

Law's Box:

Law, Jurisprudence and the Information Ecosphere

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"By means of the temple, the god is present in the temple."¹

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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

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¹ MARTIN HEIDEGGER, *Origin of the Works of Art*, in POETRY, LANGUAGE, THOUGHT 42 (Albert Hofstadter trans., Perennial Library 1971) (1960).

brings together two related modes of analysis: first, consideration of the technological, institutional, geo-political, 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 them is vital to approach the essence of law.

For so 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.² There has been significant study of how law

² See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509 (1991-92). The principal focus of *Paratexts* is on evidence, the relationship between law and fact, and how changes in media require new standards for documentary evidence. From the legal information sciences perspective, Bob Berring, Director at Bolt 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 catalyst for this author’s effort to study the problem historically with respect to media environments in general. See generally, Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673 (2000), *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305

attempts to regulate information flow 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 in effect provides a medium for law to operate.

Part I 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 the adaptation of theory by Ronald J. Deibert.³ 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 II will examine past instances of the interaction of the legal information environment with culture, societal institutions, and web of beliefs to affect legal thinking and processes. These studies will be conducted based upon historic and pre-historic cultures that emphasized different kinds of media for conducting legal affairs—stone, clay, oral, papyrus, parchment, print, and electronic. For the sake of economy, this paper will only discuss stone, clay, papyrus, and oral cultures.

(2000), *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189 (1997), *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615 (1995), *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9 (1994), and *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15 (1987).

³ See generally RONALD J. DEIBERT, PARCHMENT, PRINTING, AND HYPERMEDIA (1997).

The historical treatment will not be exhaustive but will present case studies illustrating particular transformations in the information (or media) environment, cultural modes of perception, and 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. This is representative of the ideal practice of academic law librarianship: functioning on an interdisciplinary level, bringing together diverse sources and viewpoints for considerations—hopefully initiating additional scholarly pursuit, and optimistically surveying and defining terrain for distinct new fields of study.⁴

In its concluding section, 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 to 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 and stare over its edge. In a sense, each study of the relationship of law to its information ecosphere, as studied in this piece, enhances awareness of modern law's relationship to its infosphere and the system's boundaries. More importantly,

⁴ The eminent legal historian M.T. Clanchy unapologetically adopts a similar approach—"drawing on the expertise of other scholars and using the selective method"—out of necessity because of the vast historical scope and numerous ancient languages of the subject materials. See M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307*, 4-5 (2nd ed. 1993).

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. To that end, let us proceed.

Part I—Medium Theory and Ecological Holism: A New Lens for Historical Analysis

In short, “the 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 society.”⁵ Medium Theory is grounded in communications theory and concerns the technological changes impacting the dissemination and preservation of information.⁶ Under such theory, “the medium is never neutral” but has a profound effect on how information is transformed into knowledge within a society.⁷ In the mid-twentieth century, the basic tenants of medium theory were developed by Harold Adam Innis and promulgated by Marshall McLuhan,⁸ original promulgator of “the Medium is the Message.” While not

⁵ DEIBERT, *supra* note 3, at ix.

⁶ *Id.* at ix-x.

⁷ PAUL HEYER, COMMUNICATIONS AND HISTORY: THEORIES OF MEDIA, KNOWLEDGE, AND CIVILIZATION, at xiii (1988).

⁸ DEIBERT, *supra* note 3, at 6. See generally HAROLD ADAM INNIS, BIAS OF COMMUNICATION (1951), HAROLD ADAM INNIS, EMPIRE AND COMMUNICATIONS (1950), MARSHALL MCLUHAN,

without significant academic opposition and criticism, the basic tenants of medium theory have been widely considered throughout various disciplines.⁹

In 1997, a political scientist from the Munk Centre for International Studies at the University of Toronto, named Ronald Deibert, 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 for “selecting” for certain physical characteristics. In other words, social forces and ideas survive differentially according to their “fitness” or match with the new media environment—a process that is both open-ended and contingent.¹⁰

GUTENBERG GALAXY (1962), MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

⁹ DEIBERT, *supra* note 3, at 6-7.

¹⁰ *Id.* at 36 (emphasis in original).

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.¹¹

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 the 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 to which they are acculturated, and through which they perceive the world around them.¹²

It is study of the web of-beliefs, symbolic forms and social constructs (and their interaction with the environment) that constitute the heart of ecological holism.

Deibert's objective was to focus on the role that the media or information

¹¹ *Id.* at 39-40.

¹² *Id.* at 43.

environment, among other factors, plays in the evolution of political and social institutions. In so doing, Deibert focused upon “distributive changes” and changes to the “social epistemology” as a result of changes in the medium of communication.¹³ Distributive changes have to do with changes in a society’s power structure.¹⁴ Changes in social epistemology have to do with the “web-of-beliefs into which people are acculturated and through which they perceive the world around them.”¹⁵ This paper will take a different tack, considering changes to *legal systems* brought about both by transformation of the media, or information environment, and from changes in legal epistemology. Consequently, it will explore how the information ecosystem—including both environment and web of beliefs—impacts the determination of what the law is.

Before commencing with a description of various historic and prehistoric cultures, this article enumerates factors or a heuristic framework for consideration of various media environment, and their relationship to law and 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 in contrasting different legal information ecosystems, and which the article may note from time to time. The heuristic can be thought of in

¹³ *Id.* at 67.

¹⁴ *Id.*

¹⁵ *Id.* at 94.

terms of a conceptual framework, first proposed by Ronald Deibert, and adapted here for purposes of studying the legal information ecosphere.

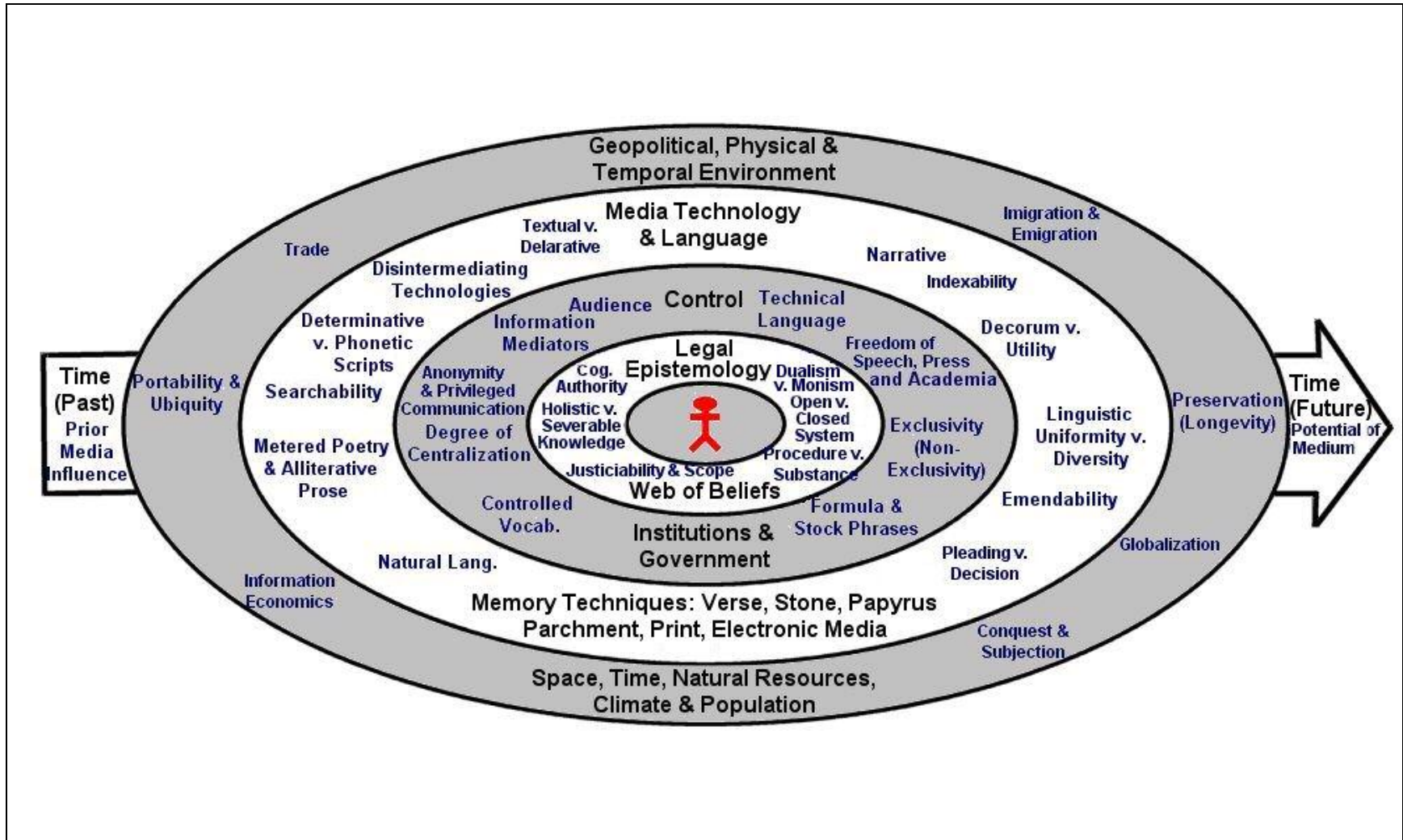


Figure 1—Model of Legal Information Ecosystem. Based on Ronald Deibert's model. See DEIBERT, *supra* note 3, at 38, fig.2.

Niche in the Information Ecosystem	Factor	Description
Legal Epistemology or "Web of Beliefs"	Dualism v. 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 v. Closed System (all inclusive)	Is the system complete (as in a civil system) or is it accepted that it is constantly changing?
	Procedure v. Substance	Is the emphasis for "capturing" law in media or memory on procedures, decisions or both?
	Justiciability, Scope & 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, <i>etc.</i> ?
	Holistic v. 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?
Control (Institutions and Government)	Technical (Specialized) v. 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 v. 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 & 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?
	Anonymity & 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, indexes, librarians, catalogers, annotators, emendators, <i>etc.</i> ?
Audience	Do specific medium target certain audiences and segments of society? Does it do so to the exclusion of others?	
Media Technology & Language (Memory Techniques: Verse, Stone, Papyrus,	Narrative	Is story telling used with legal information to facilitate memory and provide instruction?
	Indexability	Can legal information be indexed in particular medium? Is it being indexed?

Parchment, Print, Electronic Media, etc.)	Decorum v. 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 v. 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 ultimate presentation in stratum of authors and texts?
	Pleading v. 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)?
	Metered Poetry & 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 v. 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 v. Declarative	Is legal material presented in textual sentences with complex development and presentation or as lists of imperatives?
Geopolitical, Physical & Temporal Environment	Immigration & Emigration	Are immigrant populations assimilated into the legal traditions of new host countries? Do they bring separate and independent legal systems with them?
	Preservation (Longevity)	Some media provide optimum longevity, such as stone and metals are designed for preservation over lengthy periods of time and even the eternities (often 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 v. Isolation	How are changes in trade barriers, travel and communications affecting law and legal information?

	Conquest & 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 exchange? 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, <i>etc.</i>)?
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?

Part II—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. Parchment, print, and electronic environments are left out for sake of economy. However, the reader should be cautious to 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.

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

The ancient Western civilization depending upon stone as the medium of law is classical Greece. Even with the prevalence of stone as a medium of expression in Egypt, few legal texts can be found.¹⁶ Rome depended upon papyrus for the administration of its far-flung empire.¹⁷ The Mesopotamian cultures, with notable exceptions, primarily depend upon clay tablets and papyrus.¹⁸ It is the Greeks, in their Classical Period, who rely upon it 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 function with comparatively small bureaucracy, and with little record-keeping.¹⁹

¹⁶ See *infra* notes 171-172 and 205 and accompanying text.

¹⁷ INNIS, *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 favor centralization and systems of government less hierarchical in character.”).

¹⁸ See *infra* notes 113-117 and accompanying text.

¹⁹ Rosalind Thomas, *Literacy and the City-State in Archaic and Classical Greece*, in LITERACY & POWER IN THE ANCIENT WORLD 49 (Alan K. Bowman & Greg Woolf, eds., 1994). “The lack of any bureaucracy may be connected as much to the privileged position of the citizen in the *polis* as the general Greek approach to state records and the epigraphic habit.” *Id.* at 50.

