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LANGUAGE, POETRY, AND LAW: ORDER PATENTS

*Bernhard Grossfeld and Josef Hoeltzenbein**

“We shall not cease from exploration
and the end of all our exploring
will be to arrive where we started
and know the place for the first time.”¹

I. SEMIOTIC CHALLENGES²

“MAN acts as if he sculptured and mastered the language,
whereas in reality language stays on as the master of
man.”³

A. LITERALISM⁴

1. Literacy/Illiteracy

“You search the scriptures, because you think you have eternal life through them.”⁵

Comparative law is better than all our imagination.⁶ Nevertheless, comparatists are lonely riders,⁷ and are in deep trouble.⁸ This is partly due to the fact that they did not take seriously the concept that “the me-

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1. THOMAS S. ELIOT, *Little Giddings*, in *FOUR QUARTETS* (1986) [hereinafter ELIOT].
 2. AMIR D. ACZEL, *THE MYSTERY OF THE ALEPH, MATHEMATICS, THE KABBALAH, AND THE SEARCH FOR INFINITY* (2000) [hereinafter ACZEL]; DAVID FOSTER WALLACE, *EVERYTHING AND MORE: A COMPACT HISTORY OF INFINITY* (2003) [hereinafter WALLACE].
 3. MARTIN HEIDEGGER, “. . . dichterisch wohnt der Mensch . . .”, 7 *GESAMTAUSGABE* 189, 193 (2000).
 4. Cf. Rt. Hon. Lord Rodger, *The Form and Language of Judicial Opinions*, 118 *L.Q. REV.* 226 (2002); Jack Beatson, *The Role of Statute in the Development of Common Law Doctrine*, 117 *L.Q. REV.* 247 (2001).
 5. John 5:39.
 6. Franz Gamillscheg, *Vom Wert der Rechtsvergleichung*, 50 *RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW]* 8 (Supp. 1 2004); Cf. Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 *INT'L & COMP. L.Q.* 817 (1988).
 7. JOHN H. MERRYMAN, *The Loneliness of the Comparative Lawyer*, in *THE LONELINESS OF THE COMPARATIVE LAWYER AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* 1 (1999).
 8. BERNHARD GROSSFELD, *Comparative Law as a Comprehensive Approach: A European Tribute to Professor Jack A. Hiller*, 1 *RICH. J. GLOBAL L. & BUS.* 1 (2000); BERNHARD GROSSFELD, *CORE QUESTIONS OF COMPARATIVE LAW* (Vivian Curran trans., 2005) [hereinafter GROSSFELD, *CORE QUESTIONS*]; Esin Örüçü, *Critical*

dium is the message,"⁹ or, to put it less stringently, that the medium considerably conditions the message. As a consequence, each transition from one medium to another reweaves the entire social and cultural web.¹⁰

The present problems started early, when comparatists forgot that letters are the key cultural technique for the concepts of order.¹¹ The comparatists' letter-based, or addicted, approach ("textism")¹² is criticized internally as being concerned only with the literate part of society, altogether missing the growing number of functional illiterates (about 15 percent in Germany, and 30 percent in Italy and the United States).¹³

"I've been list'nin' to them lawyers
In the court house up the street,
An' I've come to the conclusion
That I'm most completely beat."¹⁴

Only recently have illiterate people begun to fetch the courts' ears and "call into doubt whether a meeting of minds had occurred."¹⁵

B. GERMANY

1. From Writing into Writing

The tendency complained of is remarkably strong in Germany, where Martin Luther's translation of the Bible reformed the German language. Luther (1483 -1546), originally preparing for the study of law (1501 -1505), had been widely exposed to a written text, the Roman law, which was the *ratio scripta* of the time. The procedural rule before the canonical courts was *Quod non est in actis, non est in mundo* ("What [i]s not in the files is not in the world"). Luther then became a Catholic priest in 1507 and a professor for biblical theology at the University of Wittenberg in 1512. He continued to study a written text, the Bible, and Latin as the

Comparative Law: Considering Paradoxes for Legal Systems in Transition, 4.1 ELECTRONIC J. COMP. L. (2000).

9. MARSHALL MCLUIHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (MIT Press 1994); Cf. Note, *The Message in the Medium: The First Amendment of the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).
10. SVEN BIRKERTS, THE GUTENBERG ELEGIES: THE FATE OF READING IN AN ELECTRONIC AGE 3 (1994); LEONARD DUDLEY, EXPLAINING THE GREAT DIVERGENCE: MEDIUM AND MESSAGE ON THE EURASIAN LAND MASS, 1700-1850 (2003).
11. GROSSFELD, CORE QUESTIONS, *supra* note 8, at 161.
12. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?*, 50 AM. J. COMP. L. 175, 187 (2002).
13. Bernhard Grossfeld & Markus Huelper, *Analphabetismus im Zivilrecht*, 9 JURISTENZEITUNG [JV] 430 (1999).
14. PAUL LAURENCE DUNBAR, *The Lawyer's Ways*, in REPRESENTATIVE POETRY ONLINE 3.0 (1998), available at <http://eir.library.utoronto.ca/rpo/display/poem760.html>; Cf. BERNHARD SCHLINCK, THE READER (Carol B. Janeway trans., Panteon Books 1997).
15. Am. Heritage Life Ins. Co. v. Lang, 312 F.3d 533 (5th Cir. 2003); Bernhard Grossfeld, *Comparatists and Languages*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 154, 168 (Pierre Legrand & Roderick Munday eds., Cambridge 2003).

exclusive academic language. This was the semiotic basis for his hermeneutical concept of *sola scriptura* ("scripture alone"), as expressed before the German Emperor Charles V at Worms in 1521.

When Luther translated the Bible into German, he wanted "to look the people on the mouth."¹⁶ This term indicates an outsider's view and thereby a certain distance towards orality. Consequently, Luther's German was the Saxon chancellery's language with a Roman law semiotic background. Luther's translation of the Bible, a written text, into written German was dedicated to Elector Prince (Kurfuerst) Friedrich III the Wise of Saxony (1463 - 1525), that is, to the representative of an administrative elite. Luther's language was quite different from the then prevailing low German, which was the merchants' language all over Northern Europe from London to Novgorod and the linguistic basis of the modern rules of commercial law with little contact with Roman law.

2. From Writing into Orality

Language soon felt the backlash of writing. German became what we call "high German," which was originally the language of the bureaucracy. Wilhelm von Humboldt (1767 - 1835) explains, "Though we pretend to write as we speak, it occurs that we speak this way because we write that way."¹⁷ Consider just one example. Voice messages by radio test the listener's ability to receive the message with the question, "Can you read me?" In this phrase, the term "read" stands for hear, understand, and comprehend.

Appropriately, the Swiss call high German, *Schreibsprache*, the "scripture language" to distinguish it from *Schwyzerduetsch*, their oral language. The introduction of paper into Europe and the invention of the printing press around 1450 supported this turn to letters and a letter-imbued, paper-styled language. The new language became the vehicle for the enlightenment literature of the 17th and 18th centuries and the standard for the academic language when it changed from Latin to German beginning in the 18th century. That could explain the fact that "Germany produces [70] percent of the world's academic tax literature."¹⁸ Unfortunately, scripture is not only an effective instrument, but also a dangerous one. What is not in writing gets lost more easily.

