

<sup>315</sup> “[T]he bald staccato style of the earliest versions may be accounted for by the hypothesis that the *filid* regarded the sagas not primarily as literary entertainment but as historical evidence.” Mac Airt, *supra* note 268, at 151 n.1.

<sup>316</sup> Clanchy, *supra* note 265, at 175 (citing, among others, F.E. HARMER, *ANGLO-SAXON WRITS* (1952)). The role of the Irish *Brehon* is recounted in the gloss of the *Senchus* as “a man wise and learned in every pleading, who states the case at the court.” 1 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at 85. Francis Bacon also makes reference to “plaine songs” in relation to legal argument (perhaps pleadings), justifying the inclusion of “vulgar rules” in the setting down the law: “whereas these rules are some of them ordinary and vulgar, that now serve but for grounds and plain songs to the more shallow and impertinent sort of arguments . . . [,] yet neverthelesse I have not affected to neglect them . . . .” FRANCIS BACON, *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND* B2 (The Legal Classics Library 1997) (1630).

<sup>317</sup> WILLIAM SHAKESPEARE, *HENRY V* act 1, sc. 2, ll. 43-51. Iambic pentameter has also been used with precedent in a delightful version of *Coke’s Reports* set to 453 rhyming verses. For example, “Rooke, Sewers must on all, not only those / Whose lands lie next the river, tax impose.” *REPORTS*

The bishop's non-rhyming or blank verse is in iambic pentameter and in its complete form includes several versions of the maxim, "no female should be inheritrix in Salique Land." Shakespeare's use of blank verse with legal argument may not be far from the pleading practices of the times, which descended from legal traditions surviving the Norman Conquest.

The question is raised whether the information environment of the Celtic *Brehons*, consisting of tales, verse, and counted pleadings, influences the fundamental conception of jurisprudence and law in that time, and whether such law consists simply of aphorisms and procedure—rather than something akin to modern, substantive precedent. Before answering those questions it is necessary to consider the relationship of the Irish bards and poets to history. The *filid* are not just supposed to preserve history and law, they also synthesize it. "He is no poet who does not synchronize and harmonize all of the stories."<sup>318</sup> However, the notion that the *filid* are literary editors has been rejected by at least one prominent scholar.<sup>319</sup> Rather the *filid* serve as an "expert witness in historical matters."<sup>320</sup> "The learned historian who does not know the prerogatives and prohibitions of these kings, is not entitled to visitations or to sell his compositions."<sup>321</sup> History, for purposes of analogy, is linked with law and precedent.<sup>322</sup> The *filid* (or *fili*) are supposed to use the tales to instruct, and not just for entertainment:

[T]he *fili*'s main business was not the mere recital of tales, but first the exposition of them, for example from the genealogical point of view, to the noble classes . . . , just as he might have been required to do at an earlier date in a lawsuit. Secondly he was expected to use them for the purpose of illustration . . . , as a distich from a poem attributed to Cormac enjoins. The kind of illustration meant is exactly that exemplified by the later bardic poets in their use of incidents from heroic tales. On this account probably the *foscéla* ('anecdotes') were required of the four higher grades of poets only, since these alone were likely to have the ear of the more important nobles.<sup>323</sup>

Poetic *filid* at the highest levels of Gaelic society function not just to preserve the law, but to use it to effectively instruct and provide insight. The similarity of function between the *filid* and precedent as developed much later in England is striking.

As to the nature of Irish law—aphorisms versus precedents—it contains both. One of the early collections of aphorisms, known as *roscada*, was the *Duil*

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OF SIR EDWARD COKE, KNT. IN VERSE pt. 5, fol. 99, sec. C1 (J. Wesley Miller, ed. William S. Hein 1999) (3d ed, 1826). However, the edition, which is authored anonymously, is most likely intended for amusement, perhaps as a mnemonic aid, and appears not to have been the source of more prominent legal maxims that are often officially cited. *See id.* at xiv.

<sup>318</sup> Mac Airt, *supra* note 268, at 142 (citing an ancient document whose translation is in dispute).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 146.

<sup>321</sup> ELLIS, *supra* note 248, at 201 (citing the *Leabhar na gCeart* or "Book of Rights").

<sup>322</sup> Mac Airt, *supra* note 268, at 145.

<sup>323</sup> *Id.* at 150 (citations omitted).

*Roscadach* or “Book of Aphorisms.”<sup>324</sup> It is included as a source of law “beside *fásaige* ‘precedents,’ the traditional decisions of real or (much more probably) mythical judges in what we may call ‘leading cases.’”<sup>325</sup> The *Senchus*, at least until the time of its recitation and recording, consisted of judgments linked “together in one consecutive poem.”<sup>326</sup> The use of precedents by the *filid* should not be surprising, given that they do not make distinct divisions between law, history and genealogy. Modern scholars have difficulty defining the ancient Gaelic terms for what the ancient *filid* (also described as poets, bards, *senchaid*, rhymers, remembrancers, *brithem*, etc.) studied.<sup>327</sup> Some of the important terminology describing the fields of study are *senchas* (*Senchus*), *coimgne*, and *filidecht*. “[T]he radical mean of *coimgne* would seem to be something like ‘joint knowledge’ (*σύνγνωσις*), ‘all-embracing (acquired) knowledge,’ or (if *com-* is intensifying), ‘very great knowledge.’”<sup>328</sup> Other interpretations of *coimgne*, as discussed by Mac Airt, include “chronicles”<sup>329</sup> and the “universal knowledge of human affairs, which the sun-god by his perpetual round brings to light in all parts of the earth.”<sup>330</sup> Binchy also uses the term “legal lore” to describe the applicable field of the *filid*.<sup>331</sup> In fact, the initial recitation to St. Patrick includes “all the professors of the sciences in Erin . . . and each of them exhibited his art,”<sup>332</sup> an event which is reminiscent in Celtic lore of the arrival of the Irish sun god Lugh, who alone is master of all of the arts (holistic knowledge) and who secures their freedom—symbolically from ignorance—as well as more traditional foes, the Titan-like Formorians.<sup>333</sup> This is a similar pattern to the Mesopotamian and Egyptian traditions.<sup>334</sup> The holistic nature of Celtic knowledge, including

<sup>324</sup> BINCHY, *supra* note 245, at 15 n.1.

