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## Law and Poetry

Edward J. Eberle

*Roger Williams University School of Law*

Bernhard Grossfeld

*Universitat Munster*

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# Law and Poetry

Edward J. Eberle\* and Bernhard Grossfeld\*\*

## I. INTRODUCTION

Law and poetry have a curious but intriguing relationship with one another. They have much in common, perhaps more than is generally appreciated. Both are human creations of imagination and ingenuity, communicate their essence through language, provide order, form and structure to a dizzying array of phenomena present in daily life, and reflect and reshape the culture from which they arise. In these ways, law and poetry offer insight and understanding into the human condition.

But law is not poetry (although lawyers can be poetic)<sup>1</sup> and poetry is not law (although poets can be “legislators”).<sup>2</sup> The

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\* Professor of Law, Roger Williams University.

\*\* Emeritus Professor of Law, Universität Münster, Germany. All translations are ours unless otherwise noted. Copyright 2005, by Edward J. Eberle and Bernhard Grossfeld. All rights reserved. We would like to thank Jennifer Maio for her valuable research assistance and Nancy Cook, Christopher Davidson and Mel Topf for their valuable comments on a draft of this article.

1. Consider the handiwork of Justice Benjamin Cardozo:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Only [by the uncompromising rigidity of courts of equity] has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

*Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). “No answer is it to say that the chance would have been of little value even if seasonably offered. Such a calculus of probabilities is beyond the science of the chancery.” *Id.* at 547.

2. As Percy Shelley stated, “Poets are the unacknowledged legislators of the world.” PERCY SHELLEY, *A DEFENSE OF POETRY* 46 (Albert S. Cook ed., Ginn & Co. 1891).

domain of law is more the domain of abstract reason, offering structure and rules to the members of a society. The domain of poetry is more the domain of imagination, offering inspiration and insight into life. We might say that law partakes more of science, poetry more of art.

Yet, while law and poetry are different, there is something intriguing about the relationship between them. Many lawyers are poets, including such two-world figures as Wallace Stevens, Edgar Lee Masters, William Cullen Bryant, e.e. cummings, Archibald Macleish and Lawrence Joseph, to name a few American poet-lawyers. German poets such as Johann Wolfgang von Goethe, Friedrich von Schiller, Novallis (Friedrich von Hardenberg) and Bernd Heinrich Wilhelm von Kleist studied law, and Goethe even worked as a young assistant at the *Reichskammergericht* in Wetzlar. Many poets have worked the theme of law into their poetry, including Chaucer, Shakespeare, Pope, Shelley and Sandburg.

So, the question is: What about the relationship of law and poetry? Does poetry inform law? Does law inform poetry? These questions are worth asking and pursuing because we as lawyers know that there is a range of phenomena and forces that influences and drives a culture on which law sits. The words (or ABCs) of law are just the bare statements of ideas or rules that, like the skin of a piece of fruit, gain real meaning only from interaction with the culture in which they operate. In this respect, we might think of law, especially its words, as the software which can function effectively only within the operating system of a culture.

The Hidden Law does not deny  
Our laws of probability,  
But takes the atom and the star  
And humans for what they are,  
And answers nothing when we lie.  
It is the only reason why  
No government can codify,  
And verbal definitions mar  
The Hidden Law.<sup>3</sup>

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3. W. H. AUDEN, *The Hidden Law*, in AUDEN: POEMS 90 (Edward Mendelson ed., 1995). For consideration of this theme, see generally

It is difficult to understand a culture because a culture consists of a wide array of forces that operate both above and below a person's ken, somewhat like rowing a boat on the ocean, above which is the sky, below which is the deep. Culture exerts a significant influence on law. It is a fair question whether law drives culture or culture drives law. Probably, it is a bit of each. We may never know, in fact, the answer to such foundational questions. But we can obtain insight into a culture by examining the forces that infuse it. And that brings us back to poetry.

Poets are prime barometers of culture, voicing its dreams, visions, hopes, aspirations or despairs. Uniquely situated within a culture, a poet offers a silhouette of the human condition in a given time-space relationship, what we might call the period or genre of the poet. The work of poets offers some of the raw stuff of culture, forming the rudiments or working materials that occupy law.

We know that any culture constitutes a complicated fusion of forces and phenomena that help drive and integrate law, giving it form and substance. Law is in a continual state of action and reaction to these phenomena, attempting to make sense and lend structure to people in the complicated enterprise of living. There is a range of phenomena that exert this effect, including history, tradition, language and geography, to name a few. These phenomena are worth studying to try to account for the complicated process of law-making – of giving order and structure to a society.

This brings us to the purpose of our article: to study and evaluate poetry as one of the phenomena that influences and helps shape law. We make no claim to understand the totality of the relationship between law and poetry. Rather, our goal is to examine some part of the relationship so that we can achieve a better understanding of the synergy between law and poetry, a relationship with important implications for law.

There is much, of course, that law and poetry have in common. First, law and poetry both trade in language, language being the constitutive force of each, giving the two disciplines life and dynamism. Language has a pervasive effect on the world it describes. Second, law and poetry both give shape and order to

the phenomena that confront the human condition. Third, law and poetry are reflective of the human spirit, capturing and instilling the dreams that animate and constitute us. Part II examines these commonalities.

Yet, while law and poetry have much in common, they also differ from one another. Most fundamentally, law is mainly the product of the intellect, although law, too, tries to capture and account for human emotion, pathos and even imagination. Poetry, by contrast, speaks more to man and woman's imagination and dreams, although poetry, too, can be logical, ordered or intellectual. Part III explains some of the differences that distinguish law from poetry.

Parts IV and V probe the interrelationship between law and poetry by tracing the sphere of influence that law exerts on poetry, and poetry on law. Law is a common theme of poetry, which Part IV surveys. But surprisingly, perhaps, poetry exerts influence on law as well, as Part V shows. We must more fully open our eyes and senses to discern this influence, which operates sometimes in discrete, unobvious ways.

Finally, in Part VI, we assemble the insights gathered from our investigation to reach greater understanding of the complicated synergy between law and poetry. Understanding the raw ingredients of culture helps direct us to the forces and influences that constitute a culture and on which the letters of law sit. Investigating this deeper perspective of culture is an urgent project as we try to understand the nature and limits of a legal system. Only by understanding a culture can we understand a legal system. Studying poetry is a direct insight into culture, as poets acutely reflect the human condition in a given time-space relationship. We need to open our senses and use our imagination if we are to truly understand the role law plays in culture.

## II. SIMILARITIES

### *A. Language as Meaning-Making*

Law and poetry are fundamentally similar in important ways. Most importantly, law and poetry have language in common. Both disciplines communicate their meanings, aspirations, rules and import through language. The study of law and poetry is, in crucial ways, the study of language.

The study of language is, as we know, not easy. Language is the complicated process of giving expression to ideas, emotions, rules or other qualities. Language is the process of meaning-making.<sup>4</sup> Yet, the meaning of language can be elusive. Sometimes language is clear. For example, the United States Constitution states that a person must be thirty-five years of age to qualify as President.<sup>5</sup> Similarly, in his poem, *Beat! Beat! Drums!*, Walt Whitman opens:

Beat! beat! drums! – blow! bugles! blow!

Through the windows – through the doors – burst like a  
ruthless force,

. . . Make even the trestles to shake the dead where they lie  
awaiting the hearses,

So strong you thump O terrible drums – so loud you bugles  
blow.<sup>6</sup>

Whitman uses the drum and bugle to sound clearly the cry of war pulsing through the nation, calling for the recruitment of soldiers who would need to set aside their normal lives to take up the cause of the Union during the United States Civil War (1861-1865).

But language can also be ambiguous. For example, the United States Constitution also states that Congress shall have the power “[t]o regulate Commerce . . . among the several states.”<sup>7</sup> What commerce actually means depends on a given time-space relationship, a given historical time as determined by the readers or interpretive community of that time. In the early nineteenth century, under the leadership of Chief Justice John Marshall, commerce meant broad federal powers to regulate commerce in the national interest; almost any commodity was commerce.<sup>8</sup> Later, toward the end of the nineteenth century, commerce meant a narrower federal power only over goods that flowed in interstate

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4. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 39-40 (1985). See generally Gary Minda, *Cool Jazz But Not So Hot Literary Text in Lawyerland: James Boyd White's Improvisations of Law as Literature*, 13 *CARDOZO STUDIES IN LAW AND LITERATURE* 157 (2001).

5. U.S. CONST. art. II, § 1, cl. 4.

6. WALT WHITMAN, *Beat! Beat! Drums!*, in *WALT WHITMAN: THE COMPLETE POEMS* 308 (Francis Murphy ed., 1986).

7. U.S. CONST. art. I, § 8, cl. 3.

8. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

commerce.<sup>9</sup> Then, in the New Deal era of the mid-twentieth century, commerce meant, again, broad powers as Chief Justice Marshall had intended; no Congressional regulation of commerce was found unconstitutional under the rubric applied determining whether an item substantially affected commerce.<sup>10</sup> Today, commerce again has a restrictive definition, sharpening what is commerce as compared to noncommerce—a definition more in keeping with the meaning of the term at the end of the nineteenth century.<sup>11</sup> The meaning of commerce varied over time with the different senses and perspectives of the operative interpretive community.

Consider an excerpt from a poem by Wallace Stevens:

Twenty men crossing a bridge,  
 Into a village,  
 Are twenty men crossing twenty bridges,  
 Into twenty villages,  
 Or one man  
 Crossing a single bridge into a village.<sup>12</sup>

The meaning of commerce is no more self-evident than the meaning of bridge-crossing in Stevens's poem. A reader could associate a range of meanings for either set of words. A difference between the Constitutional definition of commerce and the poem is that the former derives a more precise meaning from an authoritative interpreter, the United States Supreme Court, whereas the latter is intentionally left open for meaning according to the imagination and sense of the reader. We will speak to this difference later.

The point here is that language consists of a complicated process of rendering meaning, of meaning-making, that is dependent on an exchange of meaning from speaker/writer to listener/reader. Stevens captures the dynamics of this relationship well in his poem, *Six Significant Landscapes*:

I  
 An old man sits  
 In the shadow of a pine tree

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9. See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

10. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

11. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

12. WALLACE STEVENS, *Metaphors of a Magnifico*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 19 (1990).

In China.  
 He sees larkspur,  
 Blue and white,  
 At the edge of the shadow,  
 Move in the wind.  
 His beard moves in the wind.  
 The pine tree moves in the wind.  
 Thus water flows  
 Over weeds.

...

III  
 I measure myself  
 Against a tall tree.  
 I find that I am much taller,  
 For I reach right up to the sun,  
 With my eye;  
 And I reach to the shore of the sea  
 With my ear.  
 Nevertheless, I dislike  
 The way the ants crawl  
 In and out of my shadow.

...