16. Martin Luther, *Sendbrief vom Dolmetschen [An Open Letter on Translating]* (Nuremberg, 1530).

17. Richard Harder, *Bemerkungen zur griechischen Schriftlichkeit*, in *KLEINE SCHRIFTEN* 57, 61 (Walter Marg ed., C.H. Beck 1960) [hereinafter Harder, *Bemerkungen*].

18. Georg Crezelius, *Schroeder's Moment of Truth*, *WALL ST. J. EUR.*, Jan. 16-18, 2004, at A6.

C. ENGLAND¹⁹

The history of the English Law French from 1066 to 1650 tells a similar story. It ended with a parliamentary declaration on November 22, 1650, "And that from after the First day of January 1650 all Report-Books of the Resolution of Judges and all other books of the Law of England, which shall be Printed shall be in the English Tongue only."²⁰

Many of the Latin legal terms in English and American law such as "v" for "versus," "mens rea," and "habeas corpus" fall into a similar line.²¹ These words tell us about the enormous prestige of Roman law in England around 1200.²² The increasing availability of printed books and the King James Bible also helped change writing into speaking.

D. CRIPPLED LANGUAGE

The *ratio scripta* of the Roman law and the Holy Scripture from the Bible both made lawyers lettered—not just from the side of the scripture but also from scripture-bound orality. While Martin Heidegger (1879 - 1976) tells us that we are "dwelling in the house of language,"²³ lawyers often live in a fortress of letters that makes them feel superior and in full harmony with the order of the world. This explains the frequent language quirks in legal literature and the "plain English" movement.²⁴ Oral language is much stronger and richer than written language as a means of communication.²⁵ Orality is essentially a communal experience, and reading is essentially a private act. Thus, lawyers became users of a crippled language, and, because language is our master, we thereby were enslaved to crippled thinking. That is where we stand today.

II. COMPARATIVE LAW EXPERIENCE

A. TEXTISM

"Where am I when I am involved in a book?"²⁶

When entering the field of comparative law, lawyers learn about the weakness of their linguistic background transferred into law. Originally, the new field of research almost completely turned around written texts

19. For Scotland, see Hector L. MacQueen, *Laws and Languages: Some Historical Notes from Scotland*, 6.2 ELECTRONIC J. COMP. L. (2002).

20. KARSTEN KERBER, SPRACHWANDEL IM ENGLISCHEN RECHT 105 (1997).

21. Cf. Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445, 465 (1980).

22. R. H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 359 (1999).

23. Gardar Baldvinsson, *Being before the Law: Heidegger, Derrida, and the House of Language*, available at http://www.hi.is/~mattsam/Kistan/_private/GARDAR.htm (last visited July 24, 2004).

24. MARKUS HÜLPER, DIE ENGLISCHE RECHTSSPRACHE - VERSTAENDLICHKEIT FUER LAIEN UND SPRACHKUNDIGE (Muenster 2004).

25. Bernhard Grossfeld, *Language, Writing and the Law*, 5 EURO. REV. 383 (1997) [hereinafter *Language*].

26. BIRKERTS, *supra* note 10.

("the letters of the law") as if the letters contained the fullness of legal views, thus pushing more metaphorically oriented methods and talents to the side.²⁷ Also, the different impacts of written and oral language²⁸ were disregarded.²⁹ Orality is a "liv[ing] teacher," and writing is a "dead teacher."³⁰ Now this kind of textism is strongly criticized as bringing comparative law to an end as an autonomous subject.³¹ Comparative legal semiotics struggles to get out of this impasse to reach new shores.³²

B. FUNCTION

"By indirections, find direction out."³³ Writing is a particular way of thinking.³⁴ The alphabet is derived from numbers,³⁵ the heritage of which is an analytical, abstract, mathematical and functional (a mathematical term) view of the world. This brings us to the fundamentals of the 20th century approach in comparative law. It is characterized by the functional approach³⁶ that now meets growing opposition.³⁷ The functional approach was slowed down³⁸ and sometimes even stopped by sentiments like this:

When laws and institutions grow organically in the English way, it is dangerous to tamper with the different bits which may seem useless and outdated. The proof of this is that the system works as a whole even if we cannot say why it works and what rational purpose the different bits may serve. Each part of the total edifice may well have its purpose, even where we cannot understand it.³⁹

27. Hiller & Grossfeld, *supra* note 12, at 175.

28. *Language*, *supra* note 25, at 385; Bernhard Grossfeld, *Literature, Language and the Law*, 20 DE JURE 217 (1987) (South Africa).

29. HARDER, *Bermerkungen*, *supra* note 17, at 81.

30. Mortimer J. Adler, *Ch. IV, Teachers, Dead or Alive*, in *HOW TO READ A BOOK*, available at http://cyberspacei.com/greatbooks/h2/how2read/h2r_004.htm (last visited July 24, 2004).

31. Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 50 (1996); Nora V. Demleitner, *A Response to Mathias Reiman: More, More, More But Real Comparative Law*, 11 TUL. EUR. & CIV. L.F. 73, 74 (1996).

32. BERNHARD GROSSFELD, *Comparative Legal Semiotics: God's Name/God's Numbers* [hereinafter *Comparative Legal Semiotics*].

33. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 1.

34. Bernhard R. Appel, *Über die allmähliche Verfertigung musikalischer Gedanken beim Schreiben*, 56 DIE MUSIKFORSCHUNG 347 (2003).

35. Denise Schmandt-Besserat, *The Earliest Precursor of Writing*, 238 SCI. AM. 50 (June 1978); Denise Schmandt-Besserat, *Oneness, Twoness, Threeness: How Ancient Accountants Invented Numbers*, 27 THE SCIENCES 44 (July 1987); BRIAN BUTTERWORTH, *THE MATHEMATICAL BRAIN* 28 (1999).

36. KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 39, 44 (Tony Weir trans., Clarendon Press 3d ed., 1998).

37. Coen J. P. van Laer, *The Applicability of Comparative Concepts*, 22 ELECTRONIC J. COMP. L. (1998).

38. Cf. Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 RABELS ZEITSCHRIFT 419, 420 (2003).

39. P.S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 34 (1987); Cf. Wouter Snijders, *Building a European Contract Law: Five Fallacies and Two Castles in Spain*, 7.4 ELECTRONIC J. COMP. L. (2003).

Approaching China brings us into even greater troubles.⁴⁰ A fuzzy logical approach often looks more as being down to earth and thereby closer to human daily life.

C. TIME

“Time travels in diverse paces with diverse persons.”⁴¹

Another line of resistance became the understanding of law as a dynamic stream of dreams and thereby a new awareness of the concept of time: law is path-dependant.

“Time present and time past
Are both perhaps present in time future,
And time future contained in time past.”⁴²

Law looks like an “old edifice with parts the purpose of which has been forgotten.”⁴³ At first glance, it appears to be eternal like the concept of property; at least it looks as stable as a big, old house. But this metaphor is not fully appropriate; law is different from buildings, as it is “moving all the time”:⁴⁴ “Walls are toppling in slow motion, sometimes they remain slanted for some time. Two or more buildings may develop together into a new one.”⁴⁵

This brings us to the concept of time⁴⁶ in comparative law⁴⁷ with its unexpected consequences; time is natural, even biological, but it is also socially constructed. Therefore, it is a silent language⁴⁸ with an accent.⁴⁹ We are limited by our inability to fully recognize how time affects individuals and societies.⁵⁰ We wonder about the ideas of the German “juridical second” (“*juristische Sekunde*”) without any dimension and the Japanese “dynamic second” with elastic lengths varying according to circumstances:⁵¹ “Every epoch under more or less specious names has deified its particular errors.”⁵² The same words inevitably acquire another meaning over time.