[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.²⁰

The role of publishing in stone, usually on *stelae*, seems to have been one of memorialization and impression.²¹ 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 *stèle*’. Greek orators often cited a text from a *stèle* (and often indicate its location)”²²

The finality and importance of *stelae* become so prominent that it even affects the cityscape of Athens, making it look like a cemetery.²³

²⁰ *Id.* at 49.

²¹ 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)

²² *Id.* at 136 (2001) (citations omitted).

²³ 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

Despite their natural ruggedness, *stelae* are subject to amendment by erasure and chiseling out,²⁴ and the act of demolishing *stelae* may have as much importance as their original inscription.²⁵ 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.²⁶

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.”).

²⁴ Rhodes, *supra* note 21, at 136-37.

²⁵ *See id.*

²⁶ *Id.* at 140.

The use of *stelae* and “*scriptio continua* makes vocalization practically unavoidable,” a “sounded experience.”²⁷

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”²⁸ Indeed, their publication is thought to be associated with democracy itself.²⁹ This is not to suggest widespread literacy among the Greek populace, but at least public officials can check accuracy of the law without relying upon secretive archives.³⁰ Reading, in fact, is a task delegated to slaves, and encouraged in “moderation, so as not to become a vice.”³¹

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 to was complete.”³² Contracts are “wiped off” and financial decrees are destroyed.³³ The use of archives for storing and referring to written

²⁷ Jesper Svenbro, *Achaic 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., 1st paperback ed., University of Massachusetts Press 2003) (1995).

²⁸ Rhodes, *supra* note 21, at 139 and 141.

²⁹ Thomas, *supra* note 19, at 44.

³⁰ See ERIC A. HAVELOCK, PREFACE TO PLATO 39 (1963).

³¹ Svenbro, *supra* note 27, at 46.

³² Rhodes, *supra* note 21, at 139. See also *id.* at 138.

³³ *Id.*

documents are also problematic because public archives are “dispersed” and “uncentralized.”³⁴

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.³⁵

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. They make no distinction between issues of law and fact, deciding both.³⁶ 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

³⁴ Thomas, *supra* note 19, at 35-36 (“[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 authorized private documents even in the Hellenistic world is much exaggerated.”).

³⁵ 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 21, at 142.

³⁶ ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT GREECE* 72 (1927).

fear or animosity.”³⁷ No rationale for decisions is given, and consequently no body of precedent develops.³⁸ In a sense, the human *dicasts*, with their independence, provided a flexibility that stone could not. Likewise, stone, with its sense of permanence and timelessness, provided stability that *dicasts*, who lacked the ability to make precedent, could not.

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 an inch of a typical nineteenth-century novel.³⁹ 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. “Anyone

³⁷ *Id.* at 73.

³⁸ *Id.* at 74-75.

³⁹ PAUL CONWAY, PRESERVATION IN THE DIGITAL WORLD 6, fig.1, 10, fig.5 (1996).

who pleased (ἐξήν τῷ βουλομένῳ)” may prosecute.⁴⁰ In strikingly similar fashion, the law is published on *stelae*, “so that it shall be possible for whoever wishes to know [όπος άν εί είδέναι τόι βολομένοι]”⁴¹ The evils of failure to publish law and virtues of equality of access to the law are likewise noted in verse:

No worse foe than a despot hath a state
Under whom, first, can be no written 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,

⁴⁰ BONNER, *supra* note 36, 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 and 57. However, homicide is served by private, rather than public suits. *Id.* at 59.

⁴¹ Rhodes, *supra* note 23, at 35. See also Rhodes, *supra* note 21, at 139.

Keeps Silence. Can equality further go?
More—when the people piloteth the land,
She joyeth in young champions native-born.⁴²

Publication 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.⁴³ *Dicasts* have the right to ask questions and express their feelings.⁴⁴ In similar vein, the defendant’s life is an open book, subject to review by all. Even the defendant’s relatives and friends may be considered as evidence of his character.⁴⁵ Essentially, the idea that courts are autonomous from social influences originated in Rome, and is alien to Greek thinking.⁴⁶ “There is certainly no systematic attempt at Athens to distinguish between those bodies which undertake political deliberations and

⁴² Euripdes, *Suppliant*, in 1 EURIPIDES: PLAYS 213-23, ll.429-43 (A.S. Way’s trans. 1956) (quoted in part in BONNER, *supra* note 36, at 31).

⁴³ BONNER, *supra* note 36, at 77.

⁴⁴ *Id.*

⁴⁵ *Id.* at 78.

⁴⁶ S.C. Todd, *The Language of Law in Classical Athens*, in MORAL VIEW OF LAW 17, 22 (Peter Coss ed., 2000).

those which exercise legal judgment”⁴⁷ 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 noted in the distinction between public suits (*γραφαί*) and private actions (*δίκαι*).⁴⁸ Alternative meanings of *γραφαί* are *writing*, *writ* or *indictment*.⁴⁹ Thus, public suits are conceptually linked with publication and writing. To make a matter subject of 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

⁴⁷ *Id.* at 22.

⁴⁸ See BONNER, *supra* note 36, at 44.

⁴⁹ See S.C. Todd, *Glossary of Athenian Legal Terms* (Michael D. Brauw ed.), at http://www.stoa.org/projects/demos/article_law_glossary (March 16, 2003).

external marks; what you have discovered is a recipe not for memory, but for reminder.⁵⁰

The important thing is the place 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 to remembrance and equal access. It is the human component that is ultimately essential. Indeed, the impreciseness of legal terms, which are characteristically inscribed on Greek *stelae*, necessitate lengthy discussion as to their meaning.⁵¹ 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”⁵²

⁵⁰ PLATO, PHAEDRUS 274-75 (R. Hackforth trans., 1952). See also CLANCHY, *supra* note 4, at 296-97. Interestingly, Derrida and others make case for the supremacy of speech over writing. See JACQUES DERRIDA, *Exergue*, in *OF GRAMMATOLOGY* 3 (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 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), and Marianne Sadowski, Note, “*In an Evil Hour*”: *Confessions, Narrative Framing, and Cultural Complicity in Law and Literature*, 34 CONN. L. REV. 695, 703 (2002)

⁵¹ S.C. Todd, *supra* note 46, at 26.

⁵² *Id.* (*hubris* appears to be some form of assault).

Statements of law are evidence for consideration, not final rules for the resolution of disputes.⁵³ 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.⁵⁴ The result of 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’.”⁵⁵ Consequently, *stelae* may serve as an excellent medium for imprecise statements of the law and for familiarizing 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 in about the eighth century B.C.,⁵⁶ facilitates Classical values of openness and democracy. The Greek alphabet is

⁵³ See *id.* at 29-30.

⁵⁴ *Id.* at 27. (“Isocrates claims that proliferation of laws and the search for *akribeia* (‘precision’) was to miss the real function of law, which was to be general and morally educative.”) (citing Isocrates §§ 7.33 and 7.39-40).

⁵⁵ *Id.* at 32 (citations omitted) (S.C. Todd qualifies this statement as an oversimplification).

⁵⁶ See Ernst Grumach, *The Cretan Scripts and the Greek Alphabet*, in *WRITING WITHOUT LETTERS* 45, 65 (W. Haas ed., 1976).

the first purely phonetic alphabet.⁵⁷ Unlike other ancient scripts, it represents vowels as well as consonants,⁵⁸ and consequently, rejects silent determinatives and ideograms that may have previously kept meanings and their nuances hidden from listening audiences.⁵⁹ Indeed, *scriptio continua* necessitated oral reading,⁶⁰ and semantic extraction followed vocalization.⁶¹ 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 “belonging to the people”.⁶²

⁵⁷ See also, James Barr, *Reading a Script Without Vowels*, in *WRITING WITHOUT LETTERS*, *supra* note 56, at 71,75-76 (Greeks are first to create phonetic markers for each segment of a word, not just consonants, or syllables).

⁵⁸ See Grumach, *supra* note 56, at 65-66. Other ancient languages, such as Arabic and Hebrew, provides 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 57, at 76.

⁵⁹ For discussion of the problem of determinatives in Egyptian texts, see *infra* notes 183-198.

⁶⁰ See *supra* note 29 and accompanying text.

⁶¹ See Barr, *supra* note 57, at 82-84 (applying similar analysis to “pointed” and “unpointed” texts, the former of which functioned as a phonetic alphabet).

⁶² 3 OXFORD ENGLISH DICTIONARY 1088 (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.”

As far back as the 4th century B.C., the Greeks distrust documentation as evidence.⁶³ Instead they rely heavily upon ceremony—again to impress the memory—and human witnesses.

[S]o much of social behavior and deportment had to be ceremonial, or had to be recorded ceremonially, which may amount to 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 order. Thus, when Achilles [of Homer's *Illiad*] 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.⁶⁴

Thus, Homer may function as an informative source of legal procedure,⁶⁵ “as a sort of tribal encyclopedia,”⁶⁶ preceding by several centuries the more limited,

DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in *OF GRAMMATOLOGY*, *supra* note 50, at 170. See also *infra* notes 201-204.

⁶³ HAVELOCK, *supra* note 30, at 55, n.15 (1963) (“the king’s statement in Aeschylus, *Supplikes* strongly implying that an oral promise and oral memory that preserves it are more reliable than tricky documentation.”).

⁶⁴ *Id.* at 80.

⁶⁵ See *id.* at 80-81.

⁶⁶ *Id.* at 66.

memorialization function of the fourth-century *stelae*, and as a guide to the “overall ‘management’ of life.”⁶⁷

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.⁶⁸

For the ancient Greeks, law is intrinsically connected to reading, and not just any reading—verbal reading, reciting, and poetic chanting.⁶⁹ Referring to the poets’ connection to law, the *Theogony* is sometimes translated to begin: “They sing the

⁶⁷ *Id.* at 80.

⁶⁸ Jesper Svenbro, *supra* note 27, at 40-41 (citations omitted).

⁶⁹ *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.

laws and ways of all.”⁷⁰ 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.”⁷¹ One interpretation of Plato’s *Laws* is that “solemn custom often prevails over that of statute.”⁷² Custom, as promulgated orally in the medium of Homer’s *Iliad*, is an interweaving of both private and public codes of conduct.⁷³ In addition, the relationship of orality to stone is also in keeping with Greek sensibilities that statuary, stelae, and other inscribed objects speak, rather than simply functioning as epigraphs to be read.⁷⁴ Finally, the use of “*scripto continua*” made vocalization practically unavoidable.”⁷⁵

⁷⁰ HAVELOCK, *supra* note 30, at 62.

⁷¹ *Id.* at 63.

⁷² *Id.* at 62-63.

⁷³ *See id.* at 76.

⁷⁴ *See generally* Svenbro, *supra* note 27, at 46-50.

In a culture that practices 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 object 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.

⁷⁵ *Id.* at 44.

Sparta, a subculture of Greece, functions entirely without written law through the aid of their lawgiver, Lycurgus.⁷⁶ “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.”⁷⁷ Indeed, Spartan law appears to have been unwritten, obtained by Lycurgus from an oracle from Delphi. “Lykourgos attached such importance to this office that he brought an oracle from Delphi about it, which they call a *rhetra*.”⁷⁸ The reference to “offices”, “oracles,” and “*rhetra*” or *ρήτρα* (cognate of “rhetoric”) all emphasize the oral, as well as divine, nature of Spartan law. The relationship of law to oracles is also noted in earlier Mesopotamian cultures.⁷⁹

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

⁷⁶ HAVELOCK, *supra* note 30, at 55, n.15. See also, Rosalind Thomas, *Literacy and the City-State in Archaic and Classical Greece*, in *LITERACY & POWER IN THE ANCIENT WORLD* 37 (Alan K. Bowman & Greg Woolf, eds. 1st paperback ed. 1996).

⁷⁷ Thomas, *supra* note 76.

⁷⁸ See DOUGLAS M. MACDOWELL, *SPARTAN LAW* 4 (1986)(citing and translating Plutarch’s, *Lykourgos*). See also Svenbro, *supra* note 27, at 41 (“We know from Plutarch that it was forbidden in Sparta to set down the law in writing.”).

⁷⁹ See *infra* notes 122-125 and accompanying text.

legal infosphere where all had duty to participate and transparency functioned as an ideal. During the fourth century B.C., stone serves to impress the solemnity of democratic duty, provide transparency, offer stability, and inculcate law into every day life, thus removing the need for mediation from bureaucratic and scribal classes. Nonetheless, stone stelae only plays 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 their affairs. Finally, even the alphabet supports Greek ideals, facilitating complete oral expression and disavowing silent determinatives, which hid meaning.