VI  
 Rationalists, wearing square hats,  
 Think, in square rooms,  
 Looking at the floor,  
 Looking at the ceiling.  
 They confine themselves  
 To right-angled triangles.  
 If they tried rhomboids,  
 Cones, waving lines, ellipses—  
 As, for example, the ellipse of the half-  
 moon—  
 Rationalists would wear sombreros.<sup>13</sup>

Our short exercise in language illustrates how language is contingent on words situated within specific time-space relations. The meaning of words seems largely dependent on the time-space

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13. WALLACE STEVENS, *Six Significant Landscapes*, in THE COLLECTED POEMS OF WALLACE STEVENS, *supra* note 12, at 73-75.



contingency of a specific culture. In this sense, culture is highly constitutive of language. For native law, the consequences are not so dramatic, for understanding one's own culture comes naturally. For comparative law, however, the consequences are great. Understanding a culture is highly dependent on understanding its language, as language is a portal into a society. It is hard to understand a culture without understanding its language.

### *B. Language As an Ordering Mechanism*

A second relation of law and poetry concerning language is that language is the means used by the author to shape and order his or her world of experience. Human being and its condition is complicated, as any person confronts daily a multitude of phenomena. Language helps shape and order, rendering meaning to what would otherwise be the chaos of bewilderment presented by diverse phenomena. Language is a primary means by which we order and make sense of our world. Again, we can look to Wallace Stevens in his famous poem, *The Idea of Order at Key West*:

She sang beyond the genius of the sea.  
 The water never formed to mind or voice,  
 Like a body wholly body, fluttering  
 Its empty sleeves; and yet its mimic motion  
 Made constant cry, caused constantly a cry,  
 That was ours although we understood,  
 Inhuman, of the veritable ocean.  
 . . .  
 It was her voice that made  
 The sky acutest at its vanishing.  
 She measured to the hour its solitude.  
 She was the single artificer of the world  
 In which she sang. And when she sang, the sea,  
 Whatever self it had, became the self  
 That was her song, for she was the maker. Then we,  
 As we beheld her striding there alone,  
 . . . .  
 Oh! Blessed rage for order, pale Ramon,  
 The maker's rage to order words of the sea,  
 Words of the fragrant portals, dimly-starred,  
 And of ourselves and of our origins,

In ghostlier demarcations, keener sounds.<sup>14</sup>

We might consider attorney-poet Archibald Macleish's description of the interrelationship between law and poetry:

The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.

But what, then, is the business of poetry? Precisely to make sense of the chaos of our lives. To create the understanding of our lives. To compose an order which the bewildered, angry heart can recognize. To imagine man.<sup>15</sup>

Or, as Jacob Grimm, of fairy-tale fame, stated, “poetry and law have risen from the same bed.”<sup>16</sup>

Let us consider some examples. A constitution helps to order and give meaning to the character of a people as a contract does for the people who enter into it. In the United States, Americans believe themselves to be endowed with a large measure of liberty. That character attribute might owe a large part of its life to the American Constitution's empowerment of personal liberty. We might refer to the American Constitution as a “constitution of liberty.”<sup>17</sup> And, whether liberty is actually realized in the social order or not, Americans believe themselves to be uniquely endowed with the blessings of liberty.

The words of the German national anthem stress “Einigkeit und Recht und Freiheit” (“Unity, Justice and Freedom”),<sup>18</sup> new words to an old song (Franz Josef Hayden's *Kaiserquartett*) to emphasize the new German order after World War II, an order anchored in a constitution of the dignity of man.<sup>19</sup> Commitment to

14. WALLACE STEVENS, *The Idea of Order at Key West*, in THE COLLECTED POEMS OF WALLACE STEVENS, *supra* note 12, at 128-30.

15. Archibald MacLeish, *Apoligia*, 85 HARV. L. REV. 1505, 1508 (1972).

16. Jacob Grimm, *Von der Poesie im Recht*, 2 ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 25 (1816).

17. Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* 17 (2002).

18. NATIONAL ANTHEM OF THE REPUBLIC OF GERMANY, available at <http://www.germany-info.org/relaunch/info/facts/anthem.html> (last visited Nov. 22, 2005).

19. The architectonic value of the German Basic Law is human dignity, which Article One of the Basic Law makes manifest. Grundgesetz für die

dignity might ward against the darker evils of mankind. In fact, it seems the experiment has been successful during the time of the Basic Law's control. The French national anthem, *La Marseillaise*, was the rallying cry of the revolutionary break with the *ancien regime*, a new order following the words *Egalité, Fraternité, Liberté* that revolutionized European society.

The ongoing, ever-increasing unification of the European peoples under the umbrella of the European Union is symbolized by its anthem, containing the stirring words of Schiller's *Ode to Joy* (1785), written around the time of the ferment of the French Revolution, and set by Beethoven to the music of his Ninth Symphony, a common poetic song. Schiller's poem expresses the ideal of people becoming brothers, a fitting ideal for the European Union:

Freude, schöner Götterfunken,  
Tochter aus Elysium,  
Wir betreten feuer-trunken,  
Himmlische, dein Heiligtum!  
Deine Zauber binden wieder,  
Was die Mode streng geteilt;  
Alle Menschen werden Brüder,  
Wo dein sanfter Flügel weilt.  
(Joy, fair spark of the gods,  
Daughter of Elysium,  
Drunk with fiery rapture, Goddess,  
We approach thy shrine!  
Thy magic reunites those  
Whom stern custom has parted;  
All men will become brothers  
Under thy gentle wing.).<sup>20</sup>

The ordering of words can give meaning to people's dreams. In this, the Europeans were following Schiller's original inspiration to Beethoven. Beethoven fancied and thought about Schiller's *Ode to Joy* for over thirty years, trying various

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Bundesrepublik Deutschland [GG] [Basic Law of the Federal Republic of Germany] art. 1, available at [http://www.bundesregierung.de/static/pdf/GG\\_engl\\_Stand\\_26\\_07\\_02.pdf](http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf) (last visited Nov. 22, 2005).

20. Friedrich von Schiller, *An die Freude (Ode to Joy)*, in GEDICHTE 28 (1972), available at [http://w3.rz-berlin.mpg.de/cmp/beethoven\\_sym9.html](http://w3.rz-berlin.mpg.de/cmp/beethoven_sym9.html) (last visited Nov. 9, 2005).

compositions, before finally settling on the famous Ninth Symphony, itself a novel creation of part symphony, part oratorio.<sup>21</sup>

Poetry, of course, is no different. Wallace Stevens reminds us that we form our view of the world by singing against the chaos, by using the algebraic, tonal and rhythmic power of language to form structure out of chaos and patterns useful to living. Consider, again, an excerpt from his poem, *The Idea of Order at Key West*:

She was the single artificer of the world  
In which she sang. And when she sang, the sea,  
Whatever self it had, became the self  
That was her song, for she was the maker.<sup>22</sup>

As Stevens illustrates, poetry is a strong force that establishes patterns of living. The elaborate structure of poetry lends order to the collected experience. Metrical rhythms make people join as they feel comforted and secure, sensing that something is in order.

Ancient law often took the form of poetry.<sup>23</sup> Laws were expressed in incantatory rhythms. The oldest Greek and Latin words for poetry were also the eldest words for law. For example, *carmen* or *carminis* in Latin means song or statute. Resort to repetition and rhythm to impart law was especially important where enforcement authority was weak.<sup>24</sup> Poetry could act somewhat like a magic flute, inducing respect and acceptance through the spiritual power of the word. We can thus see another dimension to the idea of poets being the “unacknowledged legislators of the world.”<sup>25</sup>

### C. Language As Structure: Metaphor

Third, because law and poetry both involve language,

21. LUDWIG VON BEETHOVEN, *Symphony No. 9, Op.125 “Choral”*, available at [http://w3.rz-berlin.mpg.de/cmp/beethoven\\_sym9](http://w3.rz-berlin.mpg.de/cmp/beethoven_sym9) (last visited Nov. 9, 2005).

22. STEVENS, *supra* note 14, at 128, 129.

23. THOMAS HOBBES, *LEVIATHAN* 189 (Richard Tuck ed., 1991) (“And in ancient time, before letters were in common use, the Lawes were many times put into verse, that the rude people taking pleasure in singing, or reciting them, might the more easily reteine them in memory.”).

24. *See id.*

25. SHELLEY, *supra* note 2, at 46.

language itself is at issue. We might then observe that language is words, but is also made from more rudimentary concepts, such as structure, grammar, syntax, word choice, alliteration, assonance, consonance, dissonance, metaphor and other building blocks. These rudiments of language are keys to the meaning of words. Words represent only the surface manifestation of meaning. Equally, or perhaps more revealing of expression, are the rudiments that underlie words. Given this common clay of language—these lumps of expression—studying language is significant for both the lawyer and the poet. Studying language helps uncover its structure, shedding insight into its origins, meaning and impulse.

For example, let us consider metaphor. Metaphor is, of course, the essence of poetry. Metaphor comes from the Greek and means, literally, to transfer or to carry over. In the medium of language, metaphor (or carrying-over) means to transpose meaning from one domain to another. Death is the central metaphor of poetry, as poets strive to transcend the limits of the human experience and proffer insight into more rarefied dimensions. Metaphor is omnipresent in poetry. Consider a few examples:

In Goethe's *An den Mond* [To the Moon], he evokes a mysterious, luminescent world that captivates the human spirit:

Füllest wieder Busch und Tal  
 Still mit Nebelglanz,  
 Lösest endlich auch einmal  
 Meine Seele ganz;  
 Breitest über mein Gefild  
 Lindernd deinen Blick,  
 Wie des Freundes Auge mild  
 Über mein Geschick.

...

Was von Menschen nicht gewusst  
 Oder nicht bedacht,  
 Durch das Labyrinth der Brust  
 Wandelt in der Nacht.<sup>26</sup>  
 (Feel again bush and valley

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26. GOETHE, *An den Mond* (*Spätere Fassung*), in GOETHE: GEDICHTE 129 (Erich Trunz ed., 1993).

Quiet with the glance of fog,  
Enveloping finally even now  
My whole soul;

Broadening over my field  
Soothing your view,  
Like the mild eyes of a friend  
Over my being

. . . .

What from humans is not known  
Or not suspected,  
Through the labyrinth of the breast  
Wanders in the night.).

Here the appeal to the moon would seem to suggest enlightenment or illumination, as the light of the moon offers light amidst the night. But the moon is also comforting to the souls wandering around at night. The moon could also suggest the ideal form—truth, happiness, goodness and so on—that we desire to achieve in our lives. These meanings are suggested by the moon, even though the moon is never mentioned in the poem. The moon seems to be implicitly directing the structure of the poem.

In *The Man With the Blue Guitar*, Wallace Stevens uses the blue guitar as a metaphor for man's imagination. Consider this excerpt:

I  
The man bent over his guitar,  
A shearsman of sorts. The day was green.  
They said, "You have a blue guitar,  
You do not play things as they are."  
The man replied, "Things as they are  
Are changed upon the blue guitar."  
And they said then, "But play, you must,  
A tune beyond us, yet ourselves,  
A tune upon the blue guitar  
Of things exactly as they are."