<sup>325</sup> *Id.* at 15.

<sup>326</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 38 n.1. In some instances, much more detail of a case or matter is found in the gloss than in the text, suggesting that the glossators had access to other sources (perhaps bards or *filid*) to fill in the missing elements. Compare, e.g., *id.* at 65, with *id.* at 71-75 (comparing accounts of Fergus and the slaying of his bondswoman). In addition, the limited use of verse within the main text and the use of poetry in the gloss likewise suggests that the original *Senchus* as verse is not represented fully by the text. See, e.g., *id.* at 3-19 (account of trial of Nuada, in both verse and prose), 75 (use of verse in gloss).

<sup>327</sup> See generally Mac Airt, *supra* note 268, at 139-41. “[T]he character of the *fili* is an evolutionary one, and the equation of the term with ‘poet’ (even in a sixteenth-century connotation) is apt to be misleading.” *Id.* M.T. Clanchy often uses the term, “remembrancer” to describe the various roles of the *filid* and similar functionaries. See, e.g., CLANCHY, *supra* note 4, at plate XX (illustration of Anglo-Saxon remembrancers placing their testimony in written form upon St. Guthac’s altar); Clanchy, *supra* note 265. The term “Rymor” is also referred to by Thompson, *supra* note 266, at 74.

<sup>328</sup> Mac Airt, *supra* note 268, at 143.

<sup>329</sup> *Id.* at 147-48.

<sup>330</sup> *Id.* at 148.

<sup>331</sup> BINCHY, *supra* note 245, at 13 (“According to Irish tradition the older custodians of the legal lore were the *filid* . . .”).

<sup>332</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 15.

<sup>333</sup> See ROLLESTON, *supra* note 277, at 110, 112-18.

<sup>334</sup> See *supra* notes 89-93, 164, and 311-13 and accompanying text.

law, necessitates that the field of applicable material to facilitate the *filid's* functioning as lawspeakers probably included tales, chronologies, poetic verse, etc.<sup>335</sup> According to the gloss, all told, the *Senchus* includes some 822 "stories."<sup>336</sup> The *filid* is not relegated to a distinct field of expertise since knowledge is not divided, at least initially, into fields recognizable today. Rather, knowledge is seen as holistic, and the infosphere, which centered on remembrancers, facilitates that viewpoint. Given the breadth of druidic influence at the height of Celtic culture,<sup>337</sup> this may have important implications for the development of the common law, or at least Anxlo-Saxon willingness to consider common law, including precedents and analogies, as part of the functioning body of law.

The connection between ancient Irish law and English common law is suggested by Kurt von S. Kynell.<sup>338</sup> "The startling resemblance of these earliest Irish Common Laws [the *Senchus Mor*] not only to later English Common Laws, but indeed to modern statutory law, provides meaning to the antiquity of legal development far before Henry II [the traditionally accepted starting date of the common law]."<sup>339</sup> Indeed ancient systems of law similar to Brehemen Law have been noted in Wales, Cornwall, and Scotland:

There survives codification of two Celtic legal systems from which we may learn much: The Irish Brehon Law system and the Welsh Laws of Hywel Dda. A comparison of the two systems indicates a Common Celtic law at some period, for both systems have developed from identical basic principles. As well as Irish and Welsh systems there survive references to other Celtic legal systems. Geoffrey of Monmouth mentions the legendary Molmutine Law of Cornwall which was concerned with the protection of the weak against oppression. Between AD 858-862 Domnuil I of Alba (Scotland) had the ancient laws of Dál Riada, obviously a version of the Brehon Laws . . . .

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<sup>335</sup> An account of what was in the *Senchus* at recitation is contained in the gloss. See 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 45-47.

And he [St. Patrick] left them after this extemporaneous recital, because it was acquired through great knowledge and application; and *also the registering* of the genealogies of the men of Erin, and the artistic rules of poetry, and the Duili sloimnte, and Duili fedha, and story-telling with lays, *viz.*, the Ollamh with his seven times fifty *stories*, the Anruth with his thrice fifty and half fifty, the Cli with his eighty, the Cana with his sixty, the Dos with his fifty, the Mac-fuirmidh with his forty, the Fochluc with his thirty, the Drisac with his twenty, the Taman with his ten stories, *and* the Ollaire, with his seven stories.

*Id.*

<sup>336</sup> *Id.*

<sup>337</sup> See ELLIS, *supra* note 248, at 191 ("the word of the Druid as arbiter of the law had equal weight in Galatia, Gaul, Britain or Ireland").

<sup>338</sup> KYNELL, *supra* note 246.

<sup>339</sup> *Id.* at 85. For the traditional view as to the start of the common law, see *supra* note 246 and accompanying text.

A document, the *Leges inter Bretonnes et Scotos*, dates from the eleventh century and includes terms which are similar to those found in both the Brehon Laws and the Laws of Hywel Dda. According to Professor Kenneth Jackson: "This may imply the existence of a common Brittonic legal tradition of considerable antiquity."<sup>340</sup>

Apparently, looking no farther than Glanville and the Norman Conquest for the roots of the common law is insufficient.

Another important implication of the poetic nature of ancient Celtic law is that it accommodated their belief in the afterlife. What they needed was a law and medium that transcended this life. For instance, "the Celt would lend money on a promissory note for repayment in the next world."<sup>341</sup> They were, in fact, Egyptian in orientation.<sup>342</sup> The notion that law might also transcend this life is seen in Nuada's sentence for the death of one of St. Patrick's men—he is put to death but "adjudged to Heaven," implying forgiveness.<sup>343</sup> In the *Lays of Western Tain*, when Irish bards are ridiculed for losing their knowledge of the *Lay of Tain* or the *Saga of the Cattle Raid*—perhaps the most important lay in early Irish literature—it is recovered by an arduous quest and conjuring up the deceased spirit of the mighty Fergus, a participant of the events, and their original poet chronicler.<sup>344</sup> Indeed, poetry is the medium of life—or preservation and immortality. "[I]t [the *Senchus*] lived until it was exhibited to Patrick. The preserving shrine in this case is the poetry . . . ."<sup>345</sup> As an illustration, the recitation of the recovered *Tain* so captivates and mesmerizes the hearers that, at its conclusion, the audience shrinks in terror and seems to hear their dead kings and heroes driving by in the Celtic mist.