Diorite and Clay—Law in Mesopotamia

Preceding Classical Greece, the information ecosphere of Mesopotamia, particularly Babylon, is a paradox that incorporated clay, one of the softest of writing surfaces, diorite, which is one of the hardest,⁸⁰ and finally 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. At the same time such documents are argued to be amendments of the law and notable decisions. Knowledge is seen as holistic, yet the specimens remaining of Mesopotamian law, despite appearances to the contrary, represent only fragments of functioning legal systems. The environment seems to be both disintermediated (allowing the common peasant to approach the law of the king) and mediated through an

⁸⁰ See 1 BABYLONIAN LAWS 41 (G.R. Driver & John C. Miles eds., 1st corrected ed. 1956).

extensive scribal class, experts in both writing and the technical language of law. In the attempted reconciliation of such a disparate system, perhaps is found the truth—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. Babylonia's administrative system is sophisticated, involving higher and lower courts. It de-emphasizes the role of priests.⁸¹ Yet, religion plays an important role. Babylonia'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.⁸²

⁸¹ INNIS, *supra* note 8, at 32.

⁸² *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 stele] 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 scepter as indicative of his sovereignty, by virtue of which he promulgates the laws.

1 BABYLONIAN LAWS, *supra* note 80, 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 Annunaki, the gods of the

As in ancient Egypt,⁸³ the king is the mediator of God, and perhaps even the scribe of the oral decrees of God. In contrast to the Greeks, with perhaps the exception of Sparta,⁸⁴ the Babylonian emphasis is on mediation.

The relationship of Hammurabi's law to the divine also implicated 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"⁸⁵ Supreme sovereignty of the world is linked to possession of this book.⁸⁶ Indeed, whoever has the tablets has the right to determine fate.⁸⁷ Besides the connection to authority, the implication is that, for

netherworld who determined the fates of the living and tried the dead." *Id.* at 5 (footnotes omitted). Thus, the gods are attributed as the ultimate source of law.

⁸³ See *infra* notes 139-140 and accompanying text.

⁸⁴ See *supra* notes 76-78 and accompanying text.

⁸⁵ Hugh W. Nibley, *Genesis of the Written Word*, in NIBLEY ON TIMELY AND THE TIMELESS 114 (7th prtg. 1988) (citing W.G. Lambert, *Ancestors, Authors, and Canonicity*, in 11 JOURNAL OF CUNEIFORM STUDIES 1,9 (1957)).

⁸⁶ Nibley, *supra* note 85, 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 UNIVERSITETS 10-11 (1950)).

⁸⁷ Widengren, *supra* note 86, at 11 ("[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.").

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.”⁸⁸ The king thus possesses the “mystery of heaven and earth” and knows everything.⁸⁹ 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.⁹⁰ Furthermore, the law of Hammurabi is claimed as his own and is argued by some to be secular in character.⁹¹ How then can the apparent incongruity be reconciled?

⁸⁸ *Id.* at 11.

⁸⁹ *Id.* at 12.

⁹⁰ See MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 4 (ed. Piotr Michalowski) (Writings from the Ancient World, vol. 6, 1995).

None of the collections [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.

⁹¹ See 1 BABYLONIAN LAWS, *supra* note 80, at 3 (“Hammu-rabi himself claims to have written them. Their general character too is completely secular”). *But see infra* notes 96-98 and accompanying text.

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 his 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."⁹² 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:

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."⁹³

⁹² *Id.* at 41.

⁹³ *Id.*

Not only do inscriptions allow Hammurabi's subjects direct access to the law, or at least a sampling thereof, but they evidence the justice of Hammurabi's reign.⁹⁴ The memorialization of Hammurabi's law in diorite makes sense—after all, “the application of justice was the highest trust given by gods to a legitimate king.”⁹⁵

Even more evident of their symbolic importance, *stelae* facilitated “covenant” rituals among Hittite and Semitic peoples, whereby law is introduced to a community.⁹⁶

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.⁹⁷

⁹⁴ ROTH, *supra* note 90, at 71 (“The laws of this composition, inscribed on imposing black stone stelae, stand as evidence of Hammurabi's worthiness to rule.”).

⁹⁵ *Id.* at 5.

⁹⁶ 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).

⁹⁷ *Id.* at 286 (citations omitted).

Thus, Hammurabi's law is quite properly inscribed on *Stela* for the purpose of subjecting the people to new law. Challenging the notion that Hammurabi's law 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."⁹⁸ No surprisingly, the origin of the earliest Mesopotamian writing is also at the temple.⁹⁹ The Hammurabi bears the same relationship to religion, temples and heavenly revelation as other Semitic peoples.

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 origins. Some scholars view the Code as originating in the practicalities of administration, as "codifications of existing practice, providing precedents," and yet others view the Code as having more

⁹⁸ *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 91 and accompanying text.

⁹⁹ See HENRI FRANKFORT, *BIRTH OF CIVILIZATION IN THE NEAR EAST* 55 (Barnes and Noble, 5th prtq. 1968) (1951) (origin at Temples). 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 140, and accompanying text.

academic origins, “as products of the scribal schools, and as manifestations of the intellectual processes that developed other scientific treatises.”¹⁰⁰ 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,”¹⁰¹ “a series of amendments and restatements of parts of the law,”¹⁰² “a series of amendments to the common law of Babylon,”¹⁰³ an “adapt[ation of] old laws in a system of legislation rather than code,”¹⁰⁴ a set of regulations “compared to the English ‘Statutes of the Realm,’¹⁰⁵ and “somewhat like headnotes to a reported case, and . . . compared with a Digest or Case-law collection of records.”¹⁰⁶ The text of the Hammurabi laws provides some insight:

¹⁰⁰ ROTH, *supra* note 90, at 4.

¹⁰¹ *Id.* at 71.

¹⁰² BABYLONIAN LAWS, *supra* note 80, at 45.

¹⁰³ *Id.* at 41.

¹⁰⁴ INNIS, *supra* note 8, at 32.

¹⁰⁵ BABYLONIAN LAWS, *supra* note 80, at 48.

¹⁰⁶ *Id.* (“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 court or by a scribe of register and were deposited in the of an official archivist.”). For comparison with Egyptian Hermopolis Code, see *infra* notes 213-215 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* 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 gave¹⁰⁷

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 law'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.¹⁰⁸ Besides the lack of references

¹⁰⁷ ROTH, *supra* note 90, at 135 (emphasis added) (quoting para. xvii, lls 59-94 of the epilogue).

¹⁰⁸ *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 BABYLONIAN LAWS, *supra* note 80, 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.") and 52 ("There is not a single

to Hammurabi's laws in daily legal transactions, the failure of the Hammurabi laws to be comprehensive is also a problem.¹⁰⁹ Hammurabi's law consists of only some 300 provisions.¹¹⁰ 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.¹¹¹ This conspicuous lack of comprehensiveness also suggests that the Hammurabi law is limited to the actual cases dealt with, and perhaps particularly to those legal issues which needed reform.¹¹² In any event, the Babylonian legal system has only been captured, in a limited sense, in tangible, written media.

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 laws.”).

¹⁰⁹ BABYLONIAN LAWS, *supra* note 80, at 53 (“As, too, the Laws are not exhaustive in the manner of European code of laws, so they are not imperative . . .”).

¹¹⁰ ROTH, *supra* note 90, at 71 (“between 275 and 300 law provisions”).

¹¹¹ BABYLONIAN LAWS, *supra* note 80, at 47.

¹¹² *Id.* at 45 (“There is 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.”).

Besides the notable examples of Hammurabi's law in diorite,¹¹³ the media of the Sumerian and Babylonian civilizations and their successors emphasizes clay,¹¹⁴ which can be baked to make permanent records (a property perhaps unique to clay—to be both a temporary and permanent record).¹¹⁵ 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.¹¹⁶ In addition, Mesopotamian civilizations write upon wax and metal.¹¹⁷

¹¹³ ROTH, *supra* note 90, at 73.

¹¹⁴ For examples of the Ur-Nammu and Hammurabi Law Codes written in clay tablets, see *The Shøyen Collection: Checklist of Manuscripts*, §§ 8.1-8.2, at <http://www.nb.no/baser/schoyen/5/5.4/#8.1> (last visited March 17, 2005). See also *Cyrus Cylinder*, at <http://www.thebritishmuseum.ac.uk/compass/> (last visited March 17, 2005) (search “Cyrus cylinder”).

¹¹⁵ INNIS, *supra* note 8, at 28.

¹¹⁶ *Id.* at 40. See also J.R. 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 . . .”).

¹¹⁷ ROTH, *supra* note 90, 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*, at <http://www.thebritishmuseum.ac.uk/compass/> (last visited March 17, 2005) (search “Chalcedony cylinder seal Hillah”).

Clay tablets also possess another important property. They can be “sealed” as measures to ensure preservation, authenticity or secrecy.¹¹⁸ Seals are placed on envelopes that encapsulated or at least covered the document to obscure it from view. In fact, to be read, the envelope has to be broken.¹¹⁹ Secrecy, rather than openness is an attribute of legal knowledge. “[T]hy judgement [sic] is secret knowledge . . .” is part of the praise given to a Mesopotamian king.¹²⁰ 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 which seals them to the king’s breast.¹²¹ In the end, knowledge is power, in ancient Mesopotamia as elsewhere, 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 “code” is but a fragment, evidencing the King’s authority and justice.

¹¹⁸ “This sealing of the tablets is the regular Mesopotamian procedure of preserving the written document without any modification. It is the manner of making the legal document inviolable.” Widengren, *supra* note 86, at 12.

¹¹⁹ See State Hermitage Library, MESOPOTAMIAN WRITTEN RECORDS IN THE HERMITAGE, at http://www.hermitagemuseum.org/html_En/12/2003/hm12_1_16.html (last visited March 17, 2005). See also, Oriental Institute, University of Chicago, CLAY TABLET AND ENVELOPE (Nov. 12, 1997), at http://oi.uchicago.edu/OI/MUS/HIGH/OIM_A11878_72dpi.html.

¹²⁰ Widengren, *supra* note 86, at 12.

¹²¹ *Id.* at 12.

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

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 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.¹²²

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.¹²³

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

¹²² *Id.* at 11.

¹²³ 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.”).

divine ordinance or *oracle*)¹²⁴ or arbitrary, but that only an oracle or seer can read from the tablets of law.¹²⁵ Indeed far from being arbitrary, for the ancient mind, law is fundamental to the “transformation of a chaotic universe into a cosmos.”¹²⁶ 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.”¹²⁷ 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

¹²⁴ *Id.* at 10-11, n. 2.

¹²⁵ For discussion of the King as seer, see *id.* at 13-16. Parallels are also drawn with the Israelite kings. “[T]he Israelitic king posses 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.

¹²⁶ See John Lundquist, *supra* note 96, at 282-83 (“The temple creates law and makes law possible. It allows for the transformation of a chaotic universe into a cosmos.”).

¹²⁷ ROTH, *supra* note 90, at 1.

King Hammurabi of Babylon about 1750 B.C.E., which was copied and recopied in the scribal centers for over a thousand years.¹²⁸

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 topically diverse texts as the god lists, tree lists, professions lists, mathematical lists, star lists, pharmacopoeia, *etc.*”¹²⁹ Still others see the scribal works as codifications or summaries of precedent, or apologia for royal governance.¹³⁰

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.*¹³¹

¹²⁸ *Id.* at 2 (emphasis added).

¹²⁹ *Id.* at 4 (citations omitted).

¹³⁰ *Id.* (citations omitted).

¹³¹ John Lunquist, *supra* note 96, at 277-78 (emphasis added).

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.¹³² 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 exists of such practice 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 collaboration 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

¹³² ROTH, *supra* note 90, 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.").

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.¹³³

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.¹³⁴ 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 are developed with the aid of earlier codes, or unknown origin.¹³⁵ The problem is complicated by the fact that Hammurabi’s code itself is neither complete nor exhaustive.¹³⁶ The search for a complete “code” from which

¹³³ 1 BABYLONIAN LAWS, *supra* note 80, 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.

¹³⁴ *Id.* at 13-14.

¹³⁵ 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 the conditions.” *Id.* at 15.

¹³⁶ See *supra* notes 109-112 and accompanying text.

