

Journal of Law, Property, and Society

Volume 3

Tribute

April 2017

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Recommended citation: Marc L. Roark, *Poetry and Property: Reflections on Marc R. Poirier (1952–2015)*, 3 J. L. PROP. & SOC'Y 13 (2017), <http://www.alps.syr.edu/journal/2017/04/JLPS-2017-04-Roark.pdf>.

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Journal of Law, Property, and Society

ISSN 2373-5856

A publication of the Association for Law, Property and Society

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Poetry and Property: Reflections on Marc. R. Poirier (1952–2015)

Marc L. Roark*

Marc Poirier's commentary on law and identity drew often on sociology, literary theory, political theory, and feminist theory amongst others. Often citing wide and varied sources, Marc weaved an important narrative of understanding legal traditions as often failing to account for "otherness" in both practice and impact. In his memoir *One-L in a Different Voice*, Marc notes the early impact of Martin Heidegger's critiques of poetry on his views entering law school.¹ Though Marc says so, one might not know that Heidegger served as a significant impact on Marc's "epistemology of the law." Nowhere in all of Marc's writings does Marc cite Martin Heidegger, much less cite his critiques on Poetry.

Heidegger's critiques of poetry reveal a concept where language is construed as a type of "non-spatial" region that must be identified to exist. In this way, the word becomes the point of entry for how concepts and ideas begin to formulate around particular things. In doing so, language distinguishes parts from whole, knowing from unknowing, permanence and transience, and being from interacting. Importantly, Heidegger's views on language necessarily prompt humans to periods of telling and retelling and what it means to understand existence through varying forms of narrative—poetry being the purest form, is most essential towards its understanding.

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¹ Marc R. Poirier, *One L in a Different Voice: Becoming a Gay Male Feminist at Harvard Law School*, 78 U. MO. K.C. L. REV. 1063 (2010).

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When framed from this perspective, one finds that Martin Heidegger's works on poetry were quite influential on the way Marc thought about property, identity, and the law. This article unpacks some of those relationships by looking back on several of Marc's works to find places where Heidegger unveils new meaning for Marc's work. This essay, considers the elements of Heidegger's critiques on Poetry and how they may have influenced the work of Marc Poirier.

Heidegger on Poetry

Martin Heidegger is best known as the philosopher turned poet. Heidegger's philosophical viewpoints lent themselves well to the craft of poetry, as they focused on the role of language's role in shaping a "non-spatial region" where actors and actions become known to the physical world through the word. The word in language is an eruption, spanning the distance between known things and unknown things. The word then becomes a point of entry for thought, where parts are distinguished from wholes and knowing is distinguished from not-knowing. As one scholar wrote reflecting on Heidegger:

Human thought plays upon a thing, as it were, catching it up from the indiscriminate stream of natural process, to recognize it as *that which it is*. The act of language distinguishes parts from the whole. The word allows a thing to come out of the mist of unknowing and to take its place as what it is. Language tames the mystery and delivers it to knowledge in the form of the particular concept, whose realization is the word.²

² Paul Scott Derrick, *Emily Dickinson, Martin Heidegger and the Poetry of Dread*, 5 ATLANTIS 55, 56 (1983).

For Heidegger, manifestation necessarily means the opportunity to participate in meaning. Heidegger understood that this participation means allowing the exterior of the world to be redefined according to how individuals perceive the world. Language as a medium becomes common ground where once-idiosyncratic ideas, now invite others to form meaning through the material world around them. Heidegger's central idea of allowing "what-is be what it is" means "participating in something overt and its overtness."³ This leads to what one student of Heidegger's has termed the shaping of the "unconcealed."

What this means is that the world is merely that which has been recognized in the course of language. "History begins at the moment when the spark of self-reflection flickers in intelligence."⁴ Thoughts then emerge in material acts by revealing associations that man did not prior have words or language to associate those acts with. "By picking concepts out of physical evanescence, language fixes them to it more or less perpetual overtness . . . establish[ing] a contrast between the idea of permanence, implicit in the word, and the transience of natural process."⁵ In this emergence, time plays the pivotal role of being the arbiter of that which emerges versus that which remains concealed.

If language becomes the thing that announces the material into being, then poetry, as the purest form of language acts as the medium in which the known and the unknown are constantly in flux. Heidegger's critiques of poetry reveal that through language, the tension of transience and permanence are always in conflict through verse – often in contrasting frames. Looking to Heidegger's own poetry, we find that this contrast is how emergence can be identified:

³ *Id.*

⁴ *Id.* at 57.

⁵ *Id.*

When the early morning light quietly grows above the
mountains

the worlds darkening never reaches to the light of
being

We are too late for the Gods and too early for being.
Being's poem, just begun, is man.

To head toward a star – this only

To think is to confine yourself to a single thought
that one day stands still like a star in the world's
sky.⁶

Early and late are contrasted to light and darkness. Notably, time sets the point of reference for which the poet understands his view. In times before, one might understand being through a deity; and later, one might understand that being can be self-identified. But for now, poetry serves as a canvas for Man seeking to understand self and others as against self. As one author put it, Heidegger's project for fifty years was trying to understand what it means to "be."