Half in wonder, half in terror, loth to stay and loth to fly,  
Seem'd to each beglamour'd hearer shades of kings went thronging by:  
But the troubled joy of wonder merged at last in mastering fear,  
As they heard through pealing thunder, "FERGUS SON OF ROY IS HERE!"<sup>346</sup>

Capping the event, and for dramatic emphasis, the poet-messenger is struck dead! Ultimately, the price of recovering the *Tain* is death. Poetic verse as a medium was valued more than life because it transcended life. The immortal and

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<sup>340</sup> ELLIS, *supra* note 248, at 191-92; *see also supra* note 245 (discussing the Welsh *Damweiniau* I and II and the Book of Iorwerth).

<sup>341</sup> ROLLESTON, *supra* note 277, at 80.

<sup>342</sup> *See id.*

<sup>343</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 13, 15.

<sup>344</sup> ROLLESTON, *supra* note 277, at 234-38.

<sup>345</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 39 n.1 (emphasis added). Note that the *Senchus* lives *until* the recitation when it is recorded. In many ways, the recording of the *Senchus* may be seen to have killed it. *But see id.* (alternative reading may be that the *poet* lived until the recitation). However, the latter interpretation of the gloss contradicts other gloss which lists the poets involved in the recitation of the *Senchus*. *Id.* at 45. *See also supra* note 334.

<sup>346</sup> ROLLESTON, *supra* note 277, at 238.

transcendent power of poetry is its ability to preserve, and as such it is a most worthy vessel of law—the mead of the immortals.<sup>347</sup>

Besides the immortal nature of Celtic poetic medium, it functioned to reinforce the vitality of oral evidence and agreements: “There are three periods at which the world dies,” counsels the *Senchus*: “the period of a plague, of a general war, of the dissolution of verbal contracts.”<sup>348</sup> Consequently, the “fair price doctrine,” a product of later times, was rejected. “The binding of all to *their* good and bad contracts prevents the lawlessness of the world.”<sup>349</sup> “Bad contracts” may have even applied to fraudulent contracts, and not just contracts where the terms were not fair.<sup>350</sup> Again, confidence in and primacy of the oral medium is asserted. The ancient Irish chose oral medium as the vehicle of commerce and social interaction and worked vigorously to maintain it.

Considering the primacy of the oral medium, it is not surprising that early Icelandic law pays considerable attention to offenses of slander, particularly in verse and the use of “shame poles.” Words that “cannot be taken in a good sense” require full compensation and constitute lesser outlawry.<sup>351</sup> A derogatory statement that “can be taken in both a good and a bad sense” is a lesser offense.<sup>352</sup> Taunts about disfigurement, even if true, name-calling, and shame poles (slandering text carved into a wood pole) are also lesser outlawry.<sup>353</sup> Interestingly, defamation in verse, even composing or repeating as little as half of a stanza, receives the strictest penalty of full outlawry,<sup>354</sup> probably because of the

<sup>347</sup> See *The Mead of Poetry*, in *THE NORSE MYTHS*, *supra* note 286, at 26-32. Like the Norse, the Celts associated poetry (and life) with a giant cauldron, which is stolen by the gods from giants. See CHARLES SQUIRE, *CELTIC MYTH & LEGEND, POETRY & ROMANCE* 273, 293, 365-68 (rev. ed. 2001).

<sup>348</sup> 1 *ANCIENT LAWS OF IRELAND*, *supra* note 244, at 51 (emphasis added).

<sup>349</sup> *Id.* Exceptions were allowed for five classes of persons and go to the issue of incompetency: “the contract of a labourer without his chief, the contract of a monk without his abbot, the contract of the son of a living father without the father, the contract of a fool or mad woman, the contract of a woman without her man.” *Id.* at 51, 53.

<sup>350</sup> “Bad contracts” may have even applied to fraudulent contracts. *Id.* at 53 (citing the gloss).

<sup>351</sup> 2 GRÁGÁS, *supra* note 298, at 195. Lesser outlawry involved a fine and banishment for three years. See 1 GRÁGÁS, *supra* note 298, at 250.

<sup>352</sup> 2 GRÁGÁS, *supra* note 298, at 195-96.

<sup>353</sup> *Id.* at 196. In Icelandic saga literature, Egil uses a “scorn pole” to shame King Eirik and Queen Gunnhild of Norway. *Egil's Saga*, in *THE SAGAS OF ICELANDERS*, *supra* note 292, at 106. A similar scorn pole is used in *Gisli Sursson's Saga*. *Gisli Sursson's Saga*, in *THE SAGAS OF ICELANDERS*, *supra* note 292, at 502.

<sup>354</sup> 2 GRÁGÁS, *supra* note 298, at 197-98.

Full outlawry cast a man out of society. The outlaw forfeited his property and all rights, civil, family, and ecclesiastical. He could not lawfully be given any *assistance*—sustenance, passage, or any saving advice. He might be killed by anyone with impunity and had a price on his head; this applied forever even if he escaped abroad.

1 GRÁGÁS, *supra* note 298, at 246.

power of verse to extend the insult over time and space. Even damaging verse “in which there is no mockery” is subject to fines or the penalty of lesser outlawry.<sup>355</sup> “The reason for this prohibition must have been that it was common practice to conceal *nið* [slander] in ostensibly innocent stanzas . . . , and therefore one could not feel confident as to what was praise and what was blame.”<sup>356</sup> Verse is recognized as a potent weapon. Its use for accusations of unmanliness can even excuse the murder of a slanderer.<sup>357</sup> The Celts have similar laws emphasizing verbal offenses. A Celtic poet who “composes unlawful satire” could be deprived of part or all of the fees for his services.<sup>358</sup> Indeed, only the poet is allowed “to eulogize and satirize” in public.<sup>359</sup> In the *Senchus*, Fergus Ferglethechs slays his northern bondwoman after she reproaches him for his blemished face, of which he had been kept in ignorance. Similar to the Icelandic law, Fergus is not required to fully account for slaying his bondwomen to her kin because of her taunts about his disfigurement.<sup>360</sup> As in Iceland, the oral environment of the Celts corresponds with well-developed law for verbal offenses and damages to reputation, even when such offenses are based upon truth.