## II

I cannot bring a world quite round,  
 Although I patch it as I can.  
 I sing a hero's head, large eye  
 And bearded bronze, but not a man,  
 Although I patch him as I can  
 And reach through him almost to man.  
 If to serenade almost to man  
 Is to miss, by that, things as they are,  
 Say that it is the serenade  
 Of a man that plays a blue guitar.<sup>27</sup>

The blue guitar seems to suggest a person's imagination. More specifically, it is the imagination of the poet, imagination being the trade craft of the poet, the means by which the poet imagines and reimagines the world, playing different tunes on the blue guitar. But one might think of the blue guitar in other ways as well. For example, the blue guitar could be the lyre, the instrument on which the seer sings. Or the blue guitar could be the tool with which the poet is equipped, as the slide rule is to the accountant.

There is perhaps no way to comprehend all the meanings of these metaphors. Instead, a poet leaves the meaning of these metaphors to be determined by the unique meaning-making offered by the relationship of the poet to the individual readers. That is part of the universal appeal of poetry, as poets write for everyone, and everyone can derive their own meaning.

Law consists of metaphors too, of which the study of poetry helps inform us. For example, consider the ideals on which American free speech law is built. We imagine free speech to be a "free trade in ideas,"<sup>28</sup> a search for truth or, as Justice Harlan observed, a "freedom [to] . . . produce a more capable citizenry and more perfect polity . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."<sup>29</sup> But we must be frank: these

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27. WALLACE STEVENS, *The Man With the Blue Guitar*, in THE COLLECTED POEMS OF WALLACE STEVENS, *supra* note 12, at 165.

28. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

29. *Cohen v. California*, 403 U.S. 15, 24 (1971).

statements are more valuable as ideals (or metaphors) than actually attainable principles.<sup>30</sup> Do we really find truth? Is the polity really more perfect? Or are these the visions that inspire us, the metaphors that animate free speech law? German law operates similarly, setting forth the ideal of a "geistigen Meinungskampf" ["intellectual struggle of opinions"].<sup>31</sup>

Consider American tort law, which settles many questions on the basis of the metaphor of a "reasonable person,"<sup>32</sup> a uniform standard of human behavior, even though there may be no such person (although some of us think we, or others, can act reasonably). Or consider the contract law fiction of parties entering into agreements based upon free and equal bargaining, connoting a measurement of an equal exchange of value between the parties. Often, economic power between the parties determines outcomes more than freedom or equality. And we could list many other examples.

The point here is simple: understanding the basis of language helps us to understand law. The ubiquity of metaphor in poetry leads to insight into the use of metaphor in law. In both law and poetry, metaphor informs language and our understanding of the world with particular meaning.

#### D. Human Imagination

A final similarity worth noting between law and poetry is the most basic: law and poetry are products of human ingenuity and imagination. They are human expressions of meaning. As such, they reflect human personality and the human condition. For, when all is said and done, the reality we live is the reality our minds see and that upon which we act. The intuitions, perceptions and senses in our mind form our reality. We can take a lesson from poetry. Poetry aims to reflect reality, but more significantly to form reality, as for example in Stevens's poem, *The Man With the Blue Guitar*.<sup>33</sup> But reality-making is also the aim of

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30. Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1179 (1994).

31. Lüth, 7 BVerfGE 198, 208 (1958). For an examination of German expression law, see generally Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797 (1997).

32. RESTATEMENT (SECOND) OF TORTS § 283, at 12 (1965).

33. STEVENS, *supra* note 12, at 1510.



law. For example, there is a world of difference between living the reality of a constitution of liberty (USA), a constitution of dignity (Germany) or a constitution of Islamic fundamentalism (e.g., Saudi Arabia). Reality, like poetry, like law, in significant part is what we imagine it to be. We might think of law and poetry as different paths along the same journey, as Archibald MacLeish observed: "The law has one way of seeing it. Poetry has another. But the journey is the same."<sup>34</sup> Or, as he stated, "though the words are the same, the tunes are distinguishable."<sup>35</sup>

### III. DIFFERENCES

While the common bond of language is one that links law and poetry in powerful ways, we must not overemphasize their similarities, but frankly acknowledge their differences. There are two main differences worth observing: first, law is a science, whereas poetry is an art; and, second, each has a different relation to power.

#### A. *Science versus Art*

Law and poetry are different uses of the human mind in service of similar ideals. For the most part, legal reasoning partakes of the rational, logical or analytical aspect of the mind. In this respect, we might characterize law as a science. By contrast, poetry usually partakes of the intuitive, sensory aspect of the mind. We might say poetry illustrates what lies at the border of logic. Poetry offers us visions and sensory perceptions in ways apart from abstract logic, such as through pictures, images or visions. We might, therefore, characterize poetry as a form of art. Let us describe this difference more carefully.

When we say law is a science, we mean judgments of law operate within a set of established rules that form a field or pattern in which legal reasoning takes place. Rules of law are established in constitutions, statutes, regulations, cases and the like. These rules serve as a benchmark against which a legal question must be measured to determine resolution of the matter. Legal questions are, in this way, rule-bound.

Poetry is different. Judgments of poetry are not generally

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34. MacLeish, *supra* note 15, at 1510.

35. *Id.* at 1506.

made within the context and constraints of rules. Instead, poetry involves the free use of imagination or intuition, unencumbered by the discipline of rules. In this sense, poetry is an act of the free reign of the mind. In this way, we can characterize poetry as art, not science.

Immanuel Kant described this difference well. In his third critique, *Critique of the Power of Judgment*,<sup>36</sup> Kant provides an account of aesthetic judgment—judgment of beauty or art.<sup>37</sup> Kant distinguishes between judgments of art and judgments of science in a way we find quite useful in distinguishing law from poetry.

Judgments of beauty involve the faculties of imagination and creation. These judgments are free in the sense that they are not subject to a rule to which they must conform. There is no rule for determining whether something (e.g., a poem, painting or sculpture) is or is not beautiful.<sup>38</sup> That is why judgments of beauty cannot be resolved definitively or “scientifically.” Instead, they are free, “disinterested and ruleless, unconstrained . . . by . . . appetite” or the demands “of a master concept to which they must conform.”<sup>39</sup> Thus, aesthetic judgments partake of the exhilaration of freedom, which “is the source of the pleasure to which judgments of beauty refer.”<sup>40</sup> In this way, aesthetic judgments are a way to partake of the “pleasure of freedom itself.”<sup>41</sup>

This sense of freedom, according to Kant, is a person’s “feeling of life,”<sup>42</sup> “the pleasurable experience of being an active, living being endowed with a freedom that transcends the world.”<sup>43</sup> It is a “power of free creativity,”<sup>44</sup> unbound by rules. This is the essence of artistic invention, the heart of the enjoyment of the power itself.<sup>45</sup>

36. IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* (Paul Guyer, trans., Cambridge 2000) (1790).

37. *See id.* at 23-24.

38. Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 GA. ST. U. L. REV. 311, 319-24 (1999). This Part relies, in part, on Kronman’s article.

39. *Id.* at 324.

40. *Id.*

41. *Id.*

42. *Id.* (quoting IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 38 (J.H. Bernard trans., Hafner 1951) (1790)).

43. Kronman, *supra* note 38, at 324-25.

44. *Id.* at 325.

45. *Id.* at 324.

By contrast, a scientific judgment, by definition, must conform to a rule. The field determines the rule. In law, rules are set by the lawgivers—legislators, courts, agencies and the like. The range of legal rules present in law forms the legal field within which legal judgments must operate. That is what we mean by the rule of law.

Of course, life being what it is with all its complication, no rule applies completely in all respects. Within the rules of law there are some acts of "free play," judgments necessary to settle a case. The Supreme Court acknowledged as much in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>46</sup> Consider the statements of the German Constitutional Court in the *Soraya* case: "Law is not synonymous with the totality of written statutes."<sup>47</sup> Under some circumstances, law can include additional concepts derived from "the constitutional order as a whole" and "functioning as a corrective to the written law."<sup>48</sup> Thus, rather than being "bound by the strict letter of the law, the role of the judge is to realize in case law . . . the values immanent in the constitutional order, [even if] not written or clearly expressed in written law."<sup>49</sup> Judges should fill in statutory gaps based on "practical reason" and "well-founded general community concepts of justice."<sup>50</sup> Note Karl Llewellyn's famous observation that the role of the judge, when confronted with an act of judgment, is to apply his "situation-sense."<sup>51</sup>

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46. "The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment." 505 U.S. 833, 849 (1992).

47. 34 BVerfGE 269, 286-87 (1973).

48. *Id.* at 287.

49. *Id.*

50. *Id.*

51. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 268-85 (1960) (judges should apply common sense, respect precedent, and sense the needs of society in deciding cases). As Llewellyn explains:

[T]he sizing up of "the case" into some pattern is of the essence of getting to the case at all, and the shape it starts to take calls up familiar, more general patterns to fit it into or to piece it out or to set it against for comparison. This much, as we all know, is not a matter of method or of desire, it comes close to being a matter of necessity, it is the way the normal human mind insists on working most of the time. What is not necessity is that the courts should

Likewise, some poetry must conform to rules. For example, consider poems that rhyme or follow the three-line, seventeen syllable (5/7/5) format of the haiku. "Sashay down the page/ through the lioness/ nestled in my soul"; "Imagine now and sing/ creating myths/ forming jewels from the falling snow"; "You broke my soul/ the juice of eternity/ the spirit of my lips."<sup>52</sup> Poems like these exercise the act of "free-play" within the constraints of rules.

Or consider the fourteen-line sonnet, dating at least to the fourteenth century in Italy, and made famous by Petrarch.<sup>53</sup> Shakespeare and others from the Elizabethan Age famously employed the form:

Let me not to the marriage of true minds  
Admit impediments; love is not love  
Which alters when it alteration finds,  
Or bends with the remover to remove.  
O no, it is an ever-fixed mark  
That looks on tempests and is never shaken;  
It is the star to every wand'ring bark,  
Whose worth's unknown, although his height be taken.  
Love's not Time's fool, though rosy lips and cheeks  
Within his bending sickle's compass come;  
Love alters not with his brief hours and weeks,  
But bears it out even to the edge of doom.  
If this be error and upon me proved,  
I never writ, nor no man ever loved.<sup>54</sup>  
Beauty can be artfully expressed within the framework of a

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wind up accepting any particular legal category as the controlling pattern unless it proves to be a category with sense-significance as well as doctrinal significance, or without looking around for other possibly more significant ways to type the problem.

*Id.* at 268-69.