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.¹³⁷ 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 roll 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 *stele* 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.

The clay tablets eventually support scholasticism—including the reflection and organization of the law as a whole and a special legal terminology and

¹³⁷ See *supra* notes 92-98 and accompanying text. Nonetheless, Hammurabi's laws may represent a step forward from earlier Sumerian laws. 1 BABYLONIAN LAWS, *supra* note 80, at 15 (stressing the “hotchpotch” and “miscellaneous” nature of earlier, Sumerian laws).

language—as well as the commerce of daily life. 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 positive legislation. It is 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.

Papyrus—A Mediated Legal Infosphere in Ancient Egypt

Ancient Egypt, in contrast to classical Greece,¹³⁸ 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, mediating between the gods and man is the king, and later, the scribal classes.

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

¹³⁸ See e.g., *supra* notes 41-42 and accompanying text.

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."¹³⁹

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 God's scribe, but also the medium itself is associated with the divine, and its origins deemed to be miraculous, appearing all at once.¹⁴⁰ So

¹³⁹ Nibley, *supra* note 85, at 112-13.

¹⁴⁰ See *id.* at 110-11. The birthplace of hieroglyphs appears to be the "sacerdotal school of Heliopolis." GEORGE 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 [h]ieroglyphics ["]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*.

Id. at 105 (quoting Walter B. Emery, *Tombs of the First Pharaohs*, SCIENTIFIC AMERICAN, July 1957, at 106, 112 (1957) and ALEXANDER SCHARFF & ANTON MORTGAT, ÄGYPTEN UND VORDERASIEN IM ALTERTUM 46 (1950)). "Von der I. Dyn. an sind die Ägypter im Besitze der

central is writing that it defines Egyptian society. “The circumspection of writing is part of society’s definition of itself”¹⁴¹ 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 'Memoranda books'. . . .”¹⁴² 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.”¹⁴³ 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.¹⁴⁴ Something besides the invention of a new technology—e.g., cursive, hieratic script on papyrus—dictates its prevalence and use in society. Consistent with Diebert’s theory of ecological holism, one

Hieroglyphenschrift [From the 1st Dynasty, the Egyptians were in possession of Hierglyphic writing].” *Id.* at 45-46. In Mesopotamia, writing appears just as suddenly. See *supra* note 99.

¹⁴¹ John Baines, *Literacy and Ancient Egyptian Society*, 18 *MAN* 572, 574 (1983).

¹⁴² Nibley, *supra* note 85, at 113.

¹⁴³ HAROLD A. INNIS, *EMPIRE AND COMMUNICATIONS* 15 (*revised by Mary Q. Innis*, 1972).

But see infra note 148 and accompanying text.

¹⁴⁴ See *supra* note 140.

Egyptologist observes, “changes in writing often imply or reflect changes in the society itself. . . . 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.”¹⁴⁵ 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.¹⁴⁶ 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.”¹⁴⁷ However, the increased survival rate of new documents can also explain the increased evidence of papyrus documents, which are fragile in nature.¹⁴⁸ Nonetheless, the change that is evidenced in the information environment, as manifested in the kind of documents, is not completely explained simply by reference to probability of survival.

¹⁴⁵ Baines, *supra* note 141, at 574.

¹⁴⁶ INNIS, *supra* note 143, at 24.

¹⁴⁷ ALAN GARDINER, EGYPT OF THE PHARAOHS: AN INTRODUCTION 60 (1978).

¹⁴⁸ *Id.*

In the Early Kingdom, prayers and biographical inscriptions dominate the literary landscape.¹⁴⁹ The prime medium is stone, particularly carvings in tombs 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.¹⁵⁰

Like the Greeks,¹⁵¹ 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 the written texts into oral culture, but the system . . . is probably a product of dynastic times.”¹⁵² Nonetheless, the compression of legal communication through pat formulas, stylization, and symmetry are the hallmarks of oral verse, or an oral tradition

¹⁴⁹ See generally MIRIAM LICHTHEIM, ANCIENT EGYPTIAN LITERATURE: A BOOK OF READINGS 15-80 (1973).

¹⁵⁰ *Id.* at 17.

¹⁵¹ See *supra* notes 50-78 and accompanying text.

¹⁵² Baines, *supra* note 141, at 579 (arguing that the complexity of the written metre suggests written origin, with perhaps some elements descending from an earlier, oral culture).

capitalizing on mnemonic devices.¹⁵³ 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.¹⁵⁴

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.”¹⁵⁵ Thoth is thus identified with the rhythmic and repetitive—*e.g.*, the cycles of the moon and in the heavens.¹⁵⁶ Indeed, Thoth is represented as the baboons who marked the rising of the sun.¹⁵⁷ 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.¹⁵⁸ Thus, in the Egyptian mind, writing is inextricably linked with the measuring time, suggesting the poetic metered structure, and is most appropriately inscribed in tombs to mark the eternities. Writing is also

¹⁵³ See *infra* note 257-265 and accompanying text.

¹⁵⁴ See LICHTHEIM, *supra* note 149, at 17. See also INNIS, *supra* note 8, at 13, 18.

¹⁵⁵ E.A. WALLIS BUDGE, THE EGYPTIAN BOOK OF THE DEAD: THE PAPYRUS OF ANI, at cxviii (1895, Dover Unabridged Republication 1969).

¹⁵⁶ *Id.*

¹⁵⁷ See STEPHEN QUIRKE, ANCIENT EGYPTIAN RELIGION 32 (1992).

¹⁵⁸ See BUDGE, *supra* note 155.

fundamental to the Egyptian's conception of law and justice.¹⁵⁹ Finally, it should be noted that Thoth is connected to secret knowledge or magic, and in one instance, when a "magic" book is misappropriated, the wrath of the Gods is incited.¹⁶⁰ 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.¹⁶¹ 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 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." 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

¹⁵⁹ See *Quirke, supra* note 157, at 66, fig.37 (depiction of Thoth recording the weighing of the scales of justice, upon which sit a baboon).

¹⁶⁰ THE WAY TO ETERNITY: EGYPTIAN MYTHS 55, 111, 117-21 (Stephen Adamson, Helen Cleary & Ruth Petrie eds., 1997)

¹⁶¹ See *supra* notes 86-89 and accompanying text.

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.¹⁶²

This contrasts starkly with the stone texts from the same dynasty, which are dominated with lists of declarative statements of accomplishments (e.g., “I have done justice for its lord, I have satisfied him with what he loves”)¹⁶³ and prayers beginning with the invocation “may” (e.g., “May offerings be given . . .”).¹⁶⁴ 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, *etc.*

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, 730-750 B.C., or the Third Intermediate Period.¹⁶⁵

¹⁶² Lichtheim, *supra* note 149, at 64, ¶ 3 (footnotes omitted).

¹⁶³ *Id.* at 17, ¶ 1.

¹⁶⁴ *Id.* at 16, ¶ 2.

¹⁶⁵ For a Chronology of Egypt, see JOSEPH & LENORE SCOTT, EGYPTIAN HIEROGLYPHS 88-89 (Hippocrene Books 1998) (1968).

[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 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.¹⁶⁶

¹⁶⁶ 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 “bureaucratic 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.

Id. (citing MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 339 (A.M. Henderson & T. Parsons eds., 1947)). In any event, the Hermopolis Code is not a code book of legislative

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 “If a man brings action against a man saying, ‘he dug at the foot of my house, he caused my house to fall’”¹⁶⁷ 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*, discussed below, which emphasized the importance of pleading as a prerequisite to judgment.¹⁶⁸

As additional evidence of that the Hermopolis Code is more akin to a case digest than a body 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.*”¹⁶⁹ 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 authority to resolve a specific issue of law. As final evidence of its connection to

enactments or even decrees. Rather it functions to formalize administration of justice with the consequence of increasing the power of the administrative bureaucracy.

¹⁶⁷ MATTHA, *supra* note 166, at 19, ln 9; 38, lns 20-21.

¹⁶⁸ See *infra* notes 208-210 and accompanying text.

¹⁶⁹ MATTHA, *supra* note 166, at 35, lns 20-21 (emphasis added).

particular disputes and emphasis on pleading, the Hermopolis “Code” contains many sample forms—e.g., “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”¹⁷⁰ 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,¹⁷¹ 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.¹⁷² “There is, indeed, no

¹⁷⁰ *Id.* at 21-22, lns 12-17 (sample of a “summons with respect to a house that is not released to the man to whom it was sold”).

¹⁷¹ 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* 177 (Anne K. Capel and Glenn E. Markoe, eds. 1997) (describing the Hermopolis Legal Code: “It is not an actual ‘law code’ but a collection of ‘case law’ dealing with specific (and sometimes quite minute) details.”).

¹⁷² See generally VERSTEEG, *supra* note 166, 7-9. But see Baines, *supra* note 141, at 578 (Baines states that in the early Old Kingdom, the only apparent use for *stelae* was for royal decrees). The discrepancy between Baines and other scholars’ observations about the beginning of Egyptian law are noted here and elsewhere. See *infra* note 174. Versteg, is a law professor, writing about Egyptology. Baines is an Egyptologist writing about law. Baine’s statements about


certain indication that any form of codified law existed before the Third Intermediate Period [1085–715 B.C.],¹⁷³ 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.”¹⁷⁴ In short, the development of legal literature of any kind in Egypt does not make any significant appearance until later dynasties, when hieratic on papyrus rather than epigraphic hieroglyphs



the earliest legal texts may also be at odds with those of his fellow Egyptologist, C.J. Eyre. See *infra* note 174 and accompanying text.

¹⁷³ See SCOTT, *supra* note 165.

¹⁷⁴ Eyre, *supra* note 171, at 92 (1984) (original footnotes omitted). *But see* VERSTEEG, *supra* note 166, at 9 (citing David Lorton, *The Treatment of Criminals in Ancient Egypt*, 20 J. ECON. & SOC.HIST. ORIENT 2,5 (1977)) (discussing recent findings of codes from the Twelfth Dynasty). It is interesting that 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 141, 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, 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 172.

writings were the more common form. As in the case of Egyptian wisdom literature,¹⁷⁵ the use of papyrus corresponds to the emergence of the “Code.”

In addition to the chronological association, the term “law” bears a etymological relationship to “papyrus.” Hieroglyphic and hieratic signs had three principal functions—as phonograms, ideograms, and 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.¹⁷⁶ For instance, the determinative for *law* () is a depiction of a papyrus scroll tied with a string in the middle.¹⁷⁷

Sign	Determinative	Hieroglyphic	Hieratic
Scroll	Writing, Abstract Concepts		

¹⁷⁵ See *supra* note 163-164 and accompanying text.

¹⁷⁶ See JAMES P. ALLEN, MIDDLE EGYPTIAN: AN INTRODUCTION TO THE LANGUAGE AND CULTURE OF HIEROGLYPHS 3 (2nd rpt. 2000).

¹⁷⁷ *Id.* at 462. Hieratic also used determinatives and is visually similar to hieroglyphic text. See ALLEN, *supra* note 176, at 6. See also STEPHEN FREYER, BASIC LESSONS IN HIERATIC: LESSON 2 – COMMON DETERMINATIVES, at <http://home.prcn.org/sfryer/Hieratic/lesson2.html> (last modified Feb. 11, 2005).

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.*¹⁷⁸ Similarly, while not using a scroll as a determinative, *land register* uses the determinative of a binding tie (), which binds the scroll, and which is a determinative of the concept of *papyrus scroll*.¹⁷⁹

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

¹⁷⁸ See *id.* at 453-472. For *rule, plan, and wealth*, see MARK COLLIER & BILL MANLEY, HOW TO READ EGYPTIAN HIEROGLYPHICS 157, 159, & 160 (1998). See also EGYPTIAN BOOK OF THE DEAD *supra* note 155, at 2, 4, 5, 8, 9, 13, 14, 21, 22, 23, 25, 27, 28, 29, 30, 31, 38, 42, 47, and 52 (for all terms after *wealth*).

¹⁷⁹ Compare ALLEN, *supra* note 176, at 445 with *id.* at 457.

sitting in his judgement [sic] hall in front of four tables each with ten rolls on it.”¹⁸⁰

In the *Book of the Dead*, the judgment is described, as transliterated: “Now those *guardians* who give *judgment* the apes are Isis [and] Nephthys.”¹⁸¹ 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.¹⁸²

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.¹⁸³ For the Egyptian mind, as molded by written language,¹⁸⁴ and in contrast to the Classical Greeks, the essence of their everyday commerce, societal structure, and existence was graphic in nature, and particularly dependant upon the medium of papyrus rather than stone. The point is all the

¹⁸⁰ MATTHA, *supra* note 166, at xi (description but no illustration).