40. Temu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002); Bernhard Grossfeld & Josef Hoeltzenbein, *Globalization and the Limits of Language(s): Comparative Legal Semiotics*, RECHTSTHEORIE 87 (2004) [hereinafter *Grossfeld & Hoeltzenbein*].

41. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 3, sc. 2.

42. ELIOT, *supra* note 1, at 3.

43. Snijders, *supra* note 39, at § 2.

44. *Id.*

45. *Id.*

46. Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663 (2001); TODD RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002); Orly Lobel, Book Note, *The Law of Social Time*, 76 TEMP. L. REV. 357 (2003).

47. GROSSFELD, *CORE QUESTIONS*, *supra* note 8, at 203.

48. EDWARD T. HALL, *THE SILENT LANGUAGE* (1959).

49. ROBERT LEVINE, *A GEOGRAPHY OF TIME* (1997).

50. Lobel, *supra* note 46, at 378.

51. Reinhard Zoellner, *Zeit und die Konstruktion der Moderne – im Japan des 19. Jahrhunderts*, 11 HISTORISCHE ANTHROPOLOGIE 11, 47 (2003).

52. PERCY BYSSHE SHELLEY, *A Defence of Poetry*, in SHELLEY'S CRITICAL PROSE 11 (Bruce R. McElderry, Jr ed., 1995).

D. TRANSLATION⁵³

In comparative law, therefore, we always have to translate geographically on the horizontal and historically in the vertical. This brings us to problems which Percy Bysshe Shelley (1792 - 1822) explains as follows: "Every original language near to its source is in itself the chaos of a cyclic poem"⁵⁴ and is "arbitrarily produced by the imagination,"⁵⁵ from whence comes the opacity, the lottery of language, of every natural language. But men "even in the infancy of society, observe a certain order in their words and actions, distinct from the objects and the impressions represented by them, all expression being subject to the law of that from which it proceeds."⁵⁶

The question is how to translate a pattern born from chaos into another pattern born from another—at least somewhat—different chaos; the meeting of chaoses.

Shelley answers:

Hence the vanity of translation; it were as wise to cast a violet into a crucible that you might discover the formal principle of its colour and odour, as seek to transfuse from one language into another the creations of a poet. The plant must spring again from its seed it will bear no flower – and this is the burthen of the curse of Babel.⁵⁷

Immediately, Allen Watson's terms "legal transplants" and "law out of context" come to mind.⁵⁸

III. FREE SPEECH

The ability to speak is a basic human characteristic and a basic human need. From the times of Frederic II in Sicily we learned that without speaking contacts, babies will die. The word gives life to all human beings, not just to Adam. God "breathed into his nostrils the breath of life, and the man became a living being."⁵⁹ Jesus noted, "Man does not live by bread alone, but by every word that comes forth from the mouth of God."⁶⁰ According to Luke, the shepherds praised God "for all the things they had heard and seen, which were just as they had been told."⁶¹ John continues with, "In the beginning was the Word,"⁶² and Martin Lu-

53. Bernhard Grossfeld, *Comparatists and Languages*, in *COMPARITIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 154 (Pierre Legrand & Roderick Munday eds., 2003) [hereinafter *Comparatists and Languages*]; Bernhard Grossfeld, *Intercultural Understanding*, in *COMPARATIVE LAW* 31 (Vivian Curran ed., 2003).

54. SHELLEY, *supra* note 52, at 7.

55. *Id.* at 8.

56. *Id.* at 5.

57. *Id.* at 9.

58. Alan Watson, *Legal Transplants and European Private Law*, 44 *ELECTRONIC J. COMP. L.* (2000); *Cf.* BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 42 (1990).

59. Genesis 2:7.

60. Matthew 4:4.

61. Luke 2:20.

62. John 1:1.

ther proceeds to eternity, "O let the Word stand!"⁶³

These texts express a deep human experience expressed into religious teachings. "I am the Lord your God, who teaches you what is best for you, and who directs you in the way you should go."⁶⁴ Speaking is necessary for the individual and for society. Modern constitutions track this language style: "Congress shall make no law . . . abridging the freedom of speech,"⁶⁵ and "[E]very person shall have the right freely to express and disseminate his or her opinions in speech, writings, and pictures."⁶⁶

IV. COMPARATIVE LEGAL SEMIOTICS

"It was the custom
For his rage against chaos
To abate on the way to church,
In regulations of his spirit."⁶⁷

Today, however, our concepts of oral and, in particular, written language are severely challenged. In the Western world language is a prominent means of social ordering, although certainly not the exclusive and probably not most important means.⁶⁸ Oliver Wendell Holmes (1841 – 1935) said that language is never the thing itself and the "life of law . . . has been experience."⁶⁹ It responds unpredictably to every stimulus in our changing environment. But language, as indicated by Shelley, is itself ordered through sound and grammar, tonal and algebraic models, and the sequence of words.⁷⁰ The speaking order is affected when orality is wrapped into letters, and different writings, letters, or drawings create different patterns.⁷¹ All these interactions are translated into social life and shape the ideas about what is right and meaningful. Differences in writing styles indicate and construe a tremendous gap in worldviews given the social nature of literacy and the closeness between literacy and cognition. They are invisible powers.⁷²

Other writings stand for other roots of identity and for different concepts, better feelings, of order. Johann Gottfried Herder (1744 - 1803) realized this, inspired by Robert Wood's *Essay on the original genius of*

63. Martin Luther, Ein feste Burg ist unser Gott [A Mighty Fortress is Our God] (ca. 1529) (hymn).
64. Isaiah 48:17.
65. U.S. CONST. amend. I.
66. Grundgesetz [GG] [constitution] art. 5(1) (F.R.G.).
67. WALLACE STEVENS, THE COLLECTED OF POEMS OF WALLACE STEVENS 141 (1961).
68. *Comparatists and Languages*, *supra* note 53, at 154; cf. ATLAS OF LANGUAGES (Bernard Comrie et al. eds., rev. ed. 2003).
69. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1946).
70. *Comparative Legal Semiotics*, *supra* note 32.
71. Grossfeld & Hoeltzenbein, *supra* note 40; Bernhard Grossfeld, *Schriftart und Ordnungsdenken – Zur Rolle der Schrift in der Rechtsvergleichung*, ZEITSCHRIFT FUER RECHTSVERGLEICHUNG [ZFRV] 1 (1994) (Austria).
72. Bernhard Grossfeld, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT'L L. J. 291 (2003) [hereinafter *Patterns of Order*].