In summary, the poetic and oral environment of Celtic law delayed its splintering from the tree of knowledge to form its own distinctive branch. Law remained holistic, and consequently, the use of precedents and analogies drawn from the corpus of druidic knowledge finds ready acceptance among the Celtic councils of landowners as well as the courts of kings. The place of recitation (amid the stones), the intimacy of oral communications (“from ear to ear”), the connection to breath, the immortalizing properties and surprisingly staying power of verse, all make law alive in a way that is lost to us today. Indeed, not only is law alive, but it transcends death, providing immortality through the mead of verse.

Only after the great recitation at the time of St. Patrick and the arrival of the monastic scriptorium, was law dissected into headings, classification schemes, and index entries. Celtic attitudes and experience of law die with scholastic dissection. The intimacy of the relationship of law to every day life is a function of the infosphere, which depends on druidic remembrancers and the rhythmic cadence of oral verse. In a culture where law emphasizes personal reputation, venerates the inviolability of one’s word, and empowers self-reliance through

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<sup>355</sup> 2 GRÁGÁS, *supra* note 298, at 197-98.

<sup>356</sup> PREBEN MEULENGRACHT SØRENSEN, THE UNMANLY MAN: CONCEPTS OF SEXUAL DEFAMATION IN EARLY NORTHERN SOCIETY 70 (Joan Turville-Petre trans., 1983).

<sup>357</sup> 2 GRÁGÁS, *supra* note 298, at 198. For general discussion of medieval Icelandic and Norwegian law and attitudes about slander, particularly with reference to homosexuality or femininity in males, see SØRENSEN, *supra* note 356. “The right of vengeance prescribed for the slanders in question [sexual references] is the least conditional in Icelandic law.” *Id.* at 17.

<sup>358</sup> 1 ANCIENT LAWS OF IRELAND, *supra* note 244, at 59.

<sup>359</sup> *Id.* at 19 (according to the gloss, the only other classes of persons permitted to speak in public are the Chronicler and the Brehon).

<sup>360</sup> *Id.* at 65, 73, 75, 77, 79.

remedies of self-help,<sup>361</sup> an omnipresent palpability of law in the fabric of daily life—and death—is essential. Law has to be as real to the Icelandic or Celtic farmer as the rocks in his field and the bleating of his lambs. Law does not exclusively reside at the realm of a distant court, but can be summoned to campfires at sacred places and festivals as part of the ritual of life.

#### IV. CONCLUSION: AN UNSCIENTIFIC POSTSCRIPT<sup>362</sup>

This Article starts with reference to B.F. Skinner's box, analogizing law to a child, confined in a box identified as the infosphere. It concludes by incorporating Heidegger's "enframing," and as this heading implies, an allusion to Kierkegaard's existentialism and his rejection of what he saw as scientific reductionism. Despite controversy surrounding Heidegger's time as Rector at the University of Freiberg during the Nazi's regime,<sup>363</sup> his greatest contributions include critiques of modern technology and understanding its impact on *enframing*, the essence of thinking in the twentieth century.<sup>364</sup> For Heidegger, the problem with technology is that "[n]ature becomes a gigantic gasoline station, an energy source for modern technology and industry. This relation of man to the world [is] in principle a technical one . . . . [It is] altogether alien to former ages and histories."<sup>365</sup> Given the technological revolution in modern legal

<sup>361</sup> "The first characteristic [comparing to modern law] is that we observe in the Senchus Mor a regulated system of self-help, with resort to the courts only after the other mechanisms of self-operating law have failed." Oakes, *supra* note 259, at xvi.

<sup>362</sup> "A house may be spoken of as finished even if it lacks a minor detail, a bell-pull or the like; but in a scientific structure the absence of the conclusion has retroactive power to make the beginning doubtful and hypothetical, which is to say: unsystematic." SØREN KIERKEGAARD, *CONCLUDING UNSCIENTIFIC POSTSCRIPT* 17 (David F. Swenson & Walter Lowrie trans., Princeton Univ. Press 3d prtg. 1974) (1846). Kierkegaard further elaborates the virtues of the unscientific:

Almost everything that nowadays flourishes most conspicuously under the name of science (especially as natural science) is not really science but curiosity. *In the end all corruption will come about as consequence of the natural sciences . . . .* But such a scientific method becomes especially dangerous and pernicious when it would encroach also upon the sphere of spirit.

Walter Lowrie, *Editor's Introduction*, in *CONCLUDING UNSCIENTIFIC POSTSCRIPT*, at xv. This paper follows a similar, non-scientific spirit.

<sup>363</sup> *Martin Heidegger*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.search.eb.com/eb/article?tocId=3090> (last visited Oct. 31, 2005).

<sup>364</sup> See William Lovitt, *Introduction*, in *MARTIN HEIDEGGER, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS*, at xxix (William Lovitt trans., Garland Publ'g 1977) (1955). Essentially, the *Enframing*, which characterizes our time, means "all things are being swept together into a vast network in which their only meaning lies in their being available to serve some end that will itself also be directed toward getting everything under control." *Id.* Heidegger calls the ordering of all things to some end (under the direction of will), "standing reserve." See *id.*

<sup>365</sup> Martin Heidegger, *Memorial Address*, in *DISCOURSE ON THINKING* 50 (John M. Anderson & E. Hans Freund trans., Harper Torch Books 1966) (1959). Heidegger also notes that in such an age,



information systems, and the relationship of various technologies for transmission of legal information—stone, papyrus, clay, poetry, etc.—to legal thought,<sup>366</sup> contemplation of Heidegger's criticism of technology and technological thinking is a useful vehicle for concluding this paper.

For Heidegger, modern consideration of law (specifically, our attempt to master and order it)<sup>367</sup> would obscure its essence, which is secluded from us, because we are conditioned to think about all things, including law, as resources to be mastered and put to some end.<sup>368</sup> In addition, law is inexorably intertwined with its box and is wholly dependent upon it for its authentic appearance in our world.<sup>369</sup> Law cannot be approached except within the context of its box or infosphere, and this dependency obscures a deeper realization of its essence. Emphasis on law's box may seem an overindulgence in theory, but the

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we are fundamentally cut off from the nature of things in our world, because of our *enframed* worldview, which permeates the modern age of technology. See HEIDEGGER, *supra* note 364, at 23-24.