¹⁸¹ EGYPTIAN BOOK OF THE DEAD, *supra* note 155, at 52 (emphasis added).

¹⁸² *See supra* note 155.

¹⁸³ Indeed, the most common determinative is that of the scroll. *See* COLLIER & MANLEY, *supra* note 178, at 6.

¹⁸⁴ “Minds are formed by language” JEAN JACQUES ROUSSEAU, *ÉMILE* 73 (Barbara Boxley trans., J.M. Dent & Sons 1911) (1780) (cited by DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, in *supra* note 50, at 170). Significant criticism has been aimed at the influence of written language in relation to the spoken word. *See infra* notes 201-203 and accompanying text.

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* (Ē) or that which comes out of the mouth.¹⁸⁵ While writing on papyrus and speaking bear etymological relationships to law, this author finds no reference to legal concepts using a determinate signifying *stele*—for which there is such a determinative and ideographic sign,),¹⁸⁶ 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 the 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).¹⁸⁷ Since we have little other evidence of the linguistic breadth or depth of the spoken language (the subtleties of

¹⁸⁵ Compare ALLEN, *supra* note 176, at 423, with *id.* at 457, 460, 461, 465, 467, and 469 and COLLIER & MANLEY, *supra* note 178, at 159.

¹⁸⁶ *Id.* at 438.

¹⁸⁷ 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 201-202 and accompanying text.

expression that are not adequately captured phonetically in writing), this question may be impossible to answer. Sometimes, determinatives may have been omitted from inscriptions.¹⁸⁸ However, in a number of instances, the phonetic pronunciation would render many words, expressed in hieroglyphs, as homonyms.¹⁸⁹

Hieroglyphs	Shared Phonograms	Shared Phonetic Pronunciation	Meaning
		<i>Sšmw</i>	(noun) situation, procedure, conduct
		<i>Sšmw</i>	(noun) leader, guide, pilot
		<i>ht</i>	(noun) thing, property
		<i>ht</i>	(noun) fire
		<i>Wd</i>	(verb) command
		<i>Wd</i>	(noun) stele
		<i>Wd</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 glyphs. For instance, the concept *property* has the same phonograms as *fire*. In spoken Egyptian, *property* may or

¹⁸⁸ See COLLIER & MANLEY, *supra* note 178, at 5.

¹⁸⁹ See ALLEN, *supra* note 176, at 457, 464, and 468 (for examples from following table).

not be the same as *fire* (vowel sounds and inflections are not typically captured in the phonetic content of the hieroglyphs).¹⁹⁰

The point is that we cannot distinguish phonetically between the two when hearing the hieroglyphs or hieratic signs read out loud.¹⁹¹ A scribe orally reading from hieroglyphs or hieratic would have to find some way of conveying the subtleties of meaning to his audience.¹⁹² In essence, the process of semantic interpretation must precede vocalization—the exact opposite of reading with the Greek alphabet.¹⁹³ Even if the oral reader made the effort to convey to his audience the general meaning of the determinative (through vowel sounds,

¹⁹⁰ See SCOTT, *supra* note 165, at 40-41.

¹⁹¹ 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 *Ernst Grumach, supra* note 56, 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, WRITING WITHOUT LETTERS, supra* note 56, at 130, 177. 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.*

¹⁹² Besides hieroglyphic and hieratic scripts, ancient Hitite, 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 56, 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.

¹⁹³ See *supra* note 61 and accompanying text.

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* (𓂏𓂏, pronounced *hp*) to *thing* (𓂏𓂏),¹⁹⁴ 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 () as a determinative is to indicate abstraction.¹⁹⁵ 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.¹⁹⁶ 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,¹⁹⁷ especially in light of the fact that probably less than one percent of the

¹⁹⁴ See ALLEN, *supra* note 176, at 462, 464.

¹⁹⁵ See COLLIER & MANLEY, *supra* note 178, 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.”).

¹⁹⁶ See *supra* note 50 and accompanying text.

¹⁹⁷ See Baines, *supra* note 141, at 581 (on role of scribal classes and “images of Egypt as a land dominated by priests”).

Egyptian population was literate.¹⁹⁸ 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.”¹⁹⁹

Predictably, the Egyptian hieroglyph for *hidden* includes the determinative of the scroll.²⁰⁰ 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 of the dispersal of people unified as bodies and the beginning of their enslavement”²⁰¹ The danger is the diversion of “presence of thought [from]

¹⁹⁸ *Id.* at 584.

¹⁹⁹ *Id.* at 587.

²⁰⁰ See, e.g., *EGYPTIAN BOOK OF THE DEAD*, *supra* note 155, 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*).

²⁰¹ DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, *in supra* note 50, at 170.

speech” to “the sign of the thing itself.”²⁰² 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.”²⁰³ 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.²⁰⁴

²⁰² DERRIDA, “. . . *That Dangerous Supplement . . .*”, in *supra* note 50, at 144.

²⁰³ 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 and *supra* note 166.

²⁰⁴ 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, *End of the Book and Beginning of Writing*, *supra* note 50, at 10 (“the practice of scientific writing challenges intrinsically and with increasing profundity the ideal of phonetic writing and all its implicit metaphysics . . .”).

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. However, 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 Pharonic Period.”²⁰⁵ Modern scholars 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.²⁰⁶ The problem is that some modern scholars may mistakenly dismiss forms of literature as not constituting “law.”²⁰⁷

²⁰⁵ Eyre, *supra* note 171, at 92 (footnotes omitted) (“In this [ancient Egyptian law] differs radically from other legal system of the Ancient Near East, where the numerous codes stand at the center of attention.”). See also VERSTEEG, *supra* note 166, at 8-9, Aristide Théodoridès, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* 291, 308(2nd ed., J.R. Harris ed., 1971) (“We have, after all, collections of Sumerian, Akkadian, Hittite, and Neo-Babylonian laws—but nothing of the kind from Egypt.”), *id.* at 320 (“The Nile valley has given us no code, nor any copious theoretical treatises . . .”), JOHN A. WILSON, *CULTURE OF ANCIENT EGYPT* 172 (1951).

²⁰⁶ See *infra* notes 312-327 and accompanying text.

²⁰⁷ For similar discussion of Greek use as Homer as a source for law, see *supra* notes 64-67 and accompanying text.

Modern scholars do mine literary tales for evidence of law and social norms.²⁰⁸ 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.²⁰⁹ Even if

²⁰⁸ See, e.g., VERSTEG, *supra* note 166, at 15-17, 28-35, 180-85 (*Tale of the Eloquent Peasant*). See also, Eyre, *supra* note 171 ("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.").

²⁰⁹ See VERSTEG, *supra* note 166, 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.

fiction,²¹⁰ 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.²¹¹

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 to be case law rather than proper code.²¹² However, “case law” does not appear to be a completely adequate description either. The doubts of a noted Egyptologist, close to the text, is 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.”²¹³ It is neither code, nor case law, nor an exhaustive treatise. Why so much trouble in

²¹⁰ The fact that much of the literature is fiction does not appear to be a problem for modern scholars—at least historians.

If it may 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 147, at 61 (cited in VERSTEG, *supra* note 166, at 12, n.52).

²¹¹ VERSTEG, *supra* note 166, at 28-35.

²¹² See *supra* notes 166-174 and accompanying text.

²¹³ Johnson, *supra* note 171, at 215 n.18.

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.”²¹⁴ 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, “[i]t is pointed out that the records of all judgments are kept in the vizier’s archives, where they could certainly have been consulted.”²¹⁵ A specific instance from the Thirteenth Dynasty is noted from Egyptian text, although probably copied in the Eighteenth Dynasty:²¹⁶ “See, it is a *maxim* found in the

²¹⁴ *Id.* at n.19. See also *supra* notes 90-112 and accompanying text.

²¹⁵ Théodoridès, *supra* note 205, 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” Faulkner, *supra* at 22-23 (footnotes omitted).

²¹⁶ Théodoridès, *supra* note 205, at 307-08.

'collection of Memphis'."²¹⁷ Another example from apparently 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)."²¹⁸ 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 a suitable translations in light of modern notions of law, and once again highlights the gnostic 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:

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 Ramesses III!'

²¹⁷ *Id.* at 308 (emphasis added).

²¹⁸ *Id.* at 307 (emphasis added).

And a copy was made for the Grand Tribunal of Thebes before numerous witnesses.²¹⁹

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 [*sic*] judgements, for he who must practice justice before all men is the vizier . . . *Do not act as you please in cases where the law to be applied is known.*”²²⁰

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.”²²¹ The contrast with our own day is striking: “We believe that the world

²¹⁹ Johnson, *supra* note 171, 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).

²²⁰ Théodoridès, *supra* note 205, at 309 (emphasis added).

²²¹ VERSTEEG, *supra* note 166, at 66-7 (citing GARDINER, *supra* note 166, 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).

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.”²²² 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.”²²³ 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.”²²⁴ 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”²²⁵ In short, the use of written precedent fits the Egyptian outlook on the world and their information ecosphere.

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

²²² Byron E. Shafer, *Introduction to JOHN BAINES, LEONARD H. LESKO & DAVID P. SILVERMAN, RELIGION IN ANCIENT EGYPT: GODS, MYTHS AND PERSONAL PRACTICE 3* (Byron E. Shafer ed. 1991).

²²³ QUIRKE, *supra* note 157, at 70.

²²⁴ FRANKFORT, *supra* note 140, at 110 (also cited by NIBLEY, *supra* 85, at 110).

²²⁵ Baines, *supra* note 141, at 176.

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.²²⁶

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.²²⁷ “[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

²²⁶ John Ray, *Literacy in Egypt in the Late and Persian Periods*, in *LITERACY & POWER IN THE ANCIENT WORLD* 58-9 (Alan K. Bowman & Greg Woolf eds., 1st paperback ed. 1996).

²²⁷ Théodoridès, *supra* note 205, 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.”).

explain legal matters. The ancient Egyptians used commonplace language for legal documents and had only a few imprecise technical terms relating to law.”²²⁸ 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.²²⁹ 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.²³⁰ Perhaps, in the end, the mysterious nature and subtleties of meaning, made possible only through written determinatives and ideograms, ultimately are counterbalanced by restricting technical vocabulary and emphasizing common terms. The disparity of potential meaning between 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

²²⁸ VERSTEEG, *supra* note 166, at 4 (footnotes omitted).

²²⁹ See *supra* note 205 and accompanying text.

²³⁰ See *supra* notes 176-203 and accompanying text.

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."²³¹ 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.²³² Ancient Egypt is limited by its graphic boundaries into relative isolation.²³³ The Hermapolis 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.²³⁴

Bureaucratic administration means fundamentally the exercise of control on the basis of knowledge. . . . This consists on the one hand in

²³¹ INNIS, *supra* note 143, at 24.

²³² *Id.* at 24-25.

²³³ Baines reflects on Egypt's linguistic isolation:

[I]t is clear that Egypt, the largest centralized state of its time, was set off by 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 141, at 576.

²³⁴ *See supra* note 166.

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.²³⁵

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 (and increased use of papyrus and writings in general)—including conquest, mutual self-interest, and even tax breaks:

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.

²³⁵ WEBER, *supra* note 166, at 339.

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.²³⁶

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.²³⁷

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."²³⁸ On the one hand, language becomes an important factor in

²³⁶ Dorothy J. Thompson, *Literacy and Power in Ptolemaic Egypt*, in LITERACY & POWER IN THE ANCIENT WORLD, *supra* note 226, at 77-78.

²³⁷ *Id.* at 82.

²³⁸ Baines, *supra* note 141, at 593 ("As with any invention, full realization of its possibilities comes very slowly, if at all.").

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.

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 is also present. The nature of the Celtic and Icelandic legal infospheres is founded in cultural memory, where poets and bards orally transmit custom and law. Such a tradition favored the use of precedent and comports with later English traditions of pleading.