Homer,⁷³ at an early stage with regard to Chinese drawings. "It seems to be unbelievable how this kind of writing affects the soul that thinks in it. It brings the ideas into sequences of pictures and forms the whole character of the nation."⁷⁴

The algebraic structure is less visible. That is why only recently engineers found a way to put the drawings and characters in a position to command binary code, the 1s and 0s that are switched in a chip's transistors.⁷⁵ The authors have discussed this issue in more detail by comparing the Hebrew alphabet with the Chinese drawings.⁷⁶

For comparative lawyers the results are clear, and they go beyond writing. Signs are a kind of intellectual mapping. Signs map the man viewed environment and tell us where and how to go. They not only describe something outside of themselves, but also build their own world. Therefore, different semiotics create different legal ideas. Beyond that, they establish their own new priests who are tempted to monopolize the hermeneutics of the code and the corresponding network of brothers in letters in order to control the meaning. "When there is a change of priesthood, there is necessarily a change of law as well," and vice versa!⁷⁷ "Semiotic outsiders" are perceived as being "uneducated, ordinary" men.⁷⁸ The recognition of these persistent tensions is the core of modern comparative legal semiotics.⁷⁹

V. NEW SEMIOTICS

"The 'message' of each medium. . . is the change of the yardstick, speed or pattern, it to the situation of human brings."⁸⁰

Now, our traditional world of semiotics is changing drastically through digitalization. Using Leibniz's (1646 - 1716) binary code brought from China through his contacts with Jesuits, the computer and the Internet rule the world beyond our original dreams, hopes, and fears.⁸¹ New patterns of order emerge from computer software that forms a mighty network around the globe, transforming our concepts of time and space and new legal logistics.

73. ROBERT WOOD, AN ESSAY ON THE ORIGINAL GENIUS OF HOMER (H. Hughes 1775).

74. HARDER, *Bermerkungen*, *supra* note 17, at 61.

75. Evan Ramstad, *New Chip Speaks China's Language*, WALL ST. J. EUR., Feb. 9, 2004, at A4.

76. Grossfeld & Hoelzenbein, *supra* note 40; DUDLEY, *supra* note 10.

77. Hebrews 7:12.

78. Acts 4:13.

79. *Patterns of Order*, *supra* note 72, at 303.

80. The McLuhan Program in Culture and Technology, *The Medium is the Message*, <http://www.mcluhan.utoronto.ca/mcluhanprojekt/message2.htm> (last visited Aug. 16, 2004) (quoting Marshall McLuhan).

81. Bernhard Grossfeld, *Computer und Recht*, 39 JZ 656 (1984); Bernhard Grossfeld, *Justicia und EDV – Wandlungen der Jurisprudenz durch die elektronische Datenverarbeitung*, PERSPEKTIVEN 1986 38; Normann Witzleb, Dieter Martiny, Ulrich Thoelke, & Tim Frericks, *Comparative Law and the Internet*, 3.2 ELECTRONIC J. COMP. L. (1999).

St. Augustine (354 - 430) taught that "The New Covenant is hidden in the Old, and the Old is understood in the New."⁸² However, look at the following language sequence: from Hebrew (Jerusalem) to Greek (Constantinople) to Latin (Rome) to German (Wittenberg). We may have lost something in the translations. The same could happen with digitalized software.

VI. DIGITALIZATION

"For the deliberations of mortals are timid, and unsure are our plans."⁸³

A. ENTICEMENT

We are confronted with a new world of language: digitalization.⁸⁴ It brings abstract numerical series more deeply into our mind than the algebraic nature of language itself. The "*mos mathematicorum*" of the 12th Century after the introduction of Indo-Arabic numerals and the spread of paper⁸⁵ returns with increased power under the auspices of the "*deus geometra*."⁸⁶ It on support from Baruch Spinoza's (1632 - 1677) "*mos geometricus*" of the 17th and 18th Centuries, the era of enlightenment,⁸⁷ and makes us see order as a mathematical construct. "It was the Greeks who turned math into an abstract system, a special symbolic language that allows people not just to describe the concrete world but to account for its deepest patterns and laws."⁸⁸ The footnote adds, "One reason math texts are so abstruse and technical is because of all the specifications and conditions that have to be put on theorems to keep them out of crevasses. In this sense they're like legal documents, and often about as much fun to read."⁸⁹

B. DISPLACEMENT

The abstract math that banished superstition and ignorance, unfortunately, is itself "shot through with unreason and paradox and conundrum . . . since the beginning of its status as a real language."⁹⁰ We have to keep in mind "that a language is both a map of the world and its own world, with its own shadowlands and crevasses – places where statements that seem to obey all the language's rules are nevertheless impossible to

82. St. Augustine, *Quaestiones in Exodum*, cl. 73, in QUESTIONUM IN HEPTATEUCHUM LIBRI SEPTEM (419), available at http://www.sant-agostino.it/latino/questioni_etateuco/index2.htm.

83. Proverbs 9:14.

84. Cf. Bernhard Grossfeld, *Numbers in Law*, S. AFR. L.J. 396 (1995).

85. MECHTHILD DREYER, *MORE MATHEMATICORUM* (1996).

86. BENOIT B. MANDELBROT, *THE FRACTAL GEOMETRY OF NATURE* (1983).

87. BARUCH SPINOZA, *ETHICA, ORDINE GEOMETRICO DEMONSTRATA* (Amsterdam 1677).

88. WALLACE, *supra* note 2, at 29.

89. *Id.* at 31.

90. *Id.*

deal with."⁹¹

This refers to Georg Cantor's (1845 - 1918) theories of infinity (theory of sets), which started with Christof Gudermann's (1798 - 1852) and Karl Weierstrass's (1815 - 1897) examination paper at the Muenster University Archives, and the ensuing theorems.⁹² They created the modern set-and-number theory turning math from a practical abstraction of real-world properties to math as a system of symbols independent of the objects designated. But we have to be aware that this step also made "displacements that are incalculable."⁹³ Bugs and viruses in our computer programs give us some feeling for the limits of mathematical projections when we enter infinitely small or great numbers. Perhaps they are limping with one foot only, the mathematical one. Old pictures show the devil as limping!

Lawyers first became aware of the traps of digitalization from a technical field, often not watched by lawyers: patent law. Therefore, we will first discuss the matter from a narrower technical aspect, the emerging tendency to monopolize our language through patent law. Language problems for lawyers are not just as poetic as the title of this article might have indicated.

C. ORDER PATENTS⁹⁴

We are in CyberSpace!⁹⁵

1. Monopolizing Semiotics

The linguistic implications of copyrights and trademarks are old ideas⁹⁶ and did not bother comparatists too much, even when software became copyrightable. Also, with the dramatic change in legal semiotics and legal logistics through the Internet, a new concept of space and time seemed to be manageable.⁹⁷ This changed dramatically, however, when Patent Law invaded the software turf. While a copyright protects the form, a patent protects the idea! All of a sudden, ideas expressed in software language are no longer freely available, due to software patents⁹⁸ that have

91. *Id.* at 30.

92. ACZEL, *supra* note 2, at 70; WALLACE, *supra* note 2, at 30.

93. WALLACE, *supra* note 2, at 30.

94. BERNHARD GROSSFELD & JOSEF HOELTZENBEIN, *CyberLaw & CyberControl: Cyberspace Patents*, in Festschrift für Jean Nicolas Druey 755 (2002); Bernhard Grossfeld & Josef Hoeltzenbein, *Global Powers: International Aspects of Cyberspace Patents*, 6 KOMMUNIKATION & RECHT [K&R] 1 (2003).