<sup>366</sup> Derrida recognized and criticized the technical nature of writing. "The written signifier is always technical and representative. It has no constitutive meaning." DERRIDA, *The End of the Book and the Beginning of Writing*, in OF GRAMMATOLOGY, *supra* note 54, at 11. His primary criticism is the lack of writing's "presence" or proximity to "voice" and thought: "From then on [after seventeenth-century rationalism], the condemnation of the fallen and finite writing will take another form, within which we still live: it is non-self-presence that will be denounced . . . . Writing in the common sense is the dead letter, it is the carrier of death." *Id.* at 16-17. The problem with writing in signs is their distance from thought and voice, which alone are free. See generally *id.* at 6-18, 165-74; DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in OF GRAMMATOLOGY, *supra* note 54, at 165-74. "[V]oice, producer of the first symbols, has a relationship of essential and immediate proximity with the mind." DERRIDA, *The End of the Book and the Beginning of Writing*, in OF GRAMMATOLOGY, *supra* note 54, at 11. In the end, writing can enslave as well as liberate. See *supra* notes 207-09 and accompanying text. Writing is a dangerous "supplement" becoming "dangerous from the moment that representation there claims to be presence and the sign of the thing itself." DERRIDA, ". . . That Dangerous Supplement . . .", in OF GRAMMATOLOGY, *supra* note 54, at 144.

<sup>367</sup> See *supra* note 364.

<sup>368</sup> See generally HEIDEGGER, *supra* note 1, at 17-82.

<sup>369</sup> Heidegger describes the relationship between what is revealed (world) and what by nature is hidden (earth) positively:

The opposition of world and earth is a striving. But we would surely all too easily falsify its nature if we were to confound striving with discord and dispute, and thus see it only as disorder and destruction . . . . The more the struggle overdoes itself on its own part, the more inflexibly do the opponents let themselves go into the intimacy of simple belonging to one another. The earth [Heidegger's term for hidden essence] cannot dispense with the Open of the world [revealed] if it itself is to appear as earth in the liberated surge of its self-seclusion. The world [revealed], again, cannot soar out of the earth's [the hidden] sight if . . . it is to ground itself on a resolute foundation.

*Id.* at 49. For Heidegger, law (whose essence is largely hidden) and infosphere (which reveals law, at least in part) cannot be fully separated without making law itself appear groundless (without authority, authenticity, relevance, etc.). Law depends upon mystery for its authenticity.

implication is that humanity depends upon the unseen (that which by its very nature is to remain hidden from view—whether supernatural, subjective, or linguistic in nature) to connect with law in any form whatsoever.

In the sense of connecting to and being a part of the unseen world, law's box functions like Heidegger's depiction of a Greek temple, enveloping the god of law from view and against the "raging storms" in the world, casting light upon the world for what it is.

A building, a Greek temple, portrays nothing. It simply stands there in the middle of the rock-cleft valley. The building encloses the figure of the god, and in this concealment lets it stand out into the holy precinct through the open portico. By means of the temple, the god is present in the temple. This presence of the god is in itself the extension and delimitation of the precinct as a holy precinct . . .

Standing there, the building holds its ground against the storm raging above it and so first makes the storm itself manifest in its violence. The luster and the gleam of the stone, though itself apparently glowing only by the grace of the sun, yet first brings to light the light of the day, the breadth of the sky, the darkness of the night. The temple's firm towering makes visible the invisible space of air. The steadfastness of the work contrasts with the surge of the surf, and its own repose brings out the raging of the sea.<sup>370</sup>

Undoubtedly this is one of those passages from Heidegger in which each reader will draw his or her own unique interpretations and applications. Nonetheless, the thought of law's box—at least in the sense of the various media of stone, papyrus, clay, and oral poetry—functioning as a temple, inwardly housing the law and connecting it to the unseen, while at the same time externally bringing the violent and dynamic world into sharp focus, serves as an apt metaphorical construct, especially for bibliophiles and others with literary sensibilities.

The primary functions of the temple are to open a dwelling space for the holy, provide access to deity, memorialize covenants, and preserve the sacrosanct in the temporal world. Similarly, the primary functions of media—stone, clay, papyrus, poetry—are to open a space (providing access to law and extending its application over physical space), and preserve the same throughout time. Consider the legal *stelae* of the classical Greeks, inscribed upon that "all may know," or rather that all may have access to the law. Remember the diorite *stelae* and clay tablets of Mesopotamian civilizations, evidencing the access of all to law, demarcating space governed by law, impressing the divine right of kings, and representing not a complete code or restatement of law, but evidencing a portion of a much larger, mysterious, and unseen system. Although legal writings are relatively absent in Egyptian society, contemplate the role that libraries of wisdom literature and legal decisions played for Egyptian viziers who wished to honor the past, as well as the function Egyptian scribal classes played in the preservation of their culture and smooth administration of government, despite disruption from foreign conquering invaders. In stark contrast to classical

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<sup>370</sup> *Id.* at 41-42.

Greece, Egypt's written language, whether hieroglyphic or hieratic, through its use of determinatives and ideograms and emphasis on papyrus may have functioned to distance knowledge and law from the spoken language, even while avoiding specialized legal terminology. Finally, the Celts and Icelanders understood the significance of immortalizing law and disputes in verse for purpose of preservation, and the need for sacred places and times for their recitation. Preservation in time, establishment of regulated space, and providing access to law and justice constitute the major common functions of the various legal media discussed in this paper. The comparison of legal media to Heidegger's temple cannot be more appropriate.