Like the Egyptian and Mesopotamian civilizations, legal information is mediated, but not through a scribal class until the introduction of Christianity and monasticism. Rather it is mediated through the *filiada* 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 device rather than the written word, even though such technology is

available 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*,²³⁹ the ancient Irish legal tract dating from 438 to 441 A.D.,²⁴⁰ and so launches an extraordinary text at odds with the widely held belief that the common law tradition commences

²³⁹ 1 HIBERNIÆ LEGES ET INSTIUTIONES ANTIQUÆ (ANCIENT LAWS AND INSTITUTES OF IRELAND) 7 (William S. Hein Co. 1983) [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*.

²⁴⁰ Although the date of the *Senchus* is fixed by W. Neilson Hanock, 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, LINGUISTIC AND HISTORICAL VALUE OF THE IRISH LAW TRACTS 17 (1943) (from 29 PROCEEDINGS OF THE BRITISH ACADEMY 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*).

with Glanville and Henry II.²⁴¹ The “Poem” is not all in verse, probably being closer to the “rhythmical alliterative prose” used in Celtic sagas.²⁴² In Irish sagas and epics, prose is used with the narrative, but verse with dialogue.²⁴³ Interestingly, in the *Senchus*, it is not just any dialogue that is put into verse, but the judgment itself.²⁴⁴ 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

²⁴¹ KURT VON S. KYNELL, *SAXON AND MEDIEVAL ANTECEDENTS OF THE ENGLISH COMMON LAW* 1-2 (2000) (citing PAUL BRAND, *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 *Damweiniau 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*, at xxiv, xxix, and 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. The transition from oral verse to parchment, as experienced by the *Senchus*, overshadows original material with gloss.

²⁴² See BINCHY, *supra* note 240, at 13-14.

²⁴³ PETER BERRESFORD ELLIS, *A BRIEF HISTORY OF THE DRUIDS* 200-01 (1st Carroll & Graf ed. 2002). Similar literary forms are used in ancient Sanskrit and Welsh. *Id.*

²⁴⁴ See, e.g., 1 *ANCIENT LAWS OF IRELAND*, *supra* note 239, at 9-13.

century, the versification of the original text would be disturbed.”²⁴⁵ Scholars have identified additional passages of the *Senchus* that evidence meter, and were originally in verse,²⁴⁶ 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.”²⁴⁷ Regardless of its eclectic form, the ancient text, particularly its oldest elements, is poetic and does contain genuine verse.²⁴⁸

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.²⁴⁹ 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.²⁵⁰ The judgment is pronounced by the *Brehon* Dubhthach Mac ua

²⁴⁵ W. Neilson Hancock, *Preface to the 1865 Edition*, 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at xli.

²⁴⁶ *Id.* at xli. 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.

²⁴⁷ *Id.* at xxxiii (quoting Dr. O’Donovan, a principal translator of the *Senchus*).

²⁴⁸ *See id.* at xxxix-xli.

²⁴⁹ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 2-7.

²⁵⁰ *Id.* at 7.

Lugair, the royal poet of the island, whose sentence is given in some 60 lines of verse.²⁵¹

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*.
Nuad is adjudged to Heaven,
And it is not to death he is adjudged.²⁵²

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 Poets.”²⁵³

²⁵¹ *Id.* at 7-13.

²⁵² *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.*

²⁵³ *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 letter” or from

Our 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.²⁵⁴ In ancient times, such a system may have been more economical—a decision has

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.

²⁵⁴As 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 249-253 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 239, 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 239, 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 Richard T. Oakes, *Introduction to Senchus Mor*, in 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at vi, and W. Nielson Hancock, *supra* note 245, at xi. In contrast the Book of Aicill, was set down in about 642 A.D. *Introduction to the Book of Aicill*, 3 ANCIENT LAWS OF IRELAND, *supra* note 239, at lxxvii. Perhaps the intervention of Christianity, Latin influences (including Roman law) and monasticism explain the change over two centuries. See *infra* notes 301-302 and accompanying text.

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 these are the three rocks by which the judgments of the world are supported.²⁵⁵

In the gloss that accompanies the text, both memory and poetry are referred to as the “preserving shrine of” the *Senchus*.²⁵⁶ 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

²⁵⁵ 1 ANCIENT LAWS OF IRELAND, *supra* note 96, at 31.

²⁵⁶ *Id.* at 37, 39.

the oldest stratum is prefaced by words *amail arindchain fénechas*, 'as the *fénechas* sings (or 'recites') it'.

In the *fénechas* 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.²⁵⁷

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.²⁵⁸ In addition, the *Annals of Ulster*, dating from 444 A.D., but unwritten until the fifteenth century, records accurately some eighteen astronomical events between 496 and 884 A.D. when checked by modern calculations.²⁵⁹ Some scholars have argued that law, when dependent on memory, is flexible and amenable to necessary change,²⁶⁰ however, poetic verse

²⁵⁷ BINCHY, *supra* note 240, at 13. The Greeks also sang their laws and customs. See *supra* notes 68-71 and accompanying text.

²⁵⁸ *Id.* at 13, 14 ("[I]t [legal verse] has uses for the modern student also, since metre often enables him to emend a corrupt manuscript reading.").

²⁵⁹ ELLIS, *supra* note 243, at 204.

²⁶⁰ 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,

is remarkably stable. “Students of Gaelic classic verse are often amazed by the consistency of the product over several centuries.”²⁶¹ In some instances, verse may make law too rigid.²⁶² Besides the stability of verse as a medium, the *filid* who preserved its use are notably conservative.²⁶³ The verse composed for legal texts has “utilitarian rather than a literary value, having been composed primarily for mnemonic purposes.”²⁶⁴ The poet’s role is as 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.’”²⁶⁵

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.’”²⁶⁶ The presence of case law in the *Senchus* prior to

among others, MARC BLOCH, *FEUDAL SOCIETY* 113-14 (trans. L.A. Manyon, 1961) and THEODORE PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 308 (5th ed. 1956)).

²⁶¹ Derick S. Thompson, *Gaelic Learned Orders and Literati in Medieval Scotland*, 12 SCOTTISH STUD. 57, 74 (1968).

²⁶² See Clanchy, *supra* note 260, at 75.

²⁶³ See Seán Mac Airt, *Filidecht and Coimgne*, 28 ÉRIU 139, 141, (1958).

²⁶⁴ BINCHY, *supra* note 240, at 14. For discussion of common meters, see *id.*

²⁶⁵ Clanchy, *supra* note 260, at 169 (footnote omitted).

²⁶⁶ BINCHY, *supra* note 240, at 15.

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.²⁶⁷ 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.²⁶⁸ “Were poetry to be suppressed . . . with no history, no ancient lays [possibly, “laws”],²⁶⁹ save that each had a father, nothing of any man would be heard hereafter.”²⁷⁰ Indeed, not only is knowledge of ancient Irish preserved by the *filid* but it is controlled by them. “Until Patrick

²⁶⁷ Thompson, *supra* note 261, 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.

²⁶⁸ *See generally id.*

²⁶⁹ One of the translations of “lay,” although an obscure one, is “law.” See 6 OXFORD ENGLISH DICTIONARY, *supra* note 62, at 122 (“law; esp. religious law”). See also *infra* note 329 (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.

²⁷⁰ Thompson, *supra* note 261, at 71 (quoting the Irish poet Gilla Brighde Mhac Con Midhe).

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.”²⁷¹ The *Filid* as a class of druids probably can 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 never be effectively controverted.”²⁷² It is interesting that from the Druids’ point of view, law reduced to writing is less, rather than more, stable.

Given the Druid’s aversion to writing, the recitation of their arts, including law, for St. Patrick to record is all the more remarkable.²⁷³ 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.”²⁷⁴ It is also described as the “great recital . . . which the poets inscribed on flagstones.”²⁷⁵ Given the negative criticism of the translations by

²⁷¹ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, 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.*

²⁷² T.W. ROLLESTON, CELTIC MYTHS AND LEGENDS 84 (Dover ed. 1990) (2nd rev. ed. 1917).

²⁷³ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 15.

²⁷⁴ *Id.* at 38 n.1, 39.

²⁷⁵ *Id.* at 38 n.1.

glossators of the *Senchus*,²⁷⁶ 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.²⁷⁷

²⁷⁶ BISHY , *supra* note 240, 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 later glosses and commentaries has been responsible for much confusion on the linguistic side.”). See *also* W. Neilson Hancock, *supra* note 245, at xlii-xlvi (discussing unreliability of translations and the challenge of reconstructing the text, often using the glosses which were in later, more readable dialects, for printing).

²⁷⁷ Irish scribes did, however, write on stones. In the Book of Aigill (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 “chalk book.” 3 ANCIENT LAWS OF IRELAND, *supra* note 239, at 89. See *also* Mac Airt, *supra* note 263, at 146, 148 (ogham-stones were used for memorials, boundaries, chronicles, and *coimgne*) (see *infra* text accompanying notes 322-324 for discussion of *coimgne*), Rolleston, *supra* note, 272, at 234 (lost staves of wood or “staff book” may have recorded the *Tain*), and Kynell, *supra* note 241, at 84-5. 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. 3 ANCIENT LAWS OF IRELAND, *supra* note 239, 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 243, 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 MANKS CROSSES WITH

“The place of this Poem” is identified explicitly in the text as Teamhair and Rath-guthaird “where the stone of St. Patrick is at this day.”²⁷⁸ The *Rath* in *Rath-guthaird* 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 hill-fort,”²⁷⁹ and *Senchus* scholars note the remarkable number of *raths* in the region.²⁸⁰ Recitation and recording the *Senchus* “among the stones” would also correlate with the statement from the *Senchus* proper that “Nine persons [a holy number]²⁸¹ were appointed to arrange this *book*.”²⁸² In any event there is reason

THE RUNIC INSCRIPTIONS AND VARIOUS READINGS AND RENDERINGS COMPARED 57-60 (2nd 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 LIVE WAS LIKE AMONG DRUIDS AND HIGH KINGS: CELTIC IRELAND AD 400 – 1200, at 32 (Time-Life Books eds., 1998).

²⁷⁸ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 3.

²⁷⁹ 8 OXFORD ENGLISH DICTIONARY, *supra* note 62, at 165.

²⁸⁰ W. Neilson Hancock, *supra* note 245, at xxviii-xxxi.

²⁸¹ Kevin Crossley-Holland, *Introduction*, in THE NORSE MYTHS, at xxiv-xxv (retold by Kevin Crossley-Holland 1980). Nine is also the number of petitions in the Egyptian *Tale of the Eloquent Peasant*. See *supra* note 209 and accompanying text. Apparently, *Cormac’s Glossary* another important Irish legal text from ninth or tenth century B.C. refers the *Senchus* as the “knowledge of the nine.” W. Neilson Hancock, *supra* note 245, at xl.

²⁸² 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 17 (emphasis added). It is unlikely that the Gaelic word for “book” was confused with “flagstone” or is etymologically related (which would account for the conflicting accounts of producing both a book and writing on flagstone).

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,

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 GAELIC LANGUAGE (2nd ed. Rev. 1911), available at <http://www.ceantar.org/Dicts/MB2/index.html> (under *lebhar*, 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 239, 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. MACBAIN, *supra* (under *cairt*) and HARPER’S LATIN DICTIONARY: A NEW DICTIONARY 474 (ed. E.A. Andrews, 1879) (under *cortex*). 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.

promulgated his laws and ordinances, which were received by the surrounding multitude with awful silence and attention.²⁸³

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.”²⁸⁴ One of the three compilers of the *Breithne Neimhidh* (also a significant work of Brehman law) is Athairné, “described as an insolent satirist from the *Hill* of Howth.”²⁸⁵ The ancient Irish have similar traditions and gather at their *raths*.²⁸⁶ 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

²⁸³ JAMES JOHNSON, VIEW OF THE JURISPRUDENCE OF THE ISLE OF MAN 4 (1811). The Irish held there courts on “a hill called *Conoc an Eric, viz. the Hill of Pleas.*” *Id.* at 5 (citing Macqueen on the Western Isles).

²⁸⁴ See Mac Airt, *supra* note 263, at 152 n.1 (citing the O'Donovan's edition of the *Battle of Mag-Rath*).

²⁸⁵ ELLIS, *supra* note 243, at 166 (emphasis added).

²⁸⁶ 8 OXFORD ENGLISH DICTIONARY, *supra* note 62, at 165 (entry for *rath*) (quoting Edmund Spencer, “There is a great use amongst the Irish to make greate assemblies together upon a rath or hill.”).