Poirier on Ideas and Property

If Heidegger's main project was understanding what it means to "be," Poirier's project might be summarized as understanding how the law understands a person's right to be. From this standpoint, his focus on property is as apt a subject as Heidegger's late focus on poetry. Like Heidegger's notion that counter-themes of "transience versus permanence," "hiddenness versus overttness," and revelation versus silence emerge as verse is articulated, property too become salient themes for which Marc's property scholarship circulated. Sometimes, Marc used these exact terms or their synonyms to reveal

⁶ *The Thinker as Poet* (1947).

how law both met the challenge of addressing the self or failed miserably in that endeavor.

I want to focus on three areas where Marc embraces a Heideggerian structure to his world view. First the way Marc understands language as a medium for revealing the law. Second, the role that Marc understood for lawyers in interpreting the law for the world. And third, how Marc thought property and place should operate on law.

Marc's commentary on language is most on display in a symposium piece he published in the Washington University Law Quarterly titled "On Whose Authority: Linguists Claim of Expertise to Interpret Statutes."⁷ In that piece, Marc addresses claims by some that "linguists are experts on ordinary language and therefore ought to be consulted before judges interpret statutes, at least when they claim to be reading statutes as ordinary."⁸ Marc's main focus of his critique was towards a group of professionals that claimed to be able to "speak better than anyone else" in regards to language.⁹

At core, Marc's critique lay at the question of whether language was something that was exclusively the territory for insiders, giving people reason to not take seriously the views of those outside the professional power structure. (The same critique could be laid at the feet of lawyers and we will take that up shortly). The linguists claim of indispensability was in Marc's words a "claim of power and, if successful, an exercise of power."¹⁰ This makes the linguist's function operative, or one that highly depends on whether the community is willing to accept their expertise. If it doesn't, the linguist still

⁷ Marc R. Poirier, *On Whose Authority: Linguistics' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025 (1995).

⁸ *Id.*

⁹ *Id.* at 1026.

¹⁰ *Id.* at 1027.

claims superiority in the task by suggesting that the decision makers were simply “wrong.”¹¹ If the community does accept the linguists views, it only bolsters the claim of power that the linguist claims.

The claim that bolsters both lawyers and linguists is that they are interpreting “ordinary language.” Marc describes the paradox that ordinary language often presents to the legal speaker:

On the one hand, these texts are supposed to be accessible and to mean something. The supposition of accessibility is essential to the notion of responsibility, both as to the individual’s awareness of her/ his duties and as to the presupposition that individual rational decisionmakers decide whether or not to break the law. On the other hand, we cannot tolerate the multiple and conflicting interpretations that would be generated if we too literally the ideal of accessibility of the legal text on equal terms to every individual. Discipline and enforced coherence in reading legal texts are required. So the ordinary person is excluded from positions that can declare interpretations based on the legal authoritative text, and a specialized interpretive discipline is created. Within their own ranks, authorized interpreters – judges and the linguists and law professors who aspire to that position – maintain consistency, predictability, and so on through the discipline of their specialized linguistic practice. At the same time, they invoke the accessibility of the text as ordinary language to legitimate their exercise of power within the larger community.¹²

This territoriality that specialists lay claim to in language concerned Marc because it had the potential to reduce basic principles of fairness to a nuanced game of correctness.

¹¹ *Id.* at 1031-32.

¹² *Id.* at 1035-36.

But if Marc was concerned with how language could be controlled through access, his main focus was how language and expression announce the values we want to reveal. Marc focused on the role that visibility played in providing speech the opportunity to reveal itself. For example, in the context of LBGT reform, Marc wrote that

Indisputably, visibility has been key to the rapid shift in Western culture around the status of homosexuality. And LGBTQ strategists seem to return to visibility tactics when all else fails. The reversal represented by the success of California's Proposition 8 and the looming "lavender ceiling" for relationship recognition have triggered a "conversation strategy."¹³ LGBTQ folk are being encouraged to talk to friends and relatives about marriage, but not to sue for rights.¹⁴ The leading advocacy groups thus seek to produce a widespread educational effort diffusely, through interactions at the micro level.¹³

Noting the impact of anti-hate legislation to encourage primary schools to use Nursery Rhymes now expressly included LBGT themes making them visible in the school yards was a positive way that law made space for language to emerge. Marc's "beachhead federalism" or "kulturrekampf" showed how property and territory can close off access to language; but also how winning the fight for language in specific places can lead to greater access to ideas.¹⁴ Charging LBGT advocates, he gently urged advocates to think beyond the language, and rather to the place where language happens. He writes again,

¹³ Marc R. Poirier, *Place, Space, and Territory as Frontiers for LGBTQ Scholarship*, 19 *LAW & SEXUALITY* 188, 190-91 (2010).

¹⁴ Marc R. Poirier, *Same Sex Marriage, Identity Process, and the Kulturkampf: Why Federalism is not the Main Event*, 17 *TEMP. POL. & CIV. RTS. L. REV.* 387, 387-88 (2007-2008).