Ultimately, the question is how law's definition changes, or rather, in Heidegger's thinking, how the "appearance" of law's definition is changed as the law moves from "temples" of Mesopotamian clay to Egyptian papyrus, Athenian stone, and Celtic verse. Central to this question is what contrasting societies understand law to be: what are the accepted sources in a society, or as Bob Berring, law librarianship's foremost theorist would put it, what is the "cognitive authority" of the times?<sup>371</sup> Furthermore, how is humanity's experience of the external world altered by each new construct of the law and its medium? Heidegger's contribution is that each temple or medium opens law into our world while at the same time concealing it. In other words, the medium of law is tremendously important. Law may be concealed, even as various media present it, because it comes to us heavily filtered, annotated, mediated, edited, dressed in technical language and concepts, and in recent times, has only been made accessible through the taxonomies of various indexing and bibliographic schemes that may hide as much as they reveal.<sup>372</sup> We forget about law's connection to its medium and its origin in human conflict, court action, and legislative hearings,

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<sup>371</sup> See generally Berring, *Legal Information*, *supra* note 2. "For most of the twentieth century, the legal world had agreed to confer cognitive authority on a small set of resources." *Id.* at 1676. Professor Berring argues that the legal world is undergoing a tremendous revolution with respect to cognitive authority.

The century's close sees this situation changing radically. The comfortable structure of cognitive authority that had been so central to legal information has fallen, and it can't get up. Old tools are slipping from their pedestals while new ones are fighting for attention. Where once there was a settled landscape, there is now a battlefield. The change is not an organic growth, nor are the learned hands like those of the American Law Institute or the American Bar Association guiding it. This change is being driven by publishers as they battle in the information marketplace for consumers. Many senior lawyers who would normally function as the gatekeepers of change are unaware that the earth is shifting under their feet, but it is. Law students and young lawyers do not see current events as revolutionary, but they are. To them it is odd that anyone ever used Shepard's in print form or that anyone actually *used* a digest volume at all.

*Id.* at 1677.

<sup>372</sup> See Berring, *Collapse*, *supra* note 2, at 21, 27-28.

and more fundamentally, its foundation in the shared heritage of the every-day tales, songs and poems that permeate a culture.

Like some zoologists, we content ourselves by studying the specimen in the isolation of a sterile cage or collection box, but miss all the clues of the environment from which it came. We ignore law's box—the legal infosphere. Instead, we focus on the pristine nature and conciseness of legal texts in isolation, as presented to us in a given medium, and their efficient use in resolving the legal issues before us. However, through a shift in medium, law may at the same time become more open in some respects, while more closed in others. For instance, in modern times, electronic searching makes possible research outside of the traditional taxonomy established by West Publishing at the turn of the last century,<sup>373</sup> thus facilitating new legal disciplines like sports law, feminist jurisprudence, and cyberlaw. In this new environment, the question is whether we continue to be just as myopic as before, remaining every bit as ignorant of the relationship of law to its information ecosphere. In our own times, the sharp generational divides between those who research in print and those who prefer electronic medium—with few who straddle both effectively—suggests that only a small minority may have the necessary vantage point to consider the impact of the medium upon law.

Besides its role, both in revealing and concealing, the temple of law (as fashioned in stone, clay, papyrus, and oral verse) defines our broader world, making us see it as we do. Greek *stelae*, during the Classical period, ostensibly makes the law accessible to ordinary Athenians, but in a larger, more fundamental sense, defines the Classical Greek world for what it was—with its openness, democratic citizenry, aversion for secrets, common language, flexible interpretation, and proximity to an earlier, oral culture. Even the Greek alphabet supports democratic openness. Diorite stelae and clay tablets, not only housed early Mesopotamian law, but they emphasize that society's contrasting themes of imperial decorum and approachability of all to the law, basis in divine authority, fate and mystery (despite their limited representation as an incomplete system). At the same time, law in Mesopotamia, as written in clay, is prone to the influence of scholasticism.

The absence of Egyptian legal writings in stone, but their modest appearance in papyrus, sheds light on yet another social hierarchy, where secular

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<sup>373</sup> Bob Berring noted the following about the strength of West's taxonomy over legal thought:

In effect, West produced what Daniel Dabney [West's Senior Director for Research and Development] once called "a universe of thinkable thoughts." No judge could determine a point that did not have a location in the West system; it was complete. The conservative aspects of this are obvious. New ideas and theories are classified back into existing categories. New fields like civil rights law or feminist jurisprudence are broken apart and dropped into pre-existing categories. West would add new topics, but only when absolutely compelled to do so by major changes, and only after the passage of many years . . . .

*Id.* at 21.

law is not the predominant institution, but religion is. In ancient Egypt, the decentralized evolution of society corresponds with the emergence of papyrus and hieratic writing, and the rise of a priestly class who adapts and preserves Egyptian culture in the face of upheaval from successive invasions. The mysterious nature of Egyptian writing, whether hieroglyphic or hieratic, is further supported by its use of determinatives and ideographs to add meaning silently, without evidence of phonetic pointers, thus raising the issue of the ability of the spoken language to fully express the intellectual life of Egypt, including legal concepts.

Finally, the Celts' and Icelanders' tradition in oral verse comports with societies that treasure the intimacy of knowledge communicated from "ear to ear," which cherish independence and its druidic bards even more than royalty, and venerates the connection of verse to the immortal. For each of the legal infospheres described in this paper, the medium and information ecosphere not only serves as the vessel of law, but a defining lens of that society and its worldview. This is not far from the thinking of one of law's most prominent historians and noted diplomatists, M.T. Clanchy, in his introduction to his seminal work on the transition of English governance from oral to written systems: "[I]t is language itself which forms mentalities, not literacy . . . . Morally and psychologically, depending on the circumstances, literacy may liberate or it may confine."<sup>374</sup> Consideration of language also refocuses us on Derrida's criticisms about the enslaving power of media environments, particularly writing.<sup>375</sup> What Clanchy and Derrida apply to language can be extended to the information ecosphere, as more complete expression of the importance of communications. In other words, information ecospheres and language matter immensely because they shape and define legal thinking and processes.

In yet another sense, Heidegger is particularly relevant to the consideration of law and infosphere. For Heidegger there is a connection between language and the essence of "Being," similar to the connection between law and its box, or the information ecosphere. Heidegger asserts: "Language is the house of Being."<sup>376</sup> Consider, for example, the role of the Celtic *filid* and Icelandic lawspeakers from Heidegger's perspective:

The nearness that brings poetry and thinking together into neighborhood we call Saying. Here, we assume, is the essential nature of language. "To say,"

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<sup>374</sup> CLANCHY, *supra* note 4, at 9.

<sup>375</sup> See *supra* notes 207-09 and accompanying text.

