Rule of the Root: Proto-Indo-European Domination of Legal Language

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When Jonathan Swift had Captain Lemuel Gulliver remark upon the "peculiar cant and jargon" that is current amongst lawyers, it is very doubtful that the author appreciated quite how peculiar, and how much like an oft-repeated incantation, legal language is.[1] Swift is not the only cynic to have observed that there is a certain distinctive and technical quality to the language of law which seems more-or-less designed to exclude the uninitiated, but what is not generally appreciated is that even the everyday language of the law – from "court", to "statute", to "case", to "law" itself - derives from language which has its roots in prehistoric, specifically Proto-Indo-European, society. This paper will correct that oversight, but it aims to do more than simply reveal the hidden roots of legal language; it also seeks to explore the implications of, and to suggest a response to, the discovery that modern legal language is subject to the ongoing dominion of the Proto-Indo-European lexicon and the realization that it is arguably, therefore, subject to the ongoing influence of Proto-Indo-European thought.

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[1] Jonathan Swift, *Gulliver's Travels* (1726) pt IV 'A Voyage to The Country of The Houyhnhnms' ch 5 (London, Penguin Popular Classics, 1994) 276

Etymology isn't what it used to be. In earlier ages, when scholars were routinely educated in the classical languages, there was naturally a tendency to look to etymology to elucidate the meaning of words. Likewise, when bar and bench had Latin and a little Greek, judges engaged in etymological deliberations more frequently than they do now. Some crude statistical evidence for this is a search for the word "etymology" in UK cases on the "Westlaw" legal database, which reveals that, despite a proliferation of law reporting during the last century, most of the references appear in cases that are now more (sometimes much more) than a hundred years old.[2] Within the cases in which the authority of etymology is discussed, we are frequently cautioned to resist its allure.[3] The etymology of "etymology" suggests that it was once considered to be a study of the "truth" of words,[4] but this is another sense in which etymology isn't what it used to be. In one Victorian case, an exasperated Sir John Wickens V.C. opined that "etymology is a very unsafe guide to meaning".[5] And even during Shakespeare's lifetime, when the renaissance of classical rhetoric was in full bloom and the *figura etymologica* was a popular rhetorical trope,[6] Coke's report of *Calvin's Case*

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[2] Searched 25th October 2011.
[3] See, for example, *Meriel Tresham's Case* (1612) 9 Coke Reports 108a at 110b; *Benyon* v *Evelyn* (1660) Bridgman, O. 621 at 631; *Forbes* v *Forbes* (1854) Kay 341, 352. In one case we are cautioned that "meal" need not connote food stuff that has been ground down in a mill (*Parsons* v *Gillespie* [1898] A.C. 239, PC). In fact, the etymology of "meal" is actually rather more sophisticated than any law report is likely to reveal. The rhythmic and grinding aspects of processing grain appear to have evolved along two different lines to produce two distinct senses – one indicating something like "periodic routine" and the other indicating "grinding down of grain". Both senses are combined in the idea of "meal time". (Unless otherwise stated, all etymological proofs are taken from R K Barnhart (ed), *Chambers Dictionary of Etymology* (London, H Wilson and Company, 1988)). For a rare judicial call to respect etymology, albeit in the narrow context of the construction of wills, see *Blamford* v *Blamford* (1615) 3 Bulstrode 98; 81 E.R. 84 at 93.
[4] Marcus Tullius Cicero considered, but decided against, coining "*veriloquium*" as a Latin neologism for the Greek "*etymologia*" (Frederick M Rener, *"Interpretatio": Language and Translation from Cicero to Tytler (Approaches to Translation Studies)* (Editions Rodopi B.V., Amsterdam, 2009) at 105.
[5] This observation, made at first instance, is recorded in the report of the decision on appeal to the Court of Appeal in Chancery (*Hext v Gill* (1871-72) L.R. 7 Ch. App. 699).
[6] Shakespeare's own lines frequently exemplify this trope, in which, in its purest form, distinct words sharing the same etymological root are juxtaposed in speech or text. Witness,

warns that "arguments drawn from Etymologies, are too weak and too light for Judges to build their judgments upon".[7] The message from the reports is clear - it is not that scholars should be deterred from mining for the deep meaning of words or that advocates should be prohibited from buttressing a winning argument with etymology,[8] only that none of us should expect judges to be persuaded by the authority of etymology.