52. GROSSFELD, *supra* note 3, at 54 (quoting Teresa Riordan, *Investor Creates Software That Can Turn a Computer into Cyberpoet*, N.Y. TIMES, Nov. 24, 2003, at C7. Consider some other examples of the haiku. "Heat-lighting streak-/through darkness pierces/the heron's shriek." "In the old stone pool/a frog jumped:/splishhhhhh." "Cricket be./Careful! I'm rolling/Over!" LITERATURE: AN INTRODUCTION TO FICTION, POETRY AND DRAMA 799 (J. Kennedy and Dana Groia eds., 9th ed. 2005) [hereinafter "LITERATURE"].

53. LITERATURE, *supra* note 52, at 917.

54. William Shakespeare, *Sonnet No. 116*, in THE RIVERSIDE SHAKESPEARE 1770 (G. Blakemore Evans ed., Houghton Mifflin 1974) [hereinafter "RIVERSIDE SHAKESPEARE"].

rule, too.

A further point on Kant's account of aesthetic judgment is worth elaborating. Kant's notion of aesthetic enjoyment partakes further pleasure in that, in principle, it is universally communicable to other people in ways similar to the universality that underlies his philosophical and moral theories.<sup>55</sup> Universal communication of judgments of beauty provides common ground for all, "a common basis of experience that all human beings share."<sup>56</sup>

Aesthetic judgments (such as those involved in poetry) yield "the pleasurable sensation produced by the free play of [our] mental faculties, . . . the spontaneous creativity of mental life."<sup>57</sup> Objects of aesthetic contemplation and the judgments they yield "stimulate our awareness of this creative power" and invite us to recognize and share "this same pleasurable power."<sup>58</sup> It is an aspect of acknowledging "our common humanity"—"the shared experience of free creativity."<sup>59</sup> The poet and his or her reader share a bond that forms a basis for shared meanings: the bond of communicating and sensing life's feelings. Each thereby participates in the universal experience of being human.

### B. Power

A second difference between law and poetry worth observing is their relationship to power. Law operates within a power structure; poetry does not. Let us explain.

Law is a governing force of society. In the western legal tradition we are most familiar with, we speak of, the rule of law, meaning society is organized according to the set of norms established by the legal process. Thus, acts of law have a direct coercive effect; citizens must respect them on pain of sanction.

Poetry has no such power. We can be inspired by a poem or we can be outraged by one, but we do not go to jail if we fail to live up to its standards. Thus, when Shelley speaks about "[p]oets [as] the unacknowledged legislators of the world,"<sup>60</sup> he is not speaking

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55. See Kronman, *supra* note 38, at 325-26.

56. Kronman, *supra* note 38, at 325.

57. *Id.* at 326.

58. *Id.*

59. *Id.*

60. SHELLEY, *supra* note 2, at 46.

of coercion, but of the poet's creation of cosmos. It seems fair to say that poets have inspirational, but not coercive, power.

The same might be said of other actors within the legal system. Lawyers arguing a case, or scholars expounding a theory, influence, but do not make, law. In this respect, these legal actors may be closer to poets than to power legal actors. Scholarly theorization, in fact, is often more an act of art than an act of science. While couched in legal words, legal theory can be a form of "free-play," unbound by rules as the theory challenges the convention.

A famous example of creative legal theory is Rudolf von Jhering's challenge to the then prevailing German legal methodology of *Pandektenrecht*, the German historical school founded on close study of the principles and methodology of Roman law made famous by Friedrich Carl von Savigny. In place of *Pandektenrecht*, von Jhering postulated a theory of *Interessenjurisprudenz*, a jurisprudence of interests,<sup>61</sup> which became the basis for legal realism, the prime influence on the development of the American school of legal realism. The famous discussion between Jerome Frank, Roscoe Pound and Karl Llewellyn captures the American side of the debate.<sup>62</sup>

#### IV. THE INFLUENCE OF LAW ON POETRY

As law and poetry are two important exercises of human ingenuity, employing language to create a new visual reality, it is logical that they have some influence on one another. The next two Parts assess that mutual influence. We will start by describing the influence of law on poetry, then we will turn to illuminating the influence of poetry on law. This exercise in mapping will lead us to the crucial question of assessing the impact of this mutual influence, which we take up in Part VI.

This question has especially important consequences for law because it forces us to confront basic questions about law, its relationship to culture, and its influence. What is law, after all?

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61. Rudolf von Jhering, *Der Kampf ums Recht* (1872).

62. See generally Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); JEROME FRANK, *LAW AND THE AMERICAN MIND* (1930).

Is law an ordering mechanism or command structure of society, setting forth operating instructions? The metaphor of the rule of law would seem to suggest this. Or, alternatively, is law driven by culture? Is law just a bunch of letters, operating within a semiotic system, that sit on the surface of a deeper and more complex mix of phenomena that we refer to as culture, a given time-space relationship of people set amidst a configuration of events and forces?

If law is this second alternative, then the influence of poetry on law is quite significant. Poets, after all, are meaning-makers of the human condition in a given society. We might think of them as cultural beacons, singing the hopes, despairs, yearnings or dreams of a particular slice of life as seen through their ken. We might think of poets, in this way, as taking "rubblings of reality."<sup>63</sup> "Rubblings of reality" are the unadulterated essence of culture. If, in fact, culture drives law, then it is worthwhile to pay attention to what cultural beacons say because the seer can see in ways transcending the normal condition of people.<sup>64</sup> But we are getting ahead of ourselves. Let us turn first to mapping the influence of law on poetry, and poetry on law.

#### A. *Poems*

Law is a common topic of poetry, and this is no surprise since law is one of the major forces in society, especially western society. The fate of an individual is determined in part by law, as law pervasively affects personal choice. A person situated in western culture is faced with a plethora of laws which channel and direct behavior. Because poets reflect and influence the culture in which they live, it is natural that poets would poetize law.

Going back at least to Chaucer, we can observe law in poetry:

So great a purchasour was nowher noon.

Al was fee simple to him in effect;

His purchasing mighte nat been infect

Nowher so bisy a man as he ther nas;

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63. Briarcliff Quarterly, *Rubblings of Reality*, in WALLACE STEVENS: COLLECTED POETRY AND PROSE 815 (1997).

64. WHITMAN, *Preface to Leaves of Grass*, in WHITMAN, *supra* note 6, at 746 ("The greatest poet . . . is a seer . . . only he sees it and they do not. He is not one of the chorus. . . . What the eyesight does to the rest he does to the rest.").

And yet he semed bisier than he was.  
 In termes hadde he caas and domes alle,  
 That from the tyme of King William were falle.  
 Thereto he coude endyte, and make a thing;  
 Ther coude no wight pinche at his wryting,  
 And every statut coude he pleyn by rote.<sup>65</sup>  
 [So great a purchaser was never known.  
 All was fee simple to him, in effect,  
 Wherefore his claims could never be suspect.  
 Nowhere a man so busy of his class,  
 And yet he seemed much busier than he was.  
 All cases and judgments could he cite  
 That from King William's time were apposite.  
 And he could draw a contract so explicit  
 Not any man could fault there from elicit;  
 And every statute he'd verbatim quote.]

Law was a frequent theme of Shakespeare, including his famous cry in *Henry VI*: "The first thing we do, let's kill all the lawyers."<sup>66</sup> This phrase is frequently used to denigrate lawyers. However, in the context of the play, the more plausible meaning of the phrase is that because lawyers were especially powerful, and therefore to be feared, they were to be done away with in the first wave of extermination of the old regime.

Consider his observation in *Measure for Measure*:

We must not make a scarecrow of the law,  
 Setting it up to fear the birds of prey,  
 And let it keep one shape till custom make it,  
 Their perch, and not their terror.<sup>67</sup>

And perhaps no one ever captured the essence of defamation law as well as Shakespeare:

Good name in man and woman, dear my lord,  
 Is the immediate jewel of their souls.

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65. Geoffrey Chaucer, *THE CANTERBURY TALES: NINE TALES AND THE GENERAL PROLOGUE* 11 (V.A. Kolve ed., Norton & Co. 1989).

66. William Shakespeare, *The Second Part of Henry the Sixth* act 4, sc.2, 76-77, in *THE RIVERSIDE SHAKESPEARE* 693 (Houghton Mifflin Co., 2d ed. 1997) [hereinafter "RIVERSIDE SHAKESPEARE"].

67. William Shakespeare, *Measure for Measure*, act 1, sc. 4, 1-4, in *RIVERSIDE SHAKESPEARE*, *supra* note 66, at 590.



Who steals my purse steals trash; 'tis something,  
 nothing;  
 'Twas mine, 'tis his, and has been slave to thousands;  
 But he that filches from me my good name  
 Robs me of that which not enriches him,  
 And makes me poor indeed.<sup>68</sup>

Poetry offers us many portraits of the legal profession. Often, poets depict lawyers in unflattering terms. Carl Sandburg was not shy to demean lawyers in his poetry of the common man, geared to the simplicity of the American ideal of virtuous, self-reliant independence, the force of American democracy.

Consider Sandburg's musings in *The Lawyers Know Too Much*:

The lawyers, Bob, know too much.  
 They are chums of the books of old John Marshall.  
 They know it all, what a dead hand wrote,  
 A stiff dead hand and its knuckles crumbling,  
 The bones of the fingers a thin white ash.  
 The lawyers know  
 a dead man's thought too well.

...

When the lawyers are through  
 What is there left, Bob?  
 Can a mouse nibble at it  
 And find enough to fasten a tooth in?  
 Why is there always a secret singing  
 When a lawyer cashes in?  
 Why does a hearse horse snicker  
 Hauling a lawyer away?<sup>69</sup>

Lawyers can be held in high esteem too. Consider again Chaucer's portrait of a lawyer in *The Canterbury Tales*: "So great a purchaser was never known. . . . And he could draw a contract so explicit/Not any man could fault there from elicit."<sup>70</sup>

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68. WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3, 155-61, in RIVERSIDE SHAKESPEARE, *supra* note 66, at 1221.

69. Carl Sandburg, *The Lawyers Know Too Much*, in THE COMPLETE POEMS OF CARL SANDBURG 189 (1970).

70. See *supra* text accompanying note 59.

## B. Lawyer-Poets

Some lawyer-poets sought solace in poetry as an escape from the drudgery of law, a drudgery well-documented in current American periodicals.<sup>71</sup> Let us survey the poetry of some of them—Bryant, Masters and Joseph—as we try to obtain more insight into the influence of law on poetry.

### 1. William Cullen Bryant

William Cullen Bryant sought escape from law in the purer world of nature, a world for which he longed.

O'er Coke's black letter page,  
Trimming the lamp at eve, 't is mine to pore;  
Well pleased to see the venerable sage  
Unlock his treasur'd wealth of legal lore;  
And I that loved to trace the woods before,  
And climb the hill a play mate of the breeze,  
Have vow'd to tune the rural lay no more,  
Have bid my useless classics sleep at ease,  
And left the race of bards to scribble, starve and freeze.<sup>72</sup>

Escape to nature in the mind image he envisioned and of which he wrote served as a respite from the time-clock of law. He traced how nature could induce a natural order and make civilization.