95. Bernhard Grossfeld, *CyberCorporation Law – Comparative Legal Semiotics/Comparative Legal Logistics*, 35 INT'L LAW. 1405 (2001) [hereinafter *CyberCorporation Law*].

96. FRIEDRICH ALBRECHT, *SPRACHWISSENSCHAFTLICHE ERKENNTNISSE IM MARKENRECHTLICHEN REGISTERVERFAHREN* (1999).

97. ROBERT B. THOMPSON, *ACCOUNTING IN A GLOBAL MARKET AND IN AN ELECTRONIC AGE* 1243 (1999); But see also Scott Miller, *WTO to Weigh Web Gambling Banned by U.S.*, WALL ST. J. EUR., Jan. 24, 2004, at A7.

98. ANDRÉ NIEDOSTADEK, *DER RECHTSSCHUTZ VON COMPUTERPROGRAMMEN IN GROSSBRITANNIEN* 178 (1999); MANFRED WEITZ, *SOFTWARE ALS "SACHE"* (1998).

haunted the world for almost twenty years. The name of the game is “business method patents.” These patents are liberally granted by the U.S. Patent and Trademark Office (PTO). They can protect a single line of code that tells a computer to do a specific task; for example, the patents can tell one program to activate another (e.g. Amazon.com’s one click shopping). They seem to have a future in the European Union under the proposed directive on the patentability of computer-implemented inventions.⁹⁹

Today these patents broadly protect ways of doing business on the Internet. A landmark patent is a 2001 IBM patent for providing reservations for restroom use on airplanes.¹⁰⁰ Two years later, under fire, IBM flushed its restroom patent and dedicated it to the public.¹⁰¹ A noble 2003 Christmas gift for the needy. This example shows that these patents are not restricted to technology. Instead, they control the semiotics means of communications between people. They are nothing less than attempts to monopolize particular digitalized language patterns, patterns of order. The patent nuisance is travelling freely around the world. These are order patents that do not respect territorial limitations and have global implications through the Internet. The ongoing cross-border litigation about domain names gives us a taste of the jurisdictional conflicts of the future.¹⁰²

Concepts of order, as expressed in language, are thus monopolized, and the question that immediately arises is whether the monopoly restricted only to the English language and its poetical concepts is creating the sentiments that something is in order. Another question is whether the patent can be translated into another language, like Chinese, with different structures of order.

2. *Resistance*

Certainly, the new patents have met resistance, but so far to no avail. Overall, the number of patents has nearly doubled since 1990. There is now a “backlog of 450,000 applications pending” before the U.S. PTO.¹⁰³ Software and Internet-related patents account for more than 15 percent of all patents granted.¹⁰⁴ The digital world is thus divided into isolated

99. Bernhard Grossfeld & Josef Hoeltzenbein, *Global Powers: International Aspects of Cyberspace Patents*, 6 K&R 1, 4 (2003) [hereinafter *Global Powers*].

100. U.S. Patent No. 6,329,919 (issued Dec.11, 2001).

101. Troy Wolverton, *IBM Flushes Restroom Patent*, NEWS.COM, Oct. 11, 2002, at <http://news.com.com/2100-1017-961803.html>.

102. *Cable News Network L.P. v. CNNNews.com*, 162 F. Supp. 2d 484 (E.D. Va. 2001); Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534 (2003); Dominik Fuchs, *Weltweite internationale Zuständigkeit von US-Gerichten bei Domain-Streitigkeiten*, 50 RIW 50 41 (2004); G. W. Austin, *The Infringement of Foreign Intellectual Property Rights*, 113 L. Q. REV. 321 (1997).

103. Jonathan Krim, *U.S. Patent Office is Criticized*, WALL ST. J. EUR., Dec. 15, 2003, at A10.

104. *Id.*

pieces and loses its power to link people and communicate ideas through freely available language patterns.

The critics are now supported by the October 2003 Federal Trade Commission Report to Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,¹⁰⁵ which argues against the rapid proliferation of high technology patents. The Commission postulates that “more patents in more industries and with greater breadth are not always the best ways to maximize consumer welfare.”¹⁰⁶ They may block competition and impede innovation. The Commission is particularly concerned with the multitude of overlapping software patents that create a patent thicket difficult, if not impossible, to cope with. The language avalanche is reaching new dimensions and new rigidity partially killing itself at high social costs.

3. *Mathematical Formulas*

So far, it is generally assumed that abstract algorithms cannot be patented. The idea is that patents are only suitable for inventions that have the nature of being replaced one after another in the course of development. But algorithms, once found, persist. In other words, algorithms are man’s eternal common property.¹⁰⁷ However, this traditional view has recently been criticized.¹⁰⁸ These critics refer to the history of finding the cubic equation in the first half of the 16th century and the harsh competition between Scipione del Ferro (1465 - 1526), Niccolo Tartaglia (1499 - 1557), and Girolamo Cardano (1501 - 1576). Ferro and Tartaglia had no motivation to publish the formula found by them independently, thus giving Cardano the chance to publish it in his *Ars Magna* 1545 and to claim priority.¹⁰⁹ Consequently, we have the “cardanic equation” or “cubic equation.” One wonders if Tartaglia could have patented his ideas, if that would have sped up mathematical research. So far, we have narrowly escaped from these stations of power. But the line between algorithms and calculating programs has become quite thin, very thin indeed.

4. *Audio and Video Streaming*

The drama has reached gigantic dimensions through Acacia Research Corporation in California, which started to demand royalties for audio and video streaming over the Internet. Acacia’s targets are universities that use web videos for remote learning, providers of movies to hotels, cable and satellite providers, and streaming-media companies (e.g. Amer-

105. Federal Trade Commission, Report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, Oct. 2003, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (Oct. 2003).

106. *Id.*

107. *Cf. Global Powers*, *supra* note 99.

108. Paul B. De Laat, *Patenting Mathematical Algorithms: What’s the harm? A Thought Experiment in Algebra*, 20 INT’L. REV. L. & ECON. 187 (2000).

109. DIETER JORGENSEN, *DER RECHENMEISTER* 357 (Berlin: Rutten & Loenigs 1999).

ican Online).¹¹⁰ Acacia activated “trolls,” patents that laid dormant for ten years.”¹¹¹ The attacks are based on these U.S. patents.

Acacia’s critics are very emotional. “It’s like patenting air.”¹¹² That brings us close to our entrance statement referring to the Bible’s view that breathing is language and language is air. Patents of this kind split the world into separated, privately dominated pieces. The web loses its communicative flexibility. Freedom of expression is abridged. And finally, this leads us to poetry.

D. POETRY¹¹³

“Poets are the unacknowledged legislators of the World.”¹¹⁴

1. Poetry Patent

You might wonder how this technical approach leads us into poetry.¹¹⁵ Now, the patent trend has reached beyond music¹¹⁶ into the realm of poetry through the patenting of a “cybernetic poet.”¹¹⁷ This is no longer an image that belongs to Orwell’s 1984 horrors. On November 11, 2003, the U.S. PTO granted patent No. 6,647,395, covering a cyberspace patent,¹¹⁸ a program to create or help to create poems.