We must engage property theory which, properly understood, studies the dynamics of allocating the control and use of shared resources. Clinging to the literal words of the First Amendment simply does not get us there. We need to enrich these words by developing a fuller account of “expressive identity.” . . . The next phase of LGBTQ scholarship should include sociological and reconceptualized doctrinal accounts of battles over place, space, and territory, as they bear on control of identity performances. For example, in one classic case, Judge Pettine opined that a same-sex couple’s presence at a high school prom was different from and more suited to First Amendment protection than more traditional First Amendment activities such as leafletting or speechmaking. We need to be able to explain why.¹⁵

For Marc, making language visible was part and parcel with the ability to claim space and territory and understand why one was there.

Similarly, this idea of language announcing and shaping ideas was prominent in his work on environmental reform. Here Marc added the realm of permanence to the power of language in shaping ideas. In his Article on Public Art’s influence on Sea Change rhetoric, Marc suggests that language and communication is not always about revealing ideas, but also ensuring they are not obscured.¹⁶ In some ways, this obscuring takes on a form of “hiddenness” that can be obviated by finding new ways to be more overt. Marc writes on the problem of words qua words, or how revealing doesn’t always reveal:

¹⁵ Poirier, *supra* note 13, at 192.

¹⁶ Marc R. Poirier, *Very Clear Blue Line: Behavioral Economics, Public Choice, Public Art and Sea Level Rise*, 16 SE. ENVTL. L.J. 83, 97 (2007-2008).

The suggestion of “persistent publicity” also now seems to merit elaboration. Here is where the art angle comes back into the discussion. It is not simply a matter of getting hidden or unknown information about sea level rise out there – it is out there already – but of keeping the issue of sea level rise, and of the global climate change behind it, apparent and unavoidable. . . . The communication issue is not about information qua information. Visual cues and the immediate visual environment affect self-control in ways different from verbal or textual information. Similarly, public policy can influence behavior by changing the availability of visual cues or by creating visual counter-cues. The medium that conveys the information matters and impacts the effectiveness of the message.¹⁷

By framing the message as one that may be hidden or obscured, Marc emphasized the role of Property in preserving important social ideas. That permanence has the impact of making ideas visible in places that often are not changing.

The visibility of landscape is also associated with changelessness and indefinite duration, and ignores time. In contrast, I suggest, the coastal hazards present by sea level rise, storms, and erosion are quintessentially time-bounded and episodic in nature. Their threat is not always visible. Without permanent visual cues, this episodic risk inherent in the coastal landscape is forgettable, concealable or deniable. What is visually present most of the time is the land. And it is land that looks like developed or developable land, not the high water or the raging storm.¹⁸

For Marc, making messages visible meant avoiding the potential for them to be transient.

¹⁷ *Id.*

¹⁸ *Id.* at 102.

These ideas of permanence and visibility in claiming space came together in Marc's last work he on a place for the Aids Memorial Quilt. The last two times I saw Marc present papers, he discussed his project to understand what the property interests surrounding the AIDS memorial quilt conveyed about LBGT identity. One of Marc's conclusions was that LBGT identity has trouble isolating itself to a specific place. The AIDS quilt sat for many years in an Atlanta Warehouse and not available to display because of financial issues relating to the organization. Marc wondered out loud sometimes where the permanent places of LBGT identity are – that speak for themselves a geographical imprint for the world to see. "Stonewall? Castro?" These places represent iconic places for LBGT struggle, but nothing spoke to the transitory and disputed place for LBGT rights as the roaming and nonpermanent AIDS Memorial Quilt. That the quilt remained hidden for many years was emblematic of how eruption of language can be stalled by lacking access to space. How it had no permanent place was in Marc's words "fitting" as symbolic for the ongoing search for place in LBGT protections.

* * *

Marc's legacy reaches beyond these ideas. As a Property Professor he loved engaging with new scholars and the ideas they brought to the academy. Marc and I navigated around similar terrains for many years without crossing paths until very late. Then, as we did, we found many synergies that brought us together many times over the course of the last four years of his life – so many times that I felt I was on the Marc Poirier property circuit or vice versa. Marc's generous spirit, his buoyant laughter at finding a connection with an idea, and wise counsel are lasting pieces of permanence that we shouldn't soon forget. We invited Marc to join our colloquium on

Space and Property in Savannah and Marc was exuberant, thoughtful, engaged and infectious. Al Brophy, Steve Clowney, Caprice Roberts, Kayley Murray, and I ate, laughed, and enjoyed talking about law schools, life, and sometimes property. Marc touched our students that weekend as he shared his work on the AIDS quilt. Truthfully, I look back on that weekend and think we don't do that enough - spend purposeful time not only sharing our big ideas but our laughter, food, and fun. I can't now think of a conference with Marc that I attended where a good meal and lots of laughter were not somewhere in the mix. May his work and legacy continue to touch us as our colleague, our mentor and our friend.