<sup>376</sup> MARTIN HEIDEGGER, ON THE WAY TO LANGUAGE 63 (Peter D. Hertz trans., Perennial Library 1971) (1959); see also MARTIN HEIDEGGER, *Letter on Humanism*, in BASIC WRITINGS 213 (David Farrell Krell ed., Harper & Row 1977) (1947) ("Rather, language is the house of Being in which man ek-sists by dwelling, in that he belongs to the truth of Being, guarding it."); MARTIN HEIDEGGER, *What Are Poets for?*, in POETRY, LANGUAGE, THOUGHT 132 (Albert Hofstadter trans., Perennial Library 1971) (1950) ("Language is the precinct (*templum*), that is the house of Being.").

related to the Old Norse “saga,” means to show: to make appear, set free, that is, to offer and extend what we call World, lighting and concealing it.<sup>377</sup>

From Heidegger’s viewpoint, the poetic vocalizations of Celtic and Icelandic bards not only reveal their world, they make it possible and define it—including the legal infosphere.

For Justice Holmes, the “life of the law . . . has been experience,”<sup>378</sup> and for Heidegger, that experience—indeed, *existence*—is linguistic and poetic. “Language is the house of Being,”<sup>379</sup> and as Heidegger often quotes from the German poet Hölderlin, “poetically man dwells.”<sup>380</sup> From Heidegger’s vantage point, the only way to understand law, to comprehend its essence, is through consideration of its relationship to the medium of language (which houses experience, the “life of the law” for Justice Holmes). The point of this Article is that law is most thoroughly studied by considering language, and the larger context of the information ecosphere.

Heidegger understood the linguistic and existential essence of law, rejecting rational approaches as inadequate:

In Greek to assign is *nemein* [*νέμειν*—to dispense, share, rule, etc.]. *Nomos* is not only law but more originally the assignment contained in the dispensation of Being [which is housed by language]. Only the assignment is capable of dispatching man into Being. Only such dispatching is capable of supporting and obligating. Otherwise all law remains merely something fabricated by human reason. More essential than instituting rules is that man find the way to his abode in the truth of Being [or language which houses truth]. This abode first yields the experience of something we can hold on to. The truth of Being offers a hold for all conduct.<sup>381</sup>

For Heidegger, law’s origin is found in the primal operation or naming function of language, which defines a world, even making experience, or at least humanity’s connection to it, possible. It is that same function of language that is the source and essence of law. Like Holmes, Heidegger is not a rationalist. However, Heidegger goes even further than Holmes, pursuing the nature of experience (or “ek-sistence”),<sup>382</sup> including law, into the “abode of truth,” which for Heidegger is language. This Article extends the quest for law’s essence yet further—from experience to language, and from language to the infosphere.

*Naming, assigning, dispensing, sharing, ruling*—each a part of Heidegger’s philologically based conception of law—fit within Deibert’s conception of Medium Theory, from which this paper began, with its concentric rings of

<sup>377</sup> ON THE WAY TO LANGUAGE, *supra* note 375, at 93.

<sup>378</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown, & Co, 49th prtg. 1923) (1891).

<sup>379</sup> See *supra* note 376.

<sup>380</sup> HEIDEGGER, *Poetically Man Dwells*, in POETRY, LANGUAGE, THOUGHT, *supra* note 376, at 213.

<sup>381</sup> HEIDEGGER, *Letter on Humanism*, in BASIC WRITINGS, *supra* note 376, at 238-39.

<sup>382</sup> For discussion of *ek-sistence*, see *id.* at 213.

influence (individual, web of beliefs, institutions, technologies, and environment) evolving over time.<sup>383</sup> In short, the study of the law's infosphere is the study of language and existence in its broadest conception. People are only able to study law after understanding how their world is defined by its information ecosphere. Law as *nomos*—or as *naming, assigning, dispensing, sharing, ruling*, etc.—is an inseparable part of humanity's experience, language, and the infosphere. For Heidegger, law is part of the activity of being, which is linguistic or philological in nature. As such, changes in the infosphere correspond with changes in law and its conception. Consequently, rather than studying the cohesive, rational structuring of rules, to find the essence of law, or even perfecting the technical skill in extracting and differentiating holdings in relations to facts (as presented in the textual decision of a case), we must also look to law in the context of language, and more broadly, the totality of the infosphere, or our efforts lack foundation.

Heidegger stresses poetic thinking as the basis for discovering the nature of being, humanity, and by implication, law.<sup>384</sup> For Heidegger, experience that is philologically, poetically and meditatively contemplated will yield the basis for obligation—in other words, the guides for conduct that we “hold on to.” Consequently, Homer, or rather poetic contemplation of experience as manifested in Homer, may reveal more about legal and moral conduct than mastery of rational legal systems. The same can be said about the *Tale of the Eloquent Peasant*,<sup>385</sup> the Icelandic Sagas,<sup>386</sup> and the mass temple rituals of Mesopotamia.<sup>387</sup>

Heidegger's connection of *nomos* (law) and *nemein* is important in another respect. As already mentioned above,<sup>388</sup> legal historians have linked the meaning of *nemein* to poetic recitation:

[T]he verb *nemein* stands at the centre of a lexical family whose members all signify “to read”. One might even wonder whether *nomos*, the active noun formed from *nemein*, might not have the basic meaning of “reading” . . . . It is true that the dictionaries contain no hint of such a meaning for *nomos*, which is ordinarily translated as “law”. Nothing, that is, except for the *nomoi* of the birds in Alcman, a poet of the seventh century B.C. . . . The *nomoi* of Charondas, one of the major legislators of archaic Greece, “were chanted”, according to one ancient author.<sup>389</sup>

For the ancient Greeks, law was intrinsically connected to reading, and not just any reading—verbal reading, reciting, and poetic chanting.<sup>390</sup> For the Celts, like

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<sup>383</sup> See *supra* notes 5-16 and accompanying text, including fig. 1.

<sup>384</sup> See *supra* notes 376-80 and accompanying text.

<sup>385</sup> See *supra* notes 216-17 and accompanying text.

<sup>386</sup> See *supra* notes 299-302 and accompanying text.

<sup>387</sup> See *supra* notes 101-03 and accompanying text.

<sup>388</sup> See *supra* notes 72-77 and accompanying text.

<sup>389</sup> Svenbro, *supra* note 28, at 40-41 (citations omitted).