In this paper I am not concerned with ornamental etymology. I am not concerned with the sort of etymological authority that barristers consciously choose to invoke and judges choose to reject. My concern is with the sort of etymological authority that is so deeply rooted in our legal language that it seems impossible to undermine. My hypothesis is that legal thought is dominated by legal language and that legal language, being deeply conservative, is still dominated by its ancient roots and hence by ancient thought. It is telling, for instance, that the jurist just cited said that "arguments drawn from etymologies are too weak and too light for Judges to *build* their judgments upon" (emphasis added). He instinctively used the metaphor of construction to describe the judicial process, thereby alluding to an ideal of social stability, structure and regulation – the architectural ideal – which, as this paper will show, has been fundamental to legal language and legal thought since ancient times.

Sir William Jones, an English Colonial judge in India, and, more significantly, an exceptionally gifted hyperpolyglot and philologist, was the first person to postulate the

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for instance, the following example from Sonnet 129, which the reader will discover is loaded with legal and Proto-Indo-European interest: "Had, having, and in quest to have, extreme; / A bliss in proof, and proved, a very woe".

[7] *Calvin's Case, or the Case of the Postnati* (1608) 7 Coke Reports 1a at 27b; 77 E.R. 379 at 411, in the Court of King's Bench, heard in the Exchequer by the Chancellor and all the Judges of England. This quote is immediately followed in the report by the cautionary maxim *Saepenumero ubi proprietas verborum attenditur, sensus veritatis amittitur* ("Where attention is paid to the precise properties of words, their true meaning is lost").

[8] See, for example, *Knowles* v *Attorney-General* [1951] P 54 at 60.

language which today we call Proto-Indo-European. In 1786, in a celebrated lecture to the Asiatic Society which he had founded, he observed that:

> The Sanscrit language, whatever be its antiquity, is of a wonderful structure; more perfect than the Greek, more copious than the Latin, and more exquisitely refined than either, yet bearing to both of them a stronger affinity, both in the roots of verbs and the forms of grammar, than could possibly have been produced by accident; so strong indeed, that no philologer could examine them all three, without believing them to have sprung from some common source, which, perhaps, no longer exists; there is a similar reason, though not quite so forcible, for supposing that both the Gothic and the Celtic, though blended with a very different idiom, had the same origin with the Sanscrit; and the old Persian might be added to the same family.[9]

It is notable that Sir William attached such significance to grammar, even at the dawn of the discipline of Proto-Indo-European studies, for what we know of the Proto-Indo-Europeans and their language is attributable more to grammatical resemblance than to similarity in vocabulary. Grammatical structures are not casually borrowed between cultures in the way that vocabulary may be. That said, similarities in vocabulary can at the very least add strength to theories based on grammar.

In addition to its other aims, the present paper seeks to remedy a surprising and enduring ignorance amongst jurists of the significant historical connections between the discipline of law and the discipline of etymology, for as the origins of modern etymological scholarship can be traced to an English colonial judge, so its development owes a great deal to the German jurist and philologist Jacob Ludwig Carl Grimm (1785-1863), more generally

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[9] 2 February 1786 (published in the first volume of *Asiatick Researches* (1788) 415–431).

famous as one of the brothers Grimm of fairy-tale renown. Jacob Grimm postulated the fundamental rules which govern differences in the pronunciation of consonants between the Indo-European and Proto-Germanic languages. These rules are known collectively as "Grimm's Law".[10] That title indicates that the discipline of law is linked to the early development of the discipline of etymology by something more than the identity of individual scholars. The essential regularity of linguistic development – its obedience to certain "laws" of change – is in some respects paralleled in the way in which juridical laws, if they are worthy of that name, must maintain a certain stability and predictability even as they keep pace with social and cultural change. A mind attuned to appreciate the development of law is thus a mind attuned to appreciate etymology and the development of language.