The weak, against the sons of spoil and wrong,  
Banded, and watched their hamlets, and grew strong;  
States rose, and, in the shadow of their might,  
The timid rested. To the reverent throng,  
Grave and time-wrinkled men, with locks all white,  
Gave laws, and judged their strifes, and taught the way of right.<sup>73</sup>

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71. See, e.g., Kate Gibbs, *Far From the Glamorous Profession in 'LA Law'*, LAWYERS WEEKLY (Dec. 16, 2005); Kate Gibbs, *Search for a Billing Alternative*, LAWYERS WEEKLY (Nov. 18, 2005); Jill Schacher Chanen, *The Breaking Point: A Hiatus Can Help Lawyers Step Back and Reflect on What Is Important*, 87 A.B.A. J. 82 (June, 2001).

72. Letter from William Cullen Bryant to Jacob Porter (April 26, 1813), in 1 LETTERS OF WILLIAM CULLEN BRYANT 28 (William Cullen Bryant & Thomas G. Voss eds., 1975), quoted in Steven M. Richman, *William Cullen Bryant and the Poetry of Natural Law*, 30 AKRON L. REV. 661, 665 (1997).

73. WILLIAM CULLEN BRYANT, *The Ages*, in THE POETICAL WORKS OF

Dominance by the strong is part of the natural order. The weak must band together to form the strong.<sup>74</sup> Law can then be used to secure the right. Bryant thus speaks of the social contract, the prevailing political theory of the Enlightenment Age in which he lived. It is clear that Bryant sees hope in the natural order, and that the United States represents a new experiment, one animated by the good of nature compared to the older, corrupt ideals of Europe.<sup>75</sup> He captures this sense of democracy in *Rats and Mice*:

Once on a time, as saith our story,  
 Within a single edifice  
 A nation flourished in its glory,  
 Whose citizens were rats and mice.  
 The politics they prospered under  
 Passed far and widely for a wonder,  
 So based were they on reason's laws,  
 And equal rights of vermin;—  
 So planned, the general good to cause  
 And cleanly keep Justitia's ermine.<sup>76</sup>

The natural order of community is based on "reason, equality, [and] justice," an ideal state formed by natural law, of which the United States was the archetype.<sup>77</sup> Bryant sees an elemental harmony in nature:

The elemental harmony brings forth  
 And rears all life, and, when life's term is o'er,  
 It sweeps the breathing myriads from the earth,  
 And whelms and hides them to be seen no more:  
 While the Great Founder, he who gave these laws,  
 Holds the firm reins and sits amid his skies  
 Monarch and Master, Origin and Cause,  
 And Arbiter supremely just and wise.<sup>78</sup>

Law, in a sense, is divinely ordered in Bryant's vision. Law provides justice and order to daily life, which might, of course, be

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WILLIAM CULLEN BRYANT 21 (Roslyn 2d ed. 1915) [hereinafter "POETICAL WORKS"], *quoted in* Richman, *supra* note 72, at 665.

74. Richman, *supra* note 72, at 665.

75. *Id.* at 666.

76. *Id.* at 668.

77. *Id.*

78. POETICAL WORKS, *supra* note 73, at 330, *quoted in* Richman, *supra* note 73, at 683.

the very purpose of law.

In *The African Chief*, Bryant bemoans America's ignoble bargain with slavery:

Chained in the market-place he stood,  
A man of giant frame,  
Amid the gathering multitude  
That shrunk to hear his name.

...

Vainly, but well that chief had fought,  
He was a captive now,  
Yet pride, that fortune humbles not,  
Was written on his brow.

...

Not for thy ivory nor thy gold  
Will I unbind thy chain;  
That bloody hand shall never hold  
The battle spear again.  
A price that nation never gave  
Shall yet be paid for thee;  
For thou shalt be the Christian's slave,  
In lands beyond the sea.<sup>79</sup>

To Bryant, slavery is savage and unnatural; it is a violation of nature's laws. Bryant captures the immorality of slavery, and presages the great American struggle over it that would come.

In Bryant, we find a chronicler of early America, America with all of its promise as the New World. The ideal of America is a world animated by the positive forces of nature, following nature's model to form a new polity.

## 2. *Edgar Lee Masters*

Edgar Lee Masters, likewise, escaped to poetry, although the world of law he invoked was one of power and manipulation, law being the thread pulling lives together. Masters portrayed the legal world in all of its grittiness and politics. He invoked his own experiences as a courtroom lawyer, first in a small town, then later in Chicago.<sup>80</sup> Employing the device of soliloquy, he sought to

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79. POETICAL WORKS, *supra* note 73, at 102, *quoted in* Richman, *supra* note 65, at 670.

80. Steven Richman, *Edgar Lee Masters and the Poetics of Legal*

convey an honesty about life in a small town—fictional Spoon River—through the voices of its deceased residents. Death provides the true hindsight; freed of the conventions of life, a person can speak frankly. In Spoon River there is little justice; power and influence largely determine fate, an unseen but directing thread maneuvered by law.

Consider his portrayal of a trial lawyer in *John M. Church*:

I was attorney for the "Q"  
And the Indemnity Company which insured  
The owners of the mine.  
I pulled the wires with judge and jury,  
And the upper courts, to beat the claims  
Of the crippled, the widow and orphan,  
And made a fortune thereat.  
The bar associations sang my praises  
In a high-flown resolution.

And the floral tributes were many—  
But the rats devoured my heart  
And a snake made a nest in my skull!<sup>81</sup>  
Or consider Master's dark view of law in *Hod Putt*:

Here I lie close to the grave  
Of Old Bill Piersol,  
Who grew rich trading with the Indians, and who  
Afterwards took the bankrupt law  
And emerged from it richer than ever.  
Myself grown tired of toil and poverty  
And beholding how Old Bill and others grew in wealth,  
Robbed a traveler one night near Proctor's Grove,  
Killing him unwittingly, while doing so,  
For the which I was tried and hanged.  
That was my way of going into bankruptcy.  
Now we who took the bankrupt law in our respective ways  
Sleep peacefully side by side.<sup>82</sup>

In Spoon River, Masters depicts the adversary system as distorting and twisting truth. Lawyers' gamesmanship, power

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*Realism*, 31 CAL. W. L. REV. 103, 104 (1994).

81. Edgar Lee Masters, *John M. Church*, in SPOON RIVER ANTHOLOGY 83, 83 (1992).

82. Edgar Lee Masters, *Hod Putt*, in SPOON RIVER ANTHOLOGY, *supra* note 81, at 3.

and influence determine all.

Take note, passer-bys, of the sharp erosions  
 Eaten in my head-stone, by the wind and rain—  
 Almost as if an intangible Nemesis or hatred  
 Were marking scores against me,  
 But to destroy, and not preserve, my memory.  
 I in life was the Circuit Judge, a maker of notches,  
 Deciding cases on the points the lawyers scored,  
 Not on the right of the matter.  
 O wind and rain, leave my head-stone alone!  
 For worse than the anger of the wronged,  
 The curses of the poor,  
 Was to lie speechless, yet with vision clear,  
 Seeing that even Hod Putt, the murderer,  
 Hanged by my sentence,  
 Was innocent compared with me.<sup>83</sup>

From *Jack McGuire* we learn:

They would have hanged me except for this:  
 My lawyer, Kinsey Keene, was helping to land  
 Old Thomas Rhodes for wrecking the bank,  
 And the judge was a friend of Rhodes  
 And wanted him to escape,  
 And Kinsey offered to quit on Rhodes  
 For fourteen years for me.  
 And the bargain was made. I served my time  
 And learned to read and write.<sup>84</sup>

Master's vision is a dark one. Law is a manipulative force, bent and twisted by men of power and influence to suit their ends.

Some lawyer-poets, like Wallace Stevens, almost never invoke law, at least not directly. He seemed to keep separate his day job as surety lawyer for the Hartford Accident and Indemnity Insurance Company from his true vocation as poet. As a poet, he sought a world of mind-creation, employing metaphor freely to transfigure and escape the banality of daily existence. Unlike Masters, he appeared to like the distraction law offered from the

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83. EDGAR LEE MASTERS, *The Circuit Judge*, in SPOON RIVER ANTHOLOGY, *supra* note 81, at 74.

84. Edgar Lee Masters, *Jack McGuire*, in SPOON RIVER ANTHOLOGY, *supra* note 81, at 43.

hard work of poetry.<sup>85</sup>

Contemporary lawyer-poets invoke and reflect the world of law in their poetry as well. Consider Lawrence Joseph, a law professor at St. John's University, former practicing lawyer and active poet, speaking to the condition of that strange beast we call a lawyer.

Now, what type of animal asks after facts?

— so I'm a lawyer . . . . Things like "you too

may be silenced the way powerful  
corporations silence, contractually"

attract my attention. The issue's  
bifurcated. "Why divide the dead?"

The Foreign Minister asks, "what's one life  
when you've lost twenty million?"<sup>86</sup>

Or consider his poem, *Variations on Variations on a Theme*:

And that's the law. To bring to light  
most hidden depths. The juror screaming  
defendant's the devil staring at her  
making her insane. The intense strain  
phrasing the truth, the whole truth, nothing  
but sentences, endless sentences.<sup>87</sup>

The stuff of law is words—words and words, sentences and sentences—communicating through language the meanings of events and facts, issues and questions, rules and counter rules or standards of conduct directed by law. Law is one big struggle over what the meaning of an event or a case or a force is. There is a strain to get it right, or to get it the way you want, as the different actors push and pull to convey their points, in a sense like artists trying to form the canvas according to their desires. We might call this the struggle of law, which Joseph captures well.

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85. David A. Skeel, Jr., *Notes Toward an Aesthetics of Legal Pragmatism*, 78 CORNELL L. REV. 84, 94-95 (1992). There is a vast legal literature on Wallace Stevens. A sampling of it includes THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991) and Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990).

86. LAWRENCE JOSEPH, *Admissions Against Interest*, in *BEFORE OUR EYES* 12 (1993), quoted in David A. Skeel, Jr., *Practicing Poetry, Teaching Law*, 92 MICH. L. REV. 1754, 1764-65 (1994).

87. LAWRENCE JOSEPH, *Variations on Variations on a Theme*, in *BEFORE OUR EYES*, *supra* note 86, at 43, quoted in Skeel, *supra* note 85, at 1766.

We could go on offering more examples, but the point is clear: law is a common topic of poetry, a topic like other major forces in society that influences and infuses the muses. It is natural that this is the case, given the prominence of law in western society. The reciprocal question is now the one that interests us: how does poetry influence law?

#### V. THE INFLUENCE OF POETRY ON LAW

There are obvious and direct ways in which poetry influences law, which is perhaps surprising. The direct influence of poetry on law can be seen in the appearance of poetry in reported decisions and even the rendering of judicial decisions in verse. There are also important influences of poetry on law that are less easy to discern. This more indirect influence we refer to as an invisible power in the sense that the influence is less obvious, although the power still exerts influence. In this Part V, we chronicle the direct and indirect influence of poetry on law.