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.”²⁸⁷

Specifically, it is the “Law Rock” a “raised spot at the Althing” where the “Lawspeaker” recites the law code.²⁸⁸ Interestingly, glossators of the *Senchus* use the image of three rocks to describe the foundational basis for ancient Irish law.²⁸⁹ Finally, note that Irish High-Kings are crowned upon the Stone of Destiny at Tara.²⁹⁰ 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

²⁸⁷ THE SAGAS OF ICELANDERS: A SELECTION 737 (Örnólfur Thorsson, ed. 2000). See also JESSE L. BYOCK, FEUD IN ICELANDIC SAGA 216 (1982).

²⁸⁸ SAGAS OF THE ICELANDERS, *supra* note 287, at 750-51. In Icelandic, *lögsögumadur* or *lögmadr* is translated as “lawspeaker” and literally means “the man who recites the law.” *Id.* at 51.

²⁸⁹ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 39 (“For these are the three rocks by which the judgments of the world are supported.”).

²⁹⁰ See ROLLESTON, *supra* note 272, at 105. Apparently, the stone was lent to Scotland for the crowning of Fergus the Great in the seventh century, but was never returned. Instead it ended up in England, as the Stone of Scone, or the Coronation Stone in Westminster Abby. *Id.*

surviving manuscripts, this task would require a prodigious memory in addition to expert knowledge.”²⁹¹ The ancient Icelandic *Grágás*, recorded in the twelfth century A.D., made provision to ensure that the speaker was well versed in his task.

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.²⁹²

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 poets in the highest regard, and let them sit on the bench opposite his high seat.”²⁹³ What we would regard as primitive legal pleadings is often delivered in verse. Egil, one of Iceland’s most prominent literary, and historical,

²⁹¹ WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 18 (1990).

²⁹² 1 *LAWS OF EARLY ICELAND: GRÁGÁS* 188 (Andrew Dennis, Peter Foote & Richard Perkins trans. 1980) [hereinafter *GRÁGÁS*].

²⁹³ *Egil’s Saga*, in *SAGAS OF THE ICELANDERS*, *supra* note 287, at 15.

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 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.²⁹⁴

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].²⁹⁵

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

²⁹⁴ *Id.* at 98.

²⁹⁵ *Saga of the Confederates*, in *SAGAS OF THE ICELANDERS*, *supra* note 287, at 489.

outcome of this case.”²⁹⁶ 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. The Gaelic term *fili* or *filid* is sometimes translated as “bard” or “poet,” but it is not an exact fit.²⁹⁷ 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.”²⁹⁸ However, originally *filid* provides multiple functions—including king, jurist, poet, literary editor, historian, genealogist, *etc.*—which are eventually divested into differing fields of specialization.²⁹⁹ In essence, *filid* are the sources of all branches of knowledge. In addition, even after branches of learning have separated, there are shifts between the various functionaries.

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

²⁹⁶ *Id.* at 491.

²⁹⁷ Mac Airt, *supra* note 263, 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.”).

²⁹⁸ *Id.* at 140. See generally Thomson, *supra* note 261.

²⁹⁹ Mac Airt, *supra* note 263, at 140-42. See generally, ELLIS, *supra* note 243, at 167-250.

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 *filii* 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.³⁰⁰

One modern scholar concludes that this division of function is impacted by three major forces in Irish history—Christianity and the Norse and Norman

³⁰⁰ Thomson, *supra* note 261, 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”

1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 19. See also Mac Airt, *supra* note 263, at 140-41.

conquests.³⁰¹ The Norse and Norman invasions interrupt the influence of the *Brehons*, at least in Scotland. Christianity introduced monasticism, and with it emphasis on monasteries and scriptorium—and the production of parchment for purposes of writing.³⁰² It may also be impacted by another significant force, the increasing use of writing. With the end of the *filid* 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.”³⁰³ 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 their judicature” in Ireland in favor of other classes of professional remembrancers, the “measure of

³⁰¹ See Mac Airt, *supra* note 263, 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 Thomson, *supra* note 261, at 75.

³⁰² For an account of the literary impact Irish monasticism, see generally THOMAS CAHILL, *HOW THE IRISH SAVED CIVILIZATION 147-96* (1995).

³⁰³ See BINCHY, *supra* note 240, at 15.

pleading-times, breathings, and speech” is determined.³⁰⁴ As one glossator explains, “The time allowed for advocates was divided by breathings, about eighteen being considered equivalent to a minute.”³⁰⁵ 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.³⁰⁶

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

³⁰⁴ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 19.

³⁰⁵ *Id.*, at 18 n.2.

³⁰⁶ *Clanchy*, *supra* note 260, at 175 (citations omitted).

breathamh or breitheamh, pl. breitheamhuin (pronounced brvn), in OIr. brithem, gen. brithemon 'judge', f. breth judgment."³⁰⁷ However, *breth* is also used historically in the same context as *breath*.³⁰⁸ Anciently, the *Brehon* is the "breather" of judgments, and pleadings. His breath has to be measured. Metered verse facilitates this role.³⁰⁹

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

in French as *conteur* and in Latin as *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 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

³⁰⁷ 1 OXFORD ENGLISH DICTIONARY, *supra* note 62, at 1087.

³⁰⁸ *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).

³⁰⁹ "[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 263, at 151 n.1.

make them sound right. In the few surviving fragments of early English pleading rhythmical and alliterative formulas are very evident.³¹⁰

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 Salique is in Germany,

Between the floods of Sala 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; . . .³¹¹

³¹⁰ Clanchy, *supra* note 260, at 175 (citing, among others things, 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 court." 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 85. Francis Bacon also makes reference to "plain 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 nevertheless I have not affected to neglect them" FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND *B2 (De Capo Press 1969) (1630).

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 consisted simply of aphorisms and procedure—rather than something anything 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 *filio* are not just supposed to preserve history and law, they also synthesizes it. "He is no poet who does not synchronize and harmonize all of the stories."³¹² However, the notion that the *filio* are literary editors has been rejected

³¹¹ 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 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.

³¹² Mac Airt, *supra* note 263, at 142 (citing an ancient document whose translation is in dispute).

by at least one prominent scholar.³¹³ Rather the *filid* serve as an “expert witness in historical matters.”³¹⁴ “The learned historian who does not know the prerogatives and prohibitions of these kings, is not entitled to visitations or to sell his compositions.”³¹⁵ History, for purposes of analogy, is linked with law and precedent.³¹⁶ The *filid* (or *filli*) are supposed to use the tales to instruct, and not just for entertainment:

[T]he *filli*'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 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 *fo-scéla* ('anecdotes') were required of the four higher grades of poets only, since these alone were likely to have the ear of more important nobles.³¹⁷

³¹³ *Id.*

³¹⁴ *Id.* at 146.

³¹⁵ ELLIS, *supra* note 243, at 201 (citing the *Leabhar na gCeart* or “Book of Rights”).

³¹⁶ Mac Airt, *supra* note 263, at 145.

³¹⁷ *Id.* at 150 (citations omitted).

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 Roscadah* or “Book of Aphorisms.”³¹⁸ 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 call ‘leading cases’.”³¹⁹ The *Senchus*, at least until the time of its recitation and recording, consisted of judgments linked “together in one consecutive poem.”³²⁰ 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

³¹⁸ BINCHY, *supra* note 240, at 15 n.1.

³¹⁹ *Id.* at 15.

³²⁰ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, 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 of *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) and *id.* at 75 (use of verse in gloss).

what the ancient *filid* (also described as poets, bards, *senchaid*, rhymers, remembrancers, *brithem*, etc.) studied.³²¹ 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.’”³²² Other interpretations of *coimgne*, as discussed by Mac Airt, include “chronicles”³²³ and the “universal knowledge of human affairs, which the sun-god by his perpetual round brings to light in all parts of the earth.”³²⁴ Binchy also uses the term “legal lore” to describe the applicable field of the *filid*.³²⁵ In fact, the initial recitation to St. Patrick includes “all

³²¹ See generally Mac Airt, *supra* note 263, at 139-41. “[T]he character of the *filid* is an evolutionary one, and the equation of the term with ‘poet’ (even in a sixteenth-century connotation) is apt to be misleading.” 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 260 and CLANCHY, *supra* note 4, at plate XX (illustration of Anglo-Saxon remembrancers placing their testimony in written form upon St Guthac’s altar). The term “Rymor” is also referred to by Thomson, *supra* note 261, at 74.

³²² Mac Airt, *supra* note 263, at 143.

³²³ *Id.* at 147-148.

³²⁴ *Id.* at 148.

³²⁵ BINCHY, *supra* note 240, at 13 (“According to Irish tradition the older custodians of the legal lore were the *filid*.”).

professors of the sciences in Erin . . . and each exhibited his art,³²⁶ 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.³²⁷ This is a similar pattern to the Mesopotamian and Egyptian traditions.³²⁸ The holistic nature of Celtic knowledge, including law, necessitates that the field of applicable material to facilitate the *filid*'s functioning as lawspeakers probably included tales, chronologies, poetic verse, *etc.*³²⁹ According to the gloss, all told the *Senchus* include some 822 “stories.”³³⁰ The

³²⁶ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 15.

³²⁷ See ROLLESTON, *supra* note 272, at 110, 112-18.

³²⁸ See *supra* notes 85-89, 160, and 205-207 and accompanying text.

³²⁹ An account of what was in the *Senchus* at recitation is contained in the gloss. See 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 45-6.

And he [St. Patrick] left them after this extemporaneous recital, because it was acquired through great knowledge and application; and *also the registering of genealogies of the men of Erin, and the artistic rules of poetry, and the Duili sloinnté, and Duili fedha, and story-telling with lays, viz., the Allamh 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-furmidh 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.

³³⁰ *Id.*

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,³³¹ this may have important implications for the development of the common law, or at least Anglo-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 first suggested by Kurt von S. Kynell.³³² “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].”³³³ Indeed ancient systems of law similar to Brehmen 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

³³¹ See ELLIS, *supra* note 243, at 191 (“the word of the Druid as arbiter of the law had equal weight in Galatia, Gaul, Britain or Ireland . . .”).

³³² KYNELL, *supra* note 241.

³³³ *Id.* at 85. For the traditional view as to the start of the common law, see *supra* note 241 and accompanying text.

principles. As well as Irish and Welsh systems there survive references to other Celtic legal systems. Geoffrey of Monmouth mentions the legendary Molmuntine Law of Cornwall which was concerned with the protection of the weak against oppression. Between AD 858-862 Domnuil I of Alba (Scotland) had ancient laws of Dál Riada, obviously a version of the Brehon Laws 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."³³⁴

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 is a law and medium that transcend this life. For instance, "the Celt would lend money on a promissory note for repayment in the next world."³³⁵ They were in fact Egyptian in orientation.³³⁶ 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

³³⁴ ELLIS, *supra* note 243, at 191-92. See also note 241 (discussing the Welsh *Damweiniau I and II* and the *Book of Iorwerth*).

³³⁵ ROLLESTON, *supra* note 272, at 80.

³³⁶ See *id.*

but “adjudged to Heaven,” implying forgiveness.³³⁷ 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.³³⁸ Poetic verse as a medium was valued more than life because it transcended life. 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.”³³⁹ 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:

³³⁷ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 13, 15.

³³⁸ ROLLESTON, *supra* note 272, at 234-38.

³³⁹ 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 39 (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.* at 38 n.1 (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 329.

But the troubled joy of wonder merged at last in mastering fear,
As they heard through pealing thunder, "FERGUS SON OF ROY IS
here!"³⁴⁰

Capping the event, and for dramatic emphasis, the poet-messenger is struck dead! The immortal and 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.³⁴¹

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 plague, of a general war, of the dissolution of verbal contracts."³⁴² 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."³⁴³ "Bad contracts" may have even applied to fraudulent contracts, and not just contracts

³⁴⁰ ROLLESTON, *supra* note 272, at 238.

³⁴¹ See *The Mead of Poetry*, in THE NORSE MYTHS, *supra* note 281, 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 AND LEGEND 273, 293, 365-68 (revised ed. 2001).

³⁴² 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 51 (emphasis added).

³⁴³ *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.

where the terms were not fair.³⁴⁴ Again confidence in and primacy of the oral medium is asserted. The ancient Irish choose oral medium as the vehicle of commerce and social interaction and work 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.³⁴⁵ A derogatory statement that “can be taken in both a good and a bad sense” is a lesser offense.³⁴⁶ Taunts about disfigurement, even if true, name-calling, and shame poles (slanderous text carved into a wood pole) are also lesser outlawry.³⁴⁷ Interestingly, defamation in verse, even composing or repeating as little as half of a stanza, receives the strictest penalty of full outlawry,³⁴⁸ probably because of the

³⁴⁴ “Bad contracts” may have even applied to fraudulent contracts. *Id.* at 53 (citing the gloss).