The cyberspace patent brings technology into a field of human activities, which we associate with emotional drives, not with mathematical sequences. The underlying idea is that the real power of human thinking is the ability to find patterns¹¹⁹ and to create a lucid dream by harnessing the unconscious with technology. The clue is to create poems by using the styles and vocabularies of human poets, imitating, not plagiarizing them.

a. Tools

The patented software offers four tools: Poet’s Assistant, Poet Analyzer, Poet Creator, and Cybernetic Poet Screen Saver. Poet’s Assistant provides standard text editing features and suggests alliterations, rhymes,

110. Krim, *supra* note 103.

111. U. S. Patent No. 5,132,992 (issued July 21, 1992); U. S. Patent No. 5,235,275 (issued Oct. 12, 1993); U. S. Patent No. 5,550,863 (issued Aug. 27, 1996); U. S. Patent No. 6,002,720 (issued Dec. 14, 1999); U. S. Patent No. 6,144,702 (issued Nov. 7, 2000).

112. Jonathan Krim, *Patenting Air or Protecting Property?*, WASH. POST, Dec. 11, 2003, at E01.

113. *Patents of Order*, *supra* note 72.

114. SHELLEY, *supra* note 52, at 508.

115. Bernhard Grossfeld, *Rechtsdogmatik/Rechtspoetik*, 58 JZ 1149 (2003); THE LAWYER’S ALCOVE: POEMS BY THE LAWYER, FOR THE LAWYER, AND ABOUT THE LAWYER (Ina Russel Warren ed., 1990).

116. U.S. Patent No. 5,753,843 (issued May 19, 1998).

117. U.S. Patent No. 6,647,395 (issued Nov. 11, 2003).

118. U.S. Patent & Trademark Office, *USPTO Patent Full-Text and Image Database*, available at <http://patft.uspto.gov/netahtml/search-bool.html> (last visited Aug. 16, 2004).

119. Teresa Riordan, *Patents; Investor creates software that can turn a computer into a cyberpoet*, N.Y. TIMES, Nov. 24, 2003, at C7.

word selections, and turns of phrase. The Poet's Analyzer relies on poet personalities. The author analysis models are produced from existing poetry. For example, a standard set is already installed from the text of numerous poets, such as William Shakespeare, Thomas Stearns Eliot, and Robert Frost. But the Poet Analyzer enables you to create additional poet personalities. It uses the following aspects: words, word structures and sequence patterns, rhythm patterns, and overall poem structure like the sonnet. Now you may start to work. The Poet Creator will suggest to you words, phrases, lines and rhymes. You can cut, copy, and paste text from any of the poet's assistant windows into your poem. The Cybernetic Poet Screen Saver tool displays randomly-generated alliterations, rhymes, word sequences, lines and poems that might be on point.

b. Plagiarizing

To avoid plagiarizing the original author, the program includes a plagiarism avoidance algorithm. It defines plagiarism as more than three words in a row (quadrigrams) that appear anywhere in the original author's writings.

c. Enhancing Creativity

The accompanying explanation reads as follows:

A purpose of the poet's assistant is not necessarily to write the user's poems for him or her, but rather to spark the user's imagination, to help suggest words, phrases, ideas, etc. In writing poetry one of the most difficult aspects is finding ideas and suggestions for words and phrases. Such reference works as dictionaries, thesauruses, rhyming dictionaries, etc., are usually limited in their usefulness for this purpose. The poet's assistance mode is intended to provide a rich ever-changing source of such words and ideas.¹²⁰

2. *New Poems*

The New York Times published one resulting haiku:

"Sashay down the page
through the lioness
nestled in my soul".¹²¹

Other examples are:

"Imagine now and sing
creating myths
forming jewels from the falling snow"¹²²

and

120. U.S. Patent No. 6,647,395 (issued Nov. 11, 2003).

121. Riordan, *supra* note 119.

122. Kurzweil CyberArt Technologies, A Sampler of Poems By Ray Kurzweil's Cybernetic Poet, http://www.kurzweilcyberart.com/poetry/rkcp_poetry_samples.php3 (last visited July 27, 2004).

“You broke my soul
the juice of eternity
the spirit of my lips.”¹²³

E. LAWYERS' CONCERNS

Another question is whether that should be of particular concerns for lawyers in addition and beyond aspects of a monopoly. After all, poetry is worlds apart from the bureaucratic, pictureless realm of lawyers and judges.¹²⁴

1. *Hidden Law*

“Poetically dwelling is man.”¹²⁵

We might not accept Martin Heidegger's logocentric idea that we are dwelling in the house of language, as man is a restless sojourner in the world of things.¹²⁶ But perhaps we do agree with him that poetry is one of the strongest cultural means to establish patterns of living.¹²⁷ Poetry's elaborate structure gives the impression of a pre-stabilized order. Metrical rhythms make people join together, and they help to create the mood for law that makes us feel that something is in order. They are constantly competing with the legislator about normative concepts and form the deep structure of the visible law.

“The Hidden Law does not deny
Our laws of probability,
But takes the atom and the star
And human beings as they are;
And answers nothing when we lie.
It is the only reason why
No government can codify,
And legal definitions mar
The Hidden Law.”¹²⁸

Monopolizing even part of it is a serious immersion into a very sensitive legal area. It affects all legal hermeneutics. Let us explore this in more detail.

2. *Legislators*

“[P]oetry rules the world.”¹²⁹

123. *Id.*

124. BERNHARD GROSSFELD, *BILDHAFTES RECHTSDENKEN* (1995).

125. HEIDEGGER, *supra* note 3, at 189. *See also* Peter Trawny, “VOLL VERDIENST, DOCH DICHTERISCH WOHNET DER MENSCH AUF DIESER ERDE”: HEIDEGGER UND HÖLDERLIN (Frankfurt 2000).

126. Baldvinsson, *supra* note 23.

127. FRANCIS BACON, *ADVANCEMENT OF LEARNING* (William A. Armstrong ed., 1905).

128. WYSTAN HUGH AUDEN, *COLLECTED POEMS* 264 (Edward Mendelson ed., Vintage International 1991).

129. ROBERT FROST, *COLLECTED POEMS, PROSE & PLAYS* 264 (Richard Poirier & Mark Richardson eds., 1995).

The impact of patent concepts goes deeper when they monopolize the way our thoughts are formed through language, and particularly through poetry. Poetry has a deep impact on legal reasoning. In 1901, William John Courthope (1842 - 1917) published a book, *Life in poetry: Law in taste*.¹³⁰ In this book, the professor of poetry at the University of Oxford called his chair “the oldest seat of learning in the British Empire on a subject of the deepest interest to the human imagination.”¹³¹ Martha C. Nussbaum’s *Poetic Justice*¹³² is not so much involved with poetry as the title may indicate, but instead deals on a more abstract level with “literary imagination” and “rational emotions” in general. Elsewhere, *Law and Shakespeare* or *Law and Jane Austen* are top topics.¹³³

It is still a matter of discussion whether poetry is undemocratic, as was proposed by Immanuel Kant (1724 - 1804) and Friedrich Nietzsche (1844 - 1900), or democratic, as upheld by Walt Whitman (1819 - 1892) in his “I hear America singing, the varied carols I hear”¹³⁴ and, lately, by Anthony Kronman from Yale.¹³⁵ Therefore, let’s first look into some concrete examples that support Courthope’s claim as to the power of poetry.