##### *A. Direct Influence*

Poetry appears directly in the law, and thus we can speak of a way in which poetry influences law. The main way in which poetry influences law in this respect is as a mode of expression, conveying the meaning or emotion of an issue or reinforcing through other word forms thoughts or ideas expressed in more traditional, scientific or legal language. This influence of poetry on law is better illustrated by example than by description.

Consider, for example, Justice Blackmun's invocation of poetry as the means to depict the ubiquity and importance of baseball to American culture in the Supreme Court's decision, *Flood v. Kuhn*, which upheld the practice of treating baseball players as employees of the major league baseball teams for which they played, and not as the free agents they desired to (and later would) become:

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat"; the ring of "Tinker to Evers to Chance"; and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view,



"the great American tragedy."<sup>88</sup>

Blackmun's invocation of poetry is a readily identifiable cultural reference to Americans, speaking to the common appeal of baseball across generations. Blackmun's use of poetry is a way of conveying his understanding of the importance the case would hold for the American sport.

Or consider *Texas v. Johnson*, in which the Supreme Court, in a hotly contested five-four decision, determined that it was a violation of the cardinal free speech principle of content discrimination for government to prohibit only desecration of the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."<sup>89</sup> The majority of the Court, in a decision by Justice Brennan, carefully explained its decision in the language of First Amendment methodology, a judgment of science we might say. Chief Justice Rehnquist, responding in dissent, first offered a long set of cultural references reflected in poetry to capture and express the special meaning the flag held for the nation. He quoted extensively from, among other works, Ralph Waldo Emerson's *Concord Hymn*, the American national anthem, *The Star Spangled Banner*, and John Greenleaf Whittier's poem, *Barbara Frietche*, to convey the symbolic significance of the unity the flag holds for the nation.<sup>90</sup> Only later did Rehnquist couch his response in First Amendment methodology. In a sense, resort to poetry allowed Rehnquist to convey meaning in a way that legal language could not. The raw starkness of poetry spoke more clearly than *stare decisis*.

Another example worth mentioning is Judge Reinhardt's use of the famous song, *Strange Fruit*, to portray the act of hanging in a case that considered whether hanging was cruel and unusual punishment under the Eighth Amendment to the Constitution:

Southern trees  
Bear a strange fruit  
Blood on the leaves  
And blood at the root

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88. 407 U.S. 258, 263-64 (1972).

89. 491 U.S. 397, 400 n.1 (1989) (quoting Texas Penal Code Ann. § 42.09(b) (1989)).

90. *See id.* at 422-27.

Black bodies swingin'  
 In the Southern breeze  
 Strange fruit hanging  
 From the poplar trees.

...

Here is a fruit

...

For the tree to drop  
 Here is a strange  
 And bitter crop.<sup>91</sup>

Some judges go further, resorting to poetry to render decisions. Mary Kate Kearney assesses the sense and propriety of this act, concluding that there is a place for poetry in judicial opinions as "an appropriate form of judicial expression."<sup>92</sup> She draws upon the poetic *oeuvre* of Judge Michael Eakin, a member of the Superior and then Supreme Court of Pennsylvania.

Let us sample his handiwork. For a premarital contract gone awry, Eakin penned:

Conrad Busch filed a timely appeal,  
 Trying to avoid a pre-marital deal  
 Which says appellee need not pay him support,  
 He brings his case, properly, before this Court.

...

They wanted to marry, their lives to enhance,  
 Not for the dollars—it was for romance.  
 When they said "I do," had their wedding day kiss,  
 It was not about money—only marital bliss.

...

But a deal's a deal, if fairly undertaken,  
 And we find disclosure was fair and unshaken.  
 Appellant may shun that made once upon a time,  
 But his appeal must fail, lacking reason (if not rhyme).<sup>93</sup>  
 Consider a contract case involving the sale of emus:  
 The emu's a bird quite large and stately,

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91. Campbell v. Wood, 18 F.3d 662, 701 (9th Cir. 1994) (Reinhardt, J., dissenting) (quoting Lewis Allan, *Strange Fruit* (1939)).

92. Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 WIDENER L. J. 597, 599 (2003).

93. Busch v. Busch, 732 A.2d 1274, 1275, 1278 (Pa. Super. Ct. 1999), quoted in Kearney, *supra* note 92, at 597.

Whose market potential was valued so greatly  
 That a decade ago, it was thought to be  
 The boom crop of the 21st century.  
 Our appellant decided she ought to invest  
 In two breeding emus, but their conjugal nest  
 Produced no chicks, so she tried to regain  
 Her purchase money, but alas in vain.  
 Appellant then filed a contract suit,  
 But the verdict gave her claim the boot;  
 Thus she was left with no resort  
 But this appeal to the Superior Court.<sup>94</sup>

The rendering of judicial opinions by verse demonstrates a clear and direct influence of poetry on law, meting out justice by meter, so to say. Likewise, the use of poetry in judicial opinions illustrates how judges, too, utilize the full range of human emotion and understanding to communicate the points of the law. Perhaps poetry affords judges the opportunity to address the public in a more readily understandable medium. Perhaps, like Bryant and Masters, it affords them a creative outlet for expression different than the normal conventions of judicial opinions. So we can observe a visible impact of poetry on law. Now, let us turn to a more illusive quest: tracing the less visible influence of poetry on the law, what we call an invisible power.

### B. Indirect Influence

"By indirections find directions out . . . ."<sup>95</sup>

Less overt yet powerful, indirect influences operate in crucial ways on law, sometimes forming the formant or underlying crypto type that actually drives law.<sup>96</sup> For example, geography can drive the law. To use an example we have previously discussed, consider how geography changed water law in Texas. Inheriting the water law of England, a country with an abundance of water, Texas altered the law to fit its climate of arid, dry land. The English law of riparian rights was changed to the Texas law of

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94. *Liddle v. Scholze*, 768 A.2d 1183, 1184 (Pa. Super. Ct. 2001), *quoted in* Kearney, *supra* note 92, at 603-04.

95. William Shakespeare, *Hamlet* act 2, sc. 1, 63, *in* RIVERSIDE SHAKESPEARE, *supra* note 66, at 1200.

96. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (2nd installment), 39 AM. J. COMP. L., 343, 385 (1991).

appropriation: "first in time, first in right."<sup>97</sup>

Uncovering and decoding these invisible powers opens up a whole new array of understandings concerning the interrelationship of law to culture and, as we understand this process, law itself—its content, impetus, breadth and limitation. This is what we now set out to do: uncover some of the invisible powers of poetry on law. This will call on us to look at law in new ways, with new senses and a new awareness of the process and forces at work in forming and influencing law. But, in turn, this inquiry will open up new dimensions of law and its relationship to culture. We concentrate on these invisible powers of poetry on law: culture, language and structure.

### 1. *Culture*

Law does not exist in a void but interacts with and helps infuse culture. Poetry is one of the seminal forces of culture, as poets reflect on the human condition in a given time-space relationship and, through their voice, help constitute the culture through their expression and vision. In this respect, we might refer to poets as beacons of the culture. Shelley had a way of describing this vision: "A poem is the very image of life expressed in its eternal truth."<sup>98</sup> Or as Robert Frost expressed, "poetry rules the world."<sup>99</sup> Walt Whitman observed, simply, that "[t]he greatest poet . . . knows the soul."<sup>100</sup> Poets offer us the raw, unfiltered sense of the culture. Poets thereby help reflect the culture—the underlying setting of law, its history, tradition, milieu, impulses and so on.<sup>101</sup>

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97. Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L.J. 291, 299 (2003). For further consideration of this theme, see BERNHARD GROSSFELD, CORE QUESTIONS OF COMPARATIVE LAW (Vivian Grosswald Curran trans., 2004).

98. Percy Shelley, *A Defense of Poetry*, in SHELLEY'S POETRY AND PROSE (1821) 485 (Donald H. Reiman & Sharon B. Powers eds., Norton & Co. 1977).

99. Robert Frost, *On Extravagance: A Talk*, in COLLECTED POEMS, PROSE & PLAYS 902, 903 (1995).

100. WHITMAN, *supra* note 6, at 749.

101. Whitman, again, captures this thought well: "the greatest poet brings the spirit of any or all events and passions and scenes and persons some more and some less to bear on your individual character as you hear or read. To do this well is to compete with the laws that pursue and follow time." *Id.* at 748.

Law and poetry are both forces of culture and it is, therefore, not surprising that the forces that drive and influence poetry affect and drive law as well. Thus, in studying this aspect of poetry, we are really studying culture, the common ground from which poetry and law spring and reflect. It thus pays to trace some of the parallel influences of culture on law and poetry, showing how shared phenomena can have a common influence on each.

Studying culture means studying the forces and influences that shape culture. Let us start with the Enlightenment. In this period, the animating belief was directing man's reason to understand the natural world. The world was envisioned to be a naturally ordered design, and the objective of man was to search out and discover its principles.

Enlightenment-inspired reason influenced poetry and its natural outlet, drama, as well. The foremost literary figure of the German Enlightenment was Gotthold Ephraim Lessing, who wrote his famous play, *Nathan the Wise* (1779), during this time. In the play, Lessing gathers in Jerusalem the main religions of the time—Christianity, Judaism and Islam—and tests them with reason to see which best suits man. The test applied to religion is how it applies to human life; Lessing subjects religious tenets to reason, separating solid belief from superstition.<sup>102</sup> His work is a plea for religious tolerance. Interestingly, of course, Lessing's work on religion parallels the important thought occurring contemporaneously on religious freedom, most notably in the young America by Thomas Jefferson and James Madison, who reconceived the idea of religious freedom in constitutional democracy. In this example, culture infuses both law and poetry.

Observe further parallel forces in law. In Europe, this was the beginning of the age of codification of the private law. The animating idea was that law could be ordered along naturally derived principles and made comprehensible. The most ambitious of the codification effort was the Prussian General Territorial Law of 1794, sponsored by Frederick the Great, which attempted to set down in one code all the principles that could regulate the contingencies of life. This effort was, of course, beyond the grasp. But for us what is important is the effort: Frederick's striving to

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102. Ernst Rose, A HISTORY OF GERMAN LITERATURE 146, 148-49 (1960).

capture all of life and its contingencies in a written legal code. Belief in reason propelled this *hubris*. The famous *Code Civil Francais* of 1804 was a more famous and successful version of ordering a society through reason. For our purposes, what is notable is the common influence of specific cultural forces—here Enlightenment reason—on poetry and law.