The remainder of this paper is directed to proving the survival in modern legal language of some of the essential features of Proto-Indo-European thought; and, second, which is the most important issue going forward, to identify an appropriate practical response to its ongoing influence.

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The archaic nature of legal language

From century to century the essentials of legal language remain to a remarkable degree unchanged. Warren Cowgill writes of "the abundantly documented conservative character of legal language in all or most societies",[11] and Calvert Watkins, another specialist in Proto-Indo-European etymology, writes in the same vein that "[t]he conservatism of legal language in the various Indo-European linguistic traditions (modern as well as ancient) has long been

[10] Also known as the "Rask's-Grimm's rule" or the "First Germanic Sound Shift" or the "Germanic Consonant Shift". An example of Grimm's Law is the rule that the Indo-European voiced stops "b", "d" and "g" become, respectively, the voiceless stops "p", "t" and "k" in Proto-Germanic.

[11] Warren Cowgill, "Two Further Notes on the Origin of The Insular Celtic Absolute and Conjunct Verb Endings" (1975) 26 *Ériu* 27 at 32.

recognized, and scarcely needs comment".[12] It perhaps needs little comment amongst etymologists, but the peculiarly archaic nature of modern legal language, as compared with other branches of our current lexicon (with the possible exception of the religious lexicon), is a fact that has been almost universally overlooked by lawyers, and its implications have, until this paper, received no sustained consideration by a legal scholar. No doubt the conservatism of legal language has been confirmed throughout history by the need to keep written records of laws and legal affairs, but it must also be significant that law by its nature, and for its authority, depends upon a certain reputation of permanence and stability. Law is precedented; law is law-abiding. It should hardly surprise us, then, that legal language is conventional. How many neologisms have been admitted into the inner sanctum of the law? The answer is very few. What is the latest thing in law-speak amongst practitioners: is it "human rights"? "arbitration"? "dispute resolution"?; "regulatory reform"? Most of these words are almost nakedly Latin, and that makes them, in essence, far more ancient than the Romans, for as Michael Weiss has observed: "[t]he Latin lexicon, especially in the religious and legal spheres, shows some notable agreements with Indo-Iranian that are undoubtedly archaic":[13] The law contains few neologisms, few root-less words. Law is not a domain in which to hunt for Jabberwocks. In preparing this paper, I found a neologism (albeit nothing much like a Jabberwock) on the website of one of the world's largest law firms, the London-based Herbert Smith LLP. The website was advertising a "webinar". This is not legal language, of course, but lawyers have appropriated it, and that seems as good a tactic as any by which to convince clients that their advisors are in all respects "bang up-to-date". Except that the title of this particular webinar rather gives the game away: "The changing face of UK

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[12] Calvert Watkins, "Studies in Indo-European Legal language, Institutions, and Mythology" in (eds.) G Cardona, H M Hoenigswald and A Senn, *Indo-European and Indo-Europeans: Papers Presented at the Third Indo-European Conference at the University of Pennsylvania* (Philadephia, University of Pennsylvania Press, 1970) 321-354 at 321.
[13] Michael Weiss, "Indo-European Languages" in (eds.) M Gagarin and E Fantham, *The Oxford Encyclopedia of Ancient Greece & Rome* (Oxford, OUP, 2010) 61-63 at 63.