3. *Making Chaos Collapse*¹³⁶

“She sang beyond the genius of the sea . . . She was the single artificer of the world
In which she sang.”¹³⁷

Small wonder that poetry has the power to create and to stabilize patterns of order. Poetry is condensed language with all its richness in a “measured, metrical”¹³⁸ way. It brings rhythms of life to our senses, moving us from the inside into the mood for law through tone, rhymes, breathing rhythms, and metrical dimensions. “But most by numbers judge a poet’s song.”¹³⁹ They sing our structures into a complex world, keep us in harmony with rhythms of social life, which is all important for any society swinging together.

130. WILLIAM JOHN COURTHOPE, *LIFE IN POETRY: LAW IN TASTE* (1901).

131. *Id.* at 3.

132. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1996).

133. GEORGE W. KEETON, *SHAKESPEARE’S LEGAL AND POLITICAL BACKGROUND* (Sir Issac Pittman and Sons Ltd. 1967); O. Hodd Philips, *Law Relating to Shakespeare* 80 *LAW Q. REV.* 172 (1964); J.E.S. Simon, *Shakespeare’s Legal and Political Background* 84 *LAW Q. REV.* 33 (1968); Gunter Treitel, *Jane Austen and the Law* 100 *LAW Q. REV.* 549 (1984).

134. WALT WHITMAN, *LEAVES OF GRASS* 91 (1900), available at <http://www.bartleby.com/142/91.html> (last visited July 27, 2004).

135. Anthony T. Kronman, *Is Poetry Undemocratic?*, 16 *GA. ST. U.L. REV.* 311 (1999).

136. Cf. JACK COHEN et al., *THE COLLAPSE OF CHAOS* (1994).

137. STEVENS, *supra* note 67, at 105.

138. PERCY BYSSHE SHELLEY, *A DEFENSE OF POETRY* (Albert S. Cook ed., Ginn & Company 1903).

139. Alexander Pope, *An Essay on Criticism*, available at <http://eserver.org/poetry/essay-on-criticism.html> (last visited July 27, 2004).

“How exquisitely the individual Mind . . . to the external world
Is fitted; and how exquisitely, too – . . .
The external world is fitted to the mind;
And the Creation (by no lower name
Can it be called) which they with blended might
Accomplish.”¹⁴⁰

4. William Shakespeare

a. Othello

William Shakespeare’s verses from *Othello* stand behind the common Law rules on libel and slander.¹⁴¹

“Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
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.”¹⁴²

These lines show the high regard for reputation values in the Common Law tradition, though other words in *Othello* run into another direction.

“As I am an honest man, I had thought you had received some bodily wound. There is more sense in that than in reputation. Reputation is an idle and most false imposition, oft got without merit and lost without deserving. You have lost no reputation at all, unless you repute yourself such a loser.”¹⁴³

However, the first part of the text won the day.¹⁴⁴ It is quoted in full by Chief Justice Rehnquist in *Milkovich v. Lorain Journal Co.*¹⁴⁵ It also appears several times in decisions of Federal Courts of Appeals.¹⁴⁶

b. Macbeth

Adam Smith’s (1723 - 1790) “invisible hand” from *The Wealth of Nations* (1776) originates from Shakespeare’s *Macbeth*.

140. WILLIAM WORDSWORTH, HOME AT GRASMERE: PART FIRST, BOOK FIRST, OF THE RECLUSE, available at http://www.everypoet.com/archive/poetry/William_Wordsworth/william_wordsworth_301.htm (last visited July 27, 2004).

141. JOSEPH DEAN, HATRED, RIDICULE OR CONTEMPT: A BOOK OF LIBEL CASES 1 (1995).

142. WILLIAM SHAKESPEARE, THE TRAJEDY OF OTHELLO THE MOOR OF VENICE act 3, sc. 3.

143. WILLIAM SHAKESPEARE, THE RIVERSIDE SHAKESPEARE 1417 (G. Blakemore Evans ed., 1997).

144. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

145. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

146. *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2002); *Wenger v. Monroe*, 282 F.3d 1068 (9th Cir. 2002); *Pierce v. Capital Cities Commc’ns*, 576 F.2d 495 (3d Cir. 1978); *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977).

“Come, seeling night,
 Scarf up the tender eye of pitiful day,
 And, with thy bloody and invisible hand,
 Cancel and tear to pieces the great bond,
 Which keeps me pale.”¹⁴⁷

5. *Georg Friedrich Haendel*

The even stronger religious emphasis goes back to Friedrich Georg Haendel’s (1685 - 1759) *Judas Maccabaeus* (1746) where Judas sings,

“How vain is man, who boasts in fight
 The valour of gigantic might!
 And dreams not that a hand unseen,
 Directs and guides this weak machine.”¹⁴⁸

It is this metaphor that had a strong impact on the market oriented German Civil Code from 1900. So strong, indeed, that Adam Smith is regarded as one of the greatest jurists in Germany in the 19th century.

6. *Alfred Tennyson*

Lord Denning’s campaign to reduce the influence of binding precedent on the court (*stare decisis*) was supported by Tennyson’s (1809 – 1892) poem.

“A man may speak the thing he will;
 A land of settled government,
 A land of just and old renown,
 Where Freedom broadens slowly down

From precedent to precedent.”¹⁴⁹ Denning read the poem as saying that freedom is narrowed by strictly following precedent, not broadened. In support, he quoted Tennyson,

“That codeless myriad of precedent,
 That wilderness of single instances.”¹⁵⁰
 Lord Denning did not cite the foregoing lines,
 “. . . toil’d
 Mastering the lawless science of our law.”¹⁵¹

However, Denning’s view was ultimately adopted by the House of Lords in 1966.¹⁵²

147. SHAKESPEARE, *MACBETH*, act 3, sc. 2.

148. GEORGE HAENDEL, *JUDAS MACCABEAUS*, act. 2, air 38, available at <http://www.haendel.it/composizioni/libretti/pdf/judas.pdf> (last visited July 27, 2004).

149. Alfred Lord Tennyson, *You Ask Me, Why, Tho’ Ill at Ease*, available at <http://home.att.net/~TennysonPoetry/yamw.htm> (last visited July 27, 2004).

150. *Id.*

151. *Id.*

152. Practice Statement (Judicial Precedent), 1 W.L.R. 1234 (H.L. 1966) (holding the Court would no longer be bound by its own decisions).

7. *Courts*

This leads us to common law courts that use poetry to support their decisions. An article like *Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher*¹⁵³ discusses the readable poetic language of Alfred Thompson Denning (1899 - 1999) and Benjamin Nathan Cardozo (1870 - 1938) in their judicial writings.

For England, I refer to Lord Denning who quoted with regard to dancing around the maypole.

“On the green they watched their sons
Playing till too dark to see,
As their fathers watched them once,
As my father once watched me.”¹⁵⁴

Consider the many references to poetry which we find in American court decision. I want to give one example from the Ninth Circuit Court of Appeals. The court had to decide whether the use of hanging for the death penalty was cruel under the U.S. Constitution. Judge Stephen Reinhardt, dissenting, associated hanging with lynching (“hanging first and asking questions later”).¹⁵⁵ Reinhardt denounces it as a “barbarous practice” and begins his attack with quoting Lewis Allen’s (1939) poem *Strange Fruit*.