We might also point to the early work of Friedrich Schiller, forerunner, with Goethe, both of the influential *Sturm und Drang* [Storm and Stress] cultural movement. Schiller's first play, *The Robbers*, depicts a noble outlaw who rebels against the values of his father and what he views as the staid and stultifying conventions of, in essence, the *ancien regime*: tradition, reason, authority, law and order. Fatefully, perhaps, the play appeared in 1781, the same year in which Lessing died, in a literary passing of the guard. Immanuel Kant's foundational book on reason, *Critique of Pure Reason*, also appeared in 1781, refuting rationalist philosophy.<sup>103</sup> The rebellion of *Sturm und Drang* was directed against princely absolutism, authority and the stifling conventions of rationalism. The movement sought, instead, the spontaneous life forces of the human spirit, such as passion and emotion. The rallying cry was for liberty and a return to the purity of nature and the ways of the common man.<sup>104</sup> We might think of *Sturm und Drang* as the cultural revolution of the 1780s and 1790s, a cultural siren of the modern age dawning in Europe.

By studying *Sturm und Drang*, we can obtain further perspective on the mutual influences culture has on law and poetry. The individualism and cry for freedom at the root of *Sturm und Drang* paralleled the great political theories of the age captured so well by the American Revolution (especially the 1776 Declaration of Independence and 1787 Constitution) and the French Revolution of 1789. Each of the literary and political movements drew inspiration and energy from the same impulses of personal freedom and nature. The American and French revolutions were political and social; the German revolution was inwardly spiritual in orientation, affecting letters and the arts.<sup>105</sup>

The poetry of William Cullen Bryant, written later in the

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103. *Id.* at 146, 165.

104. *Id.* at 162.

105. *Id.* at 156.

early nineteenth century, a formative period of law and letters in the United States, works on similar themes, shifting somewhat to nature and natural reason, as we have discussed.<sup>106</sup> This was the period just after the adoption and implementation of the American Constitution, a period of hope. Bryant's poetry mirrors the essential sense of the American experiment in constitutional democracy. In his poetry, Bryant sought an order and sense of place in nature—a return to the basics—in a way similar to the Framers' design of a new world of law based on natural reason and naturally derived principles of government. Natural law and natural poetry reveal the common theme of nature as an influence, seeking normative order in nature. The New World of America offered these more open possibilities to reconstitute a new order.

We might reconsider the poetry of Edger Lee Masters in this light as well. Masters wrote darkly of law in the early twentieth century. He portrayed law as a somewhat sinister force, a controlling power manipulated by the wealthy and well-connected to perpetuate the power structure of the small town he portrayed in *Spoon River*.<sup>107</sup> Masters's work took place at the time of the emergence of legal realism as a force in legal academics and, later, law. Thus, we might identify legal realism as a common cultural influence on the poetry of Masters and American society of that time. Viewing Masters as a legal realist provides a different perspective on his work, and his work yields keen insight into the society of that time.

Here, too, we could reconsider the work of Lawrence Joseph. Joseph writes today in the era of post-modernism in literature and law. Not surprisingly, Joseph's poetry is modernist, playing with authorial authority, the merging of object and subject and the testing of language as a shaping force. His portrayal of law reflects the influence of Critical Legal Studies (CLS). The real force of society—economic power, beliefs, and ambitions—shape law more than a statute. Or, as simply stated in the CLS credo: "LAW IS POLITICS."<sup>108</sup>

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106. See Richman, *supra* note 73, at 665.

107. See generally *supra* note 82.

108. John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984).

## 2. *Language Architecture*

A further symmetry between law and poetry reveals deep connections between the two, connections that must be carefully studied so that their influence and power can be appreciated. This influence of poetry on law is the modernist experiment in language alluded to in our discussion of Lawrence Joseph. Modernist poetry probes the relationship between author and topic—subjective and objective, the use and conception of language—its contingent nature and opaqueness, its strength and limitation, and the ability through imagination and language to create and reconstitute reality. This modernist poetry experiment presaged the development of the post-modernist developments of legal theory, starting with Critical Legal Studies in the 1980s and now transforming to a range of Critical movements, such as those over race, gender, sexual orientation and the like.

The experiments in poetry began in the early twentieth century in the work of poets like T. S. Eliot, William Carlos Williams, Ezra Pound, and Marianne Moore. Their work made clear that language was a handiwork, a lens that reflected particular perspectives—of the author, of the idea, or of the object. Language was not necessarily a transparent, clear communication of objective truths, senses or the like.<sup>109</sup> Stated differently, modernist poetry showed that poetry was the realization of the reality created by the mind of the poet. The reality we understand or see, in other words, is the reality created and present in our minds. We might speak of a “mind reality.” Language was, ultimately, a shaping mechanism, shaping the ideas or forms we perceive with our senses.

The questions posed by modernist poetry had deep implications for law. Was law any different? Initially, we might say, the answer was yes. Law was different than modernist poetry because law was based on certain core principles, such as justice, liberty or order, and, therefore, these core principles anchored law to objective, universal or stable principles. Law could not be contingent or subjective, as poetry. After all, law was a governing system in society, with direct and coercive effects on

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109. Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227, 1230, 1233-34 (1993).



people.

Yet, the more one contemplates the lessons of modernism, the more one realizes they had a point. Law was not necessarily objective or immutable. Law might, in fact, be based on certain core organizing assumptions around which the architecture of a legal system could be built. But if that is so, then the assumptions around which law are built are perhaps nothing other than the assumptions around which poems are built. Both law and poetry, in other words, are experiments in language (or so they could be). The type of language employed is predicated on the underlying assumptions made. Stated a different way, the reality portrayed through language, in either law or poetry, is the reality shaped by the creator and his interpreters.

Viewed this way, we can now see that law itself can be viewed as less objective and more contingent. Law depends on the assumptions made by the creator—legislators, judges or other lawgivers. Thus, study of the law's assumptions might uncover law's source, the underlying historical, philosophical, cultural or economic forces that help determine the path of the law. Law, in other words, is contingent on the assumptions made. And if assumptions can be made, assumptions can also be altered. In this respect, then, law is like modernist poetry—a lens reflecting the perspective of the creator, of the idea or the like.

For example, consider the United States Constitution. When a person first reads the Constitution, the person is naturally inclined to read it as authoritative, objective and maybe even universal in its appeal to foundational concepts such as separation of powers, democracy and human rights. Yet, the more one reads and studies the Constitution, and heeds the lessons of language, the more one recognizes that the Constitution, like any work, is rooted in certain base assumptions, and that these assumptions animate the work and, to the extent the work is rendered into law as a coercive power, the legal system itself.

In the case of the Constitution, architectural principles are rooted in particular time-place world views that vest the document with special meaning. For example, the framing period reflected the influence of the Enlightenment and natural law, especially as those influences were discussed and developed in England and France. Thus, the conception of liberty might have a less universal and a more particular, or contingent, sense, dependent

on the views and aspirations of white aristocratic men in 1780s America.

Or consider how the meaning of words can change. The concept of equality was introduced to the Constitution in 1868 with the adoption of the Fourteenth Amendment following the Civil War. The equality of 1868 contained the space-time views of the abolitionist Reconstruction Congress that had drafted it. By 1896, however, the meaning of equality had changed, as the Supreme Court, in *Plessy v. Ferguson*, vested the clause with the meaning of "separate but equal."<sup>110</sup> In 1954, the Supreme Court, in *Brown v. Board of Education*, altered the meaning of equality again, declaring that "in the field of public education the doctrine of 'separate but equal' has no place."<sup>111</sup> The point here is that all language, including the language of law, can be indeterminate and contingent, dependent upon a particular exchange of meaning between author and reader. The ascription of meaning to words depends upon the given interpretive community of a given time-space relationship. That is the meaning of the Court's declaration in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.<sup>112</sup>

The dependence of language on interpretative communities, a lesson of poetry and literature, has deep meaning for law as well. The meaning-making of law is, like poetry, dependent on the exchange of meaning between the author (in law's case, the law-maker) and the interpretive community. Generally, the exchange of the meaning of law is carried out by the powerful or persuasive members of the society. The meaning they ascribe to law will tend

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110. *See generally* 163 U.S. 537 (1896).

111. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

112. 505 U.S. 833, 901 (1992).

to reflect their views. If this is so, the law of the jurisdiction will tend to lock in the values, views and aspirations of the dominant elements of society.

Alternative conceptions of law depend on different exchanges of meaning, a different complexion of authors and readers. This lesson of poetry and literature has, in the course of our time, transformed our conception of law. With the advent, first, of legal realism, we came to realize that the law is power—what the lawmaker says it is—and not the revealed wisdom of some objective ordering of principles. From this, the legal realists framed their theory of law not as objective but as social policy. Law could then be directed along desired ways, such as social utility, economic justice or economic efficiency.

The true lesson of modernism, however, was with the advent of the CLS movement, which focused on law as contingent, reflecting underlying assumptions about people, social structure and power. Language was the governing mechanism of society, put in place by the governing structure of society. Law was the narrative of the powerful over the powerless, or so it could be.

Heeding the lessons of modernist poetry and postmodern literary theory, if law and society were to change, a new narrative was necessary. This became the aim of CLS: to construct a new narrative of law. These challenges to conventional legal thought transformed into a whole field of what we might call outsider jurisprudence—the perspectives of those outside the mainstream and the power structure. The movement included critical race, critical gender, queer studies, storytelling and so forth. Each of these is trying to shape a new reality by employing a new narrative.

For our purposes, what is significant is that we can identify an important influence of poetry—here modernist poetry—on law. The main impact of this influence is on scholarship more than rules of law, although the vision of legal modernism can also be discerned in the law itself.<sup>113</sup> In this respect, we have uncovered

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113. An example would be the anti-pornography ordinance drafted by feminist pioneers Catherine MacKinnon and Andrea Dworkin that targeted discrimination against women. The Minneapolis city council adopted the ordinance, but the mayor vetoed it. The city of Indianapolis adopted the ordinance, but it was struck down by the federal courts. *See generally* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*,

and decoded an invisible power of poetry on law.

The intense focus on language, structure and authorial authority propels us to recognition of further insights and understandings of law. Two important insights uncovered by the study of poetry are, first, the time-space contingency of legal language and, second, the appreciation of the structure and assumptions—implicit and explicit—of legal language. These learnings flow from our recognition of language as a shaping mechanism of the reality created, which we understand in that form. Let us discuss these in turn.

### *3. Time-Space Contingency of Language*

The teaching of modernist poetry instructs that language itself is contingent and indeterminate. Language is what the author constructs it to be. The meaning of language is the exchange of meaning created by the author as communicated and understood by the reader. But this exchange of meaning occurs in a specific time-space relationship (which we define as a milieu), which will reflect the specific influences, phenomena, and ideas that comprise the milieu. In this respect, we would refer to the specific historical, social, economic, philosophical, technological and other forces constitutive of the culture. The contingency of language as it operates within a specific milieu turns attention to the base forces that comprise the milieu. Legal language is no different. To understand legal language, we need to identify and decode the base forces that comprise the milieu within which legal language operates.