<sup>390</sup> See *id.* (“The law had a vocal distribution, based at first on memory, later on writing.”).

the Greeks, law's "preserving shrine" (the *Senchus*) was poetry.<sup>391</sup> Poetic verse retained a connection to the immortality, breath, and life.<sup>392</sup> As noted, the ancient Icelanders used verse to preserve judgments, and reserved the places in court nearest the kings for their poets.<sup>393</sup> The Egyptians used verse to honor their dead,<sup>394</sup> and some of the most interesting sources for studying Egyptian law are literary.<sup>395</sup> In short, the poetic roots of law, which perhaps draw nearest to its essence, are apparent in many cultures.

A final, but essential connection of "law" to its etymological roots in Heidegger's *assignment* also includes the casting of lots, or the determination of fate.<sup>396</sup> As with casting lots, *assignment* is determined by fate. In the Mesopotamian mind, law is the flip side of fate. It is written on the *Tablets of Destiny*, the mysterious tool of the oracle and seer.<sup>397</sup> This notion of law in the context of fate is at home in the poetic worldview of the Icelanders and Celts, where fate played the central role.<sup>398</sup> The connection of law to fate is manifested more recently in the close semantic ties of *doom*, *fate* and *judgment*, as in the *Doomsday Book*, produced immediately following the Norman conquest,<sup>399</sup> and

<sup>391</sup> ANCIENT LAWS OF IRELAND, *supra* note 244, at 39.

<sup>392</sup> See *supra* notes 341-47 and accompanying text.

<sup>393</sup> See *supra* note 300 and accompanying text.

<sup>394</sup> See *supra* notes 153-58 and accompanying text.

<sup>395</sup> See *supra* notes 211-17 and accompanying text.

<sup>396</sup> See Widengren, *supra* note 91, at 10-11 n.2.

<sup>397</sup> See *supra* notes 89-93 and 124-29 and accompanying text.

<sup>398</sup> See, e.g., SQUIRE, *supra* note 347, at 182, 190-200 (recounting Finn's spears, each destined to kill a king, and a Gaelic version of Helen of Troy, an account from the Book of Leinster concerning Deirde's inescapable fate); THE NORSE MYTHS, *supra* note 286, at xix-xx ("[F]atalism so fundamental to the Norsemen, is reflected in the myths . . . Raganarok itself, 'the Destruction of the Powers', is inescapable. The time must come when all creation will be destroyed by fire and flood."); *Beowulf*, in 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 25, 72 (M.H. Abrams ed., 5th ed. 1986) ("In my land I awaited what fate brought me, held my own well, sought no treacherous quarrels, nor did I swear many oaths unrightfully."); *The Sagas of the People of Laxardal*, in THE SAGAS OF ICELANDERS, *supra* note 292, at 274 (discussion of the unfolding of Gudrun's fate: "It is not the events of the plot as such that engage us, but rather its unravelling as a narrative of the predicament of individuals who are caught up in the relentless onward march of events and social change.").

<sup>399</sup> See CLANCHY, *supra* note 4, at 32.

[T]he book has been called *Domesdei*, "by the natives" because it seemed to them like the Last Judgment described in Revelation . . .

. . . .

[The] Domesday book was of symbolic rather than practical importance: "That is why we have called the book *The Book of Judgment*, not because it contains decisions on various difficult points, but because its decisions like those of the Last Judgment are unalterable."



which is also reminiscent of the Mesopotamian *Tablets of Destiny*. In any event, modern notions of law are significantly broadened by considering its etymological heritage.

With respect to law, the pursuit of its essence necessitates contemplation of law's box, or its infosphere, not in a reductionist, deterministic sense, but in the sense of contemplating the whole of the information ecosphere—the interaction of webs of beliefs, social institutions, media technologies, and physical and temporal environments. It is in this sense that this investigation in the end must be unscientific. This means that “finding the law” can never be reduced to simple research techniques or controlled experiments. It cannot be reduced to Lexis free-text searching or mastery of West's print digests, with their exhaustive, but thoroughly rational system of Topic and Key Numbers, unless at the same time we accept that doing so has forever *enframed* our legal world view, cutting us off from the realization of a more vital and fundamental understanding of law's essence. Indeed, such tools replace contemplative reading and poetic reflection upon the underlying experience of legal literature with determined, but algorithmic searching, and thinking, intent upon subjecting the law to narrow, self-interested purposes, and efficient packaging law for convenient billing—Heidegger's nightmare of the world as a giant gasoline station.<sup>400</sup> Not surprisingly, accessing the law with modern tools such as Lexis and Westlaw must first be economically justified, usually only in the context of specialists representing a “paying client” who desires a pre-determined outcome.

The consequences of an enframed approach to law also imply that techniques for delineating narrow holdings and formalizing issues may be suspect if such methods imply lack of appreciation for the infosphere.<sup>401</sup> Law cannot be reduced to a technology or technique, even as sacrosanct an intellectual exercise as identifying and differentiating doctrinal holdings in relation to the factual record. The challenge is to dare otherwise—to “dare the precinct of Being,”<sup>402</sup> to “dare language,”<sup>403</sup> and to dare law's box in the fullest sense by contemplating the legal infosphere. It is to dare Justice Holmes' life of the law—experience—by returning to the bards of our ancestors and resurrecting the cadent verses of our past. It is to go beyond, or at least see, the boundaries of the pristine case book and the artificial confinements imposed by digests and algorithmic searches in approved sources to contemplate what may lie beyond. Perhaps only then, will we have the perspective necessary to discover and understand law in our own times.

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*Id.* (citing *DIALOGUS DE SCACCARIO* 64 (Charles Johnson ed. & trans., Oxford Univ. Press 1950)).

<sup>400</sup> See *supra* note 365 and accompanying text.

<sup>401</sup> See, e.g., Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037 (1961). Professor Gilmore argues that legal realism's techniques for interpreting the law are a direct result of the information environment. “[A]n instinctive judicial response to the problem of too many cases had been the development of an extraordinarily narrow theory of precedent cases.” *Id.* at 1045.

<sup>402</sup> HEIDDEGGER, *What Are Poets For?*, in *POETRY, LANGUAGE, THOUGHT*, *supra* note 376, at 132.

<sup>403</sup> *Id.*