financial services regulatory architecture”.[14] This short phrase contains several of the most ancient, fundamental and deeply-rooted linguistic expressions of legal thought. The “face” of the law recalls the fact that the artificial construct we call the legal “person” derives from “*persona*”, which is the Latin word for the ancient Greek-style dramatic mask.[15] The word “regulatory” derives from the Proto-Indo-European (“PIE”) root **reg-,* which has yielded a whole set of words associated with legal and political order, including regina, rex, royal, director, right and rule.[16] Maine argues that our current conception of a legal right is not ancient,[17] but even if that is true, it cannot be denied that the notion of social regulation being “rectilinear” and “level” and in some way equivalent to the direction of a “straight path” is truly archaic, as Maine himself acknowledges elsewhere.[18] One might add that the language that we use to describe the infringement of legal rights has been dominated since time immemorial by the idea of “wrong” and “tort”, which as every first-year law student is taught, connotes the physical twisting of something which ought to be straight.[19] Next in the title of the law firm’s webinar is “architecture”. This describes the art of the “master builder”, which, as has already been mentioned, and as the word-set of **reg-* confirms, was a paradigm for social order and regulation even before Aristotle offered the famous metaphor which

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[14] http://www.herbertsmith.com/News/Events/FSR+Update+webinar+090311.htm (accessed 25th October 2011).

[15] The Chambers Dictionary of Etymology (note 5 above) records that the Latin *persona* may be “borrowed from the Etruscan *phersu* mask”. It might also be connected to a sense of sound passing through (*per-sono*).

[16] The asterisk symbol which frequently appears in a PIE root, such as **reg-*, indicates a conjectured reconstruction.

[17] Sir Henry S Maine, *Dissertations on Early Law and Custom* (London, John Murray, 1914): “[t]he clear conception of a legal right is not ancient, or even Roman, but…it belongs distinctively to the modern world” (at 390).

[18] Note 60 below. See, also, W Cesarini-Sforza, *“ius” e “directum”. Note sull’origine storica dell’idea di diritto* (Bologna, Stab. poligr. riuniti, 1930) (I am grateful to my colleague Professor Emanuele Conte of the Law School at the Università Degli Studi Roma Tre for bringing this source to my attention).

[19] “Wrong” is cognate with the Old Icelandic *rangr*, meaning crooked or awry, and the Proto-Indian **wrengh-* (“to turn”). The synonymous “Tort” comes to us from the PIE base **twork-/*twerk* (“twist”) via the Latin *tortus* (“twisted”).

likened equitable judgment to building using a flexible rule.[20] Sometimes the survival of an archaic expression is exact. For instance, it is still the law of England that an easement acquired by prescription must be acquired "*nec vi*, *nec clam*, *nec precario*" (without force, without stealth, without permission). The negation "*nec*" is, as Calvert Watkins observes, "ancient".[21] His point is that it was ancient even to the Romans who used it. From our perspective it is truly archaic. Modern legal language is not merely conservative; in many of its aspects it is prehistoric, it is primal.

Proto-Indo-Europeans

"...etymology is usually indicative of some kind of historical connection. The question is whether the connection is essential or contingent".[22]

Etymology is a discipline in which it is rarely safe to make categorical claims, especially with regard to the cultural origins of a language; more especially when one is digging down as deep as the Proto-Indo-European. Language is always changing, so it is inconceivable that our current version of the reconstructed Proto-Indo-European lexicon was ever actually spoken by a certain people at a certain time. We can only speculate that an early people group in the course of its development from generation to generation cultivated a language which at some time or other established the roots for the languages which would later be used in the various branches (including Latin and Greek) of the Indo-European family of people groups.

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[20] Aristotle, *The Nichomachean Ethics*, Book V chapter 10.
[21] Calvert Watkins, "In the interstices of procedure': Indo-European legal language and comparative law" (1986) 13.1 *Historiographia Linguistica* 27-42 at 35.
[22] John Lyons, "Linguistics and law: the legacy of Maine" in (ed.) Alan Diamond, *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge, CUP, 1991) 337.

Thus the Proto-Indo-European lexicon was probably formed around the period