Applying these lessons of language to law, we see law in a different light. For example, let us consider the legal world of the nineteenth century in the United States. If we look to the nineteenth century with twenty-first century eyes, we see the nineteenth century in a way different than the prevailing wisdom of the nineteenth century. In the United States, the nineteenth century was the age of the classical model of law. Law was assumed to rest on objectively rooted principles that were neutral

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475 U.S. 1001 (1986). The history is recounted in KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1085-87 (13th ed. 2001). Their idea was more successful in Canada. See *R. v. Butler* [1992] 1 S.C.R. 452 (explicit sex that degrades or dehumanizes can be banned).

and incontestable. Law was a science. The role of a judge was to derive logical conclusions from the objectively ordered system of the law. The act of judging was the act of divining principles—the oracle of wisdom—not of employing “situation sense.”<sup>114</sup>

The legal language of the time strove for clarity, transparency and consistency. Language was assumed to be a clear means of communicating the truths of law, like a glass window revealing an interior. Poetry was no different. The poet’s language was his or her self-confident revelation of meaning and truths. Consider John Keat’s famous poem *Ode to a Grecian Urn*.

O Attic shape! fair attitude! with brede  
Of marble men and maidens overwrought,  
With forest branches and the trodden weed;  
Thou, silent form! dost tease us out of thought  
As doth eternity: Cold Pastoral!  
When old age shall this generation waste,  
Thou shalt remain, in midst of other woe  
Than ours, a friend to man, to whom thou say’st,  
‘Beauty is truth, truth beauty—that is all  
Ye know on earth, and all ye need to know.’<sup>115</sup>

Today, however, we can observe that the language of the nineteenth century operated pursuant to these very base assumptions, the key operating milieu of this time: an objectively ordered world predicated on belief of certain universal truths. Perhaps belief animated the milieu more than truth. The culture structured itself around a belief—reason and truth—that regulated human conduct.

The use of language in this way can be an act of power, as narratives portray specific meanings and realities. In the nineteenth century, the narrative was law as an objectively ordered science. Conceptualizing law meant rooting society to stable, consistent principles. There are advantages to stability; for example, stability yields a certain comfort, if not trust, in proven or accepted truths. But the narrative of stability tends to lock in the views and aspirations of the entrenched elements of society,

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114. LLWELLYN, *supra* note 51; See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) (describing the change from the classical nineteenth century model of law).

115. John Keats, *Ode on a Grecian Urn* (1820), in *THE OXFORD BOOK OF ENGLISH VERSE 1250-1918* 633 (Sir Arthur Quiller-Couch ed., 1968).

the very members that comprise the power structure of the social order. In pre-industrial America, this may not have been such a dramatic point. For, apart from immigration of some continental Europeans, the American population of the era was essentially homogenous, with the main dominant part still the English-derived settlement of the founding period (Native Americans were, simply, not integrated; African Americans were mainly treated as slaves). The use of language can also be a more rebellious act of power, as new narratives can help construct new realities. Consider two historical examples: the use of common law in England and the use of natural law by American rebels. Turning first to common law, note how English lawyers of the seventeenth century employed the language and law of the common law to preserve their power and guard against the encroachment of the power of the monarch in the Stuart dynasty, beginning with James I, which sought to restore ancient royal prerogatives more typical of traditional European monarchy, including the use of civil law procedures and canon law.<sup>116</sup> The aim of common law lawyers was to preserve the common law to counter the power of the Crown, which sought to extend its reach through greater assertion of its law and courts, over and against the common law. Common law lawyers and judges, such as Lord Edward Coke, resorted to articulation of common law principles to formulate and establish a rule of law covering, even the King, a heretical act in the view of a King bent on restoring the rule of the divine right of kings.<sup>117</sup> The ultimate triumph of English common law illustrates how language can be a decisive shaping mechanism in effectuating change in society. Common law lawyers were vanguards in the victory of Parliamentary forces against those of the Crown. In this case, the Crown lost its head with the beheading of Charles I in 1649.

The American Revolution was similar. To resist English colonization, founding Americans invented a new narrative, the narrative of natural law. This narrative justified a new language

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116. MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 446-47 (2d ed. 1994).

117. A vignette of the history is covered in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 1 (5th ed. 2003).

of human rights and the resultant break from England. The new narrative of natural law drew upon the classical development of natural law in Europe, English Whig theory, and writers such as Grotius and Locke. But Americans fashioned it in new ways to illustrate English oppression and the need to found society on new conceptions of sovereignty, organization of government, constitutionalism and human rights. A written Declaration of Independence proclaiming man's "inalienable rights"<sup>118</sup> and a movement toward written constitutionalism as the foundational organizing charter of the country became the central focuses and rallying points of the new country.

We could go on, but the point is clear: language can shape and create new realities. Narrative makes a difference. We learn these insights from our study and appreciation of language.

#### *4. Structure: Metaphor*

A further insight of poetry useful to law is appreciation of what we might call the structure of language—the grammar, syntax, sentence composition, structure and other devices used or embedded in language. In poetry, the main structural device is metaphor. Metaphor is the life of poetry as the poet uses metaphor to transmit meaning. Poetry teaches us appreciation of these rubrics of language, and they have application to law as well.

In law, we tend to think of the ideals or theories of law, the animating spirit around which a system of law is built. For example, we might think of natural law, law and economics, legal realism or critical theories as theories or ideals on which a legal work is based. But these theories might as well be considered metaphors; they are the rubrics that convey and lend the legal work its meaning. For example, evaluating facts by law and economics methodology will tend to yield a different meaning than evaluation by critical legal studies. Building a system on positivism is likely to yield a structure different than one built on natural law. The theory of law is the metaphor of law, transmitting and vesting meaning in the legal work.

Or we might consider the building of law on particular constructs. Consider again the structuring of American tort law

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118. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

upon the edifice of a "a fictitious person, who never has existed on land or sea: the 'reasonable man.'"<sup>119</sup> The reasonable person standard is used as an external, objective and uniform standard of human behavior. Courts use the ideal of a "reasonable" person as a means of measuring human actions against the norm of what a reasonable person would do in certain circumstances.<sup>120</sup> For example, the Restatement (Second) of Torts identifies the reasonable person as "the standard of conduct to which he must conform to avoid being negligent . . . under like circumstances."<sup>121</sup> A "reasonable" person is a literary fiction, like a poem.

Or consider contract law from the perspective of "free and equal bargaining positions" or exchanges of value based on "arms-length" transactions.<sup>122</sup> Use of these rubrics structures the law along desired objectives, vesting it with particular meanings and orientations, quite apart from whether these constructs are actually manifested in fact.

Other areas of law rely on artifices or visions invented by lawyer-man, not unlike poet-man. For example, the whole area of corporation law, we might say, is built upon the fiction of a corporation. A duly formed corporation has legal existence, as other legal "persons" (e.g., partnerships, organizations, trusts), and can have significant powers and capabilities. A corporation can own, buy, sell or encumber property. A corporation can even buy another corporation. A corporation can outlive its founders or existing set of operating officers; a corporation can experience a taste of eternity, unlike human beings (except maybe poets). Yet, of course, a corporation does not live, breathe or talk (except figuratively or through personification), unlike us. Instead, a corporation exists as a figment of our imagination, one that tangibly affects human existence, because of the life and power bestowed on it by law and legal language vested with the creativity of lawyers. A corporation is the essence of a poetic fiction.

Employing the insights of language and its structure that we gain from study of poetry, we can better appreciate the artifice on

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119. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 174 (W. Page Keeton ed., 5th ed. 1984).

120. KEETON, *supra* note 119, at 173-74.

121. RESTATEMENT (SECOND) OF TORTS § 283, at 12 (1965).

122. *See supra* text accompanying note 31.



which law is built. For example, consider accounting, a field with wide impact on law and finance. The concept of depreciation bestows significant financial advantages on its claimants. The property subject to depreciation—deductions of recognizable costs of wear and tear—loses progressively its value over time, according to tax calculations. But the property may, in fact, be in the same (or improved) state as at its purchase, according to a fair market value determination. A piece of real estate to which improvements are made would be an example. The difference in valuation is attributable to a legal construct—tax-specific depreciation tables—not to real-life, fair market value events.<sup>123</sup> Depreciation, like a corporation, is a legal fiction. We might consider it a metaphor of the law, transferring over meaning. In ways like these, we can appreciate the creativity of lawyers. Lawyers, like poets, can be meaning-makers.

Further, the ideals of law, like the ideals of poetry, animate the spirit of the system or cosmos created. Consider ideals of constitutional law—equality, liberty, fairness or, in judicial proceedings, truth, to name a few. Is law and the language that vests it with meaning any different than poetry? Consider some ideals of poetry: beauty, truth, freedom, inspiration, metamorphosis. Each of the language forms portrays a striving for some ideal form not ordinarily attainable in daily life.

Study of poetry, we can see, is study of language and its creation. The acts of creation can make order and structure. In this way, poetry and law are alike. They are both products of human imagination that shape and order life.

Study of poetry also uncovers the structure of language—the edifice on which it stands. This insight of poetry leads us to the study of legal language and directs us to the rudiments of language on which the law is built. We gain greater appreciation of the law—what it is, its origins, inspirations and aspirations. These are all ways, albeit indirectly, illuminating the influence of poetry on law.

## VI. CONCLUSION

Our short study of the relationship between law and poetry

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123. Conversation with Bruce Kogan, Professor of Law, Roger Williams University School of Law, in Bristol, R.I. (Feb. 11, 2005).

reveals that law and poetry share important relations between them and exert mutual influence on each other. We have seen that law and poetry share language as their working medium; language shapes the chaos of experience in law and poetry; and law and poetry are products of human ingenuity and imagination.

We have also observed that law and poetry differ from one another as well. Law tends more toward the scientific dimension of human thought; poetry tends more toward man's artistic side. Law is often an act of power; poetry makes no claim on power.

But more interesting than the interrelationships between the two is their mutual influence on one another. Law is a frequent topic of poetry; many people are or have been students and/or practitioners of law and poetry. Courts employ poetry to make their points; some judges write opinions in verse. Law and poetry both reflect the culture they are situated in, and they can also help constitute such culture. Study of poetry reveals important insight into the structure and use of language which can uncover discrete, even immanent, patterns in the law.

These observations lead to our point: since law reflects culture and can also infuse culture, we need a deeper understanding of the forces at work that comprise a culture. Poetry is one such important force, as other forces such as history, geography, language or technology. As our study of poetry shows, study of culture calls upon us to examine more carefully the phenomena that comprise a culture and evaluate them with new senses and broader perspectives so that we can be sensitive to the raw materials at the root of these forces. Examination of the underside of law is necessary if we are to obtain greater insight into the phenomena on which a culture sits and a law operates.

Only then can we obtain new understandings of the complicated process of law's operation within a culture. In short, we must be pioneers exploring new dimensions in order to return home to our chosen field of law with greater understanding. Only then can we better assume our roles of bringing and rendering technical expertise and assistance within the cultural context in which law sits. We should strive to be, in other words, translators of law's meanings.