³⁴⁵ 2 GRÁGÁS, *supra* note 292, at 195. Lesser outlawry involved of a fine and banishment for three years. See 1 GRÁGÁS, *supra* note 292, at 250.

³⁴⁶ 2 GRÁGÁS, *supra* note 292, at 195.

³⁴⁷ *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 *SAGAS OF THE ICELANDERS*, *supra* note 287, at 106. A similar scorn pole is used in *Gisli Sursson’s Saga*, *id.* at 502.

³⁴⁸ 2 GRÁGÁS, *supra* note 292, at 197-98.

Full outlawry casts 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*—

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.³⁴⁹ “The reason for this prohibition must have been that it was common practice to conceal *nid* [slander] in ostensibly innocent stanzas . . . , and therefore one could not feel confident as to what was praise and what was blame.”³⁵⁰ Verse is recognized as a potent weapon. Its use for accusations of unmanliness can even excuse the murder of the slanderer.³⁵¹ 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.³⁵² Indeed, only the poet is allowed “to eulogize or satirize” in public.³⁵³ In the *Senchus*, Fergus

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 292, at 246.

³⁴⁹ 2 GRÁGÁS, *supra* note 292, at 197-98.

³⁵⁰ PREBEN MEULENGRACHT SØRENSEN, THE UNMANLY MAN: CONCEPTS OF SEXUAL DEFAMATION IN EARLY NORTHERN SOCIETY 70 (Joan Turville-Petre trans., 1983).

³⁵¹ 2 GRÁGÁS, *supra* note 292, 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 350. “The right of vengeance prescribed for the slanders in question [sexual references] is the least conditional in Icelandic law.” *Id.* at 17.

³⁵² 1 ANCIENT LAWS OF IRELAND, *supra* note 239, at 59.

³⁵³ *Id.* at 19 (according to the gloss, the only other classes of persons permitted to speak in public are the Chronicler and the Brehon).

Ferglethechs slays his northern bondwoman after she reproaching 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 slaying his bond's women to her kin because of her taunts about his disfigurement.³⁵⁴ 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 find 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 away 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, is law dissected into headings, classification schemes, and index entries. Celtic attitudes and experience of law die with scholastic dissection. The intimacy of the relationship law to every day life is a function of the infosphere, which depends on druidic remembrancers and the rhythmic

³⁵⁴ *Id.* at 65, 73, 75, 77, 79.

cadence of oral verse. In a culture where law emphasizes personal reputation, venerates the inviolability of one's word, and empowers self-reliance through remedies of self-help,³⁵⁵ 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.

³⁵⁵ “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.” Richard T. Oakes, *supra* note 254, at xvi.

Conclusion: An Unscientific Postscript³⁵⁶

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 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,³⁵⁷ his greatest contributions include critiques of modern technology and understanding its impact on *enframing*, the essence of

³⁵⁶ "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 a 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 University Press 3rd 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 SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, at xv. This paper follows a similar, non-scientific spirit.

³⁵⁷ *Martin Heidegger*, ENCYCLOPÆDIA BRITANNICA, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.search.eb.com/eb/article?tocId=3090> (last visited March. 17, 2005).

thinking in the twentieth century.³⁵⁸ 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.”³⁵⁹ Given the technological revolution in modern legal information systems, and the relationship of various technologies for transmission of legal information—stone, papyrus, clay, poetry, *etc.*—to legal thought,³⁶⁰ contemplation of Heidegger’s

³⁵⁸ See William Lovitt, *Introduction* to MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS*, at XXIX (William Lovitt trans., Harper Touchbooks 1977) (1962). 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.*

³⁵⁹ Martin Heidegger, *Memorial Address*, in *DISCOURSE ON THINKING* 50 (John M. Anderson & E. Hans Freund trans., Harper Touch Books 1966) (1959). Heidegger also notes that in such an age, we fundamentally cut off from the nature of things in our world, because of our *enframed* worldview, which permeates the modern age of technology. See MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS*, 23-4 (William Lovitt trans., Harper Touchbooks 1977) (1962).

³⁶⁰ Derrida recognizes the technical nature of writing and criticized it. “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 *supra* note 50 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

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)³⁶¹ 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.³⁶² In addition, law is inexorably intertwined with its box and is wholly dependent upon it for its authentic appearance in our world.³⁶³ Law cannot be approached except within the context of its box or

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, and DERRIDA, *Genesis and Structure of the Essay on the Origin of Languages*, *supra* note 50, at 165-174. “[V]oice, producer of *the first symbols*, has a relationship of essential and immediate proximity with mind.” DERRIDA, *End of the Book and the Beginning of Writing*, *supra* note 50, at 11. In the end, writing can enslave as well as liberate. *See supra* notes 201-203 and accompanying text. Writing is a dangerous “supplement” becoming “dangerous from the moment that representation there claims to be presence and sign of the thing itself.” DERRIDA, “. . . *That Dangerous Supplement . . .*” *supra* note 50, at 144.

³⁶¹ *See supra* note 358.

³⁶² *See generally*, HEIDEGGER, *supra* note 1, at 17-81.

³⁶³ 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

infosphere, and this dependency obscures a deeper realization of its essence. Emphasis on law's box may seem an over-indulgence in theory, but the 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 enclosed 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. . . .

part, the more inflexibility 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 to appear as groundless (without authority, authenticity, relevance, etc.). Law depends upon mystery for its authenticity.

Standing there, the building holds its ground against the storm raging above it and so makes the storm itself manifest 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.³⁶⁴

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 function of media—stone, clay, papyrus, poetry—is to open a space (providing access to law and extend its application over physical space), and to preserve the same throughout time. Consider the legal *stelae* of the classical Greeks, inscribed upon that “all may

³⁶⁴ *Id.* at 42.

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 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?³⁶⁵ 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

³⁶⁵ See generally, Berring, *Legal Information and the Search for Cognitive Authority*, *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 now is 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 or that anyone actually *used* a digest volume at all.

Id. at 1677.

it, because it comes to us heavily filtered, annotated, mediated, edited, dressed in technical language and concepts, and in recent times, has only be made accessible through the taxonomies of various indexing and bibliographic schemes that may hide as much as they reveal.³⁶⁶ We forget about law's connection to its medium and its origin in human conflict, court action, and legislative hearings, 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,³⁶⁷ thus facilitating new legal disciplines like sports

³⁶⁶ See Berring, *Collapse of the Structure of the Legal Research Universe*, *supra* note 2, at 21, 27-28 (1994).

³⁶⁷ 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

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 as 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

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 and 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.

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 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 the Icelander's tradition in oral verse comports with a society 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.”³⁶⁸ Consideration of language also refocuses us on Derrida’s criticisms about the enslaving power of media environments, particularly writing.³⁶⁹ 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.”³⁷⁰ Consider, for example, the role of the Celtic *filid* and Icelandic lawspeakers from Heidegger’s perspective:

³⁶⁸ CLANCHY, *supra* note 4, at 9.

³⁶⁹ See *supra* notes 201-203 and accompanying text.

³⁷⁰ 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.,

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

“To say,” 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.³⁷¹

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,”³⁷² and for Heidegger, that experience—indeed, *existence*—is linguistic and poetic. “Language is the house of Being,”³⁷³ and as Heidegger often quotes from the German poet Hölderlin, “poetically man dwells.”³⁷⁴ 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

Perennial Library 1971) (1960) (“Language is the precinct (*templum*), that is the house of Being.”).

³⁷¹ ON THE WAY TO LANGUAGE, *supra* note 370, at 93.

³⁷² O.W. HOLMES, JR., THE COMMON LAW 1 (Little, Brown, & Co, 49th prtg. 1923) (1891).

³⁷³ See *supra* note 370.

³⁷⁴ MARTIN HEIDEGGER, *Poetically Man Dwells*, in POETRY, LANGUAGE, THOUGHT 213 (Albert Hofstadter trans., Perennial Library 1971) (1960).

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 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.³⁷⁵

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”),³⁷⁶ including law, into the “abode of truth,” which for Heidegger is

³⁷⁵ *Letter on Humanism*, *supra* note 370, at 238-39.

³⁷⁶ For discussion of *ek-sistence*, see *id.* at 213.

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 influence (individual, web of beliefs, institutions, technologies, and environment) evolving over time.³⁷⁷ 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.

³⁷⁷ See *supra* notes 5-15 and accompanying text, including fig. 1.

Heidegger stresses poetic thinking as the basis for discovering the nature of being, humanity, and by implication, law.³⁷⁸ 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*,³⁷⁹ the Icelandic Sagas,³⁸⁰ and the mass temple rituals of Mesopotamia.³⁸¹

Heidegger’s connection of *nomos* (law) and *nemein* is important in another respect. As already mentioned above,³⁸² 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

³⁷⁸ See *supra* notes 370-374 and accompanying text.

³⁷⁹ See *supra* notes 210-211 and accompanying text.

³⁸⁰ See *supra* notes 293-296 and accompanying text.

³⁸¹ See *supra* notes 96-98 and accompanying text.

³⁸² See *supra* notes 68-73 and accompanying text.

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.³⁸³

For the ancient Greeks, law was intrinsically connected to reading, and not just any reading—verbal reading, reciting, and poetic chanting.³⁸⁴ For the Celts, like the Greeks, law’s “preserving shrine” (the *Senchus*) was poetry.³⁸⁵ Poetic verse retained a connection to the immortality, breath, and life.³⁸⁶ As noted, the ancient Icelanders used verse to preserve judgments, and reserved the places in court nearest the kings for their poets.³⁸⁷ The Egyptians used verse to honor their dead,³⁸⁸ and some of the most interesting sources for studying Egyptian law are literary.³⁸⁹ 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

³⁸³ Jesper Svenbro, *supra* note 27, at 40-41(citations omitted).

³⁸⁴ See *id* (“The law had a vocal distribution, based at first on memory, later on writing.”).

³⁸⁵ ANCIENT LAWS OF IRELAND, *supra* note 239, at 39.

³⁸⁶ See *supra* note 335-341 and accompanying text.

³⁸⁷ See *supra* note 293 and accompanying text.

³⁸⁸ See *supra* note 149-154 and accompanying text.

³⁸⁹ See *supra* note 205-211 and accompanying text.

fate.³⁹⁰ 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.³⁹¹ 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.³⁹² 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,³⁹³ and

³⁹⁰ See Widengren, *supra* note 85, at 10-11, n. 2.

³⁹¹ See *supra* note 85-89 and 120-125 and accompanying text.

³⁹² See, e.g., NORSE MYTHS, *supra* note 341, at xix-xx (“[F]atalism so fundamental to the Norsemen, is reflected in the myths. . . . Ragnarok itself, ‘the Destruction of the Powers’, is inescapable. The time must come when all creation will be destroyed by fire and flood.”), *The Sagas of the People of Laxardal*, in SAGAS OF THE ICELANDERS, *supra* note 287, 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 is unraveling as a narrative of the predicament of individuals who are caught up in the relentless onward march of events and social change.”), *Beowulf*, in 1 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.”), SQUIRE, *supra* note 341, at 182, 190-200 (revised ed. 2001) (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).

³⁹³ 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. . . .

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—

. . . . [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.”

Id. (citing *Dialogus de Scaccario* 64 (C. Johnson ed., 1950)).

Heidegger's nightmare of the world as a giant gasoline station.³⁹⁴ 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.³⁹⁵ Law cannot be reduced to a technology or technique, even as sacrosanct an intellectual exercise as delineating and differentiating doctrinal holdings in relation to the factual record. The challenge is to dare otherwise—to "dare the precinct of Being,"³⁹⁶ to "dare language,"³⁹⁷ 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.

³⁹⁴ See *supra* note 359 and accompanying text.

³⁹⁵ 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. "An instinctive judicial response to the problem of too many cases had been the development of an extraordinarily narrow theory of cases." *Id.* at 1045.

³⁹⁶ *What Are Poets For?*, *supra* note 370, at 132.

³⁹⁷ *Id.*

Perhaps only then, will we have the perspective necessary to discover and understand law in our own times.