Southern trees bear a strange fruit
Blood on the leaves and blood at the roots
Black bodies swingin’ in the southern breeze
Strange fruit hangin’ from the poplar trees
Pastoral scene of the gallant South
The bulging eyes and twisted mouth
Scent of magnolias sweet and fresh
And the sudden smell of burning flesh
Here is the fruit
For the crows to pluck
For the rain to gather
For the wind to suck
For the sun to rot
For the tree to drop
Here is a strange and bitter crop.¹⁵⁶

F. DIGITAL PATTERNS OF LEGAL ORDER

“Poetry is a way of taking life by the throat.”¹⁵⁷

153. Brady Coleman, *Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher*, 32 RUTGERS L.J. 485 (2001); DOROTHEE KUTZNER, *LORD DENNING: ENGLISCHE AUSLEGUNGSTRADITION UND EUROPÄISCHES RECHT* (2001).

154. *New Windsor Corp. v. Mellor*, [1975] 3 All E.R. 44, 47 (C.A.).

155. *Campbell v. Wood*, 18 F.3d 662, 701 (9th Cir. 1994).

156. *Id.*

157. Robert Frost (1963), available at <http://www.bartleby.com/63/66/7166.html> (last visited July 27, 2004).

1. Borrowed Pictures

What happens to our freedom of putting dreams into words, from there into sentiments and further on into order and law, when the creating process is digitalized and when the code of creation is numerically guided, when the muse sits in the software? Also, what happens to our freedom when the particular character of mathematical language intrudes into legislative processes?

So far we have taken it for granted that poetry is born in the mind, heart and soul, but now it might be created by computers. The line between imitation and plagiarism is very thin. Inspiration from others might easily get the upper hand over one's own life experience and voice. Empty shells might stay on like mortmains. What looks like a fresh fruit could be merely canned food. The question is, will the crippling effects of written language increase when parts of it are monopolized?

How trustworthy are these new poems? Percy Bysshe Shelley (1792 - 1822) tells us.

Poetry is not like reasoning, a power to be exerted according to the determination of the will. A man cannot say, 'I will compose poetry.' The greatest poet even cannot say it: for the mind in creation is as a fading coal which some invisible influence, like an inconstant wind, awakens to transitory brightness: the power arises from within, like the colour of a flower which fades and changes as it is developed, and the conscious portions of our natures are un-prophetic either of its approach or its departure.¹⁵⁸

Genesis takes for granted that the word creates order, that name-giving is the decisive human faculty. "Whatever the man called each of them would be its name."¹⁵⁹ Wallace Stevens (1879 - 1955)¹⁶⁰ reminds us that we form our view of the world by singing against the chaos, by using the algebraic, tonal and rhythmical power of language to make "chaos collapse,"¹⁶¹ to form patterns. We refer again to his poem, *The Idea of Order at Key West*.¹⁶²

"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,
Knew that there never was a world for her
Except the one she sang and, singing, made."¹⁶³

158. SHELLEY, *supra* note 52, at 503.

159. Genesis 2:19; Cf. GROSSFELD, CORE QUESTIONS, *supra* note 8.

160. Cf. TONY SHARPE, WALLACE STEVENS: A LITERARY LIFE (2000); Tim Nolan, *Poetry and the Practice of Law* (2001), available at http://www.riderlaw.com/news_pubs/article_detail.cfm?ARTICLE_ID=3634&ARTICLE_TYPE_ID=2.

161. COHEN, *supra* note 136.

162. STEVENS, *supra* note 67, at 105.

163. Wallace Stevens, *The Idea of Order at Key West*, available at http://cscs.umich.edu/~crshalizi/Poetry/Stevens/The_Idea_of_Order_at_Key_West.html (last visited July 27, 2004).

We look to poetry for inspiration. But creativity only comes from one's experience and voice. Poetry patents give us canned, even re-canned food instead of fresh fruits. They limit our freedom of choices of how to do it, by preferring one pattern over the other.

"But thou, contracted to thine own bright eyes,
Feed'st thy light's flame with self-substantial fuel,
Making a famine where abundance lies,
Thyself thy foe, to thy sweet self too cruel."¹⁶⁴

2. *Digital Cage*

Let's now turn from poets as the "unacknowledged legislators"¹⁶⁵ to our acknowledged parliamentary legislator. What digitalization can do for poets can be done for them. What happens when digitalization becomes the invisible hand directing the legislator, and in particular when it is monopolized? Will it continue to be "the sacred well, [t]hat from beneath the seat of Jove will spring?"¹⁶⁶ Will it become a new kind of Watergate "deep throat" only recognizable by the happy few, by a small group of computer freaks? Into what patents thickets will the people's sovereignty be lost, drowned and strangled?

If this happens, petrifying legal language might reach new dimensions; the time that shrinks horizontally widens vertically. New language mortuaries appear on the horizon, but our concerns go beyond. Parts of the legislative process may become patented or monopolized. Important mental processes are then reserved to hidden power groups. They form new patterns of order, rise as priests from a pedestal that is arcane for most lawyers. Is our cage of language widened or narrowed?

Palmstroem, old, an aimless rover,
walking while in deep reflection
at a busy intersection
is run over . . . Tightly swathed in dampened tissues
he explores the legal issues,
and it soon is clear as air:
Cars were not permitted there!
And he comes to the conclusion:
his mishap was an illusion,
for, he reasons pointedly,
that which *must* not, *can* not be.¹⁶⁷

164. WILLIAM SHAKESPEARE, SONNET NO. 1.

165. SHELLEY, *supra* note 52, at 508.

166. JOHN MILTON, LYCIDAS, *available at* <http://www.readprint.com/work-1238/John-Milton> (last visited July 27, 2004).

167. CHRISTIAN MÖRGENSTERN, THE GALLOWS SONGS 35 (Max Knight trans., University of California 1964).

G. CONCLUSIONS

There are always new aspects in the relation of language and law towards each other. New semiotics creates new logistics and vice versa, and thus create new content. They build until they reach then unknown concepts of space and time, and they make new orders arise. This is the ongoing challenge for lawyers, who have a feeling for the poetic diction in law.¹⁶⁸ Shakespeare tells us that the lawyer's work arises largely from hunch and instinct, and it is here that poetry comes in.

“We are the music-makers,
And we are the dreamers of dreams,
Wandering by lone sea-breakers,
And sitting by desolate streams.
World-losers and world-forsakers,
On whom the pale moon gleams;
Yet we are the movers and shakers
Of the world forever, it seems.”¹⁶⁹

We will always have reasons for optimism, as the ever renewed poetic power of the younger generation will find ways to outwit the elder. But law is path dependant. That is why we are responsible not to erect too many hurdles and to throw too many stones into the future's paths. Let's keep poetry off-limits from patents!

168. OWEN BARFIELD, *POETIC DICTION* (1928); OWEN BARFIELD, *SAVING THE APPEARANCES: A STUDY IN IDOLATRY* (1957).

169. Arthur O'Shaughnessey, *Ode ("We Are the Music-Makers")*, in REPRESENTATIVE POETRY ONLINE 3.0 (1998), available at <http://eir.library.utoronto.ca/rpo/display/poem760.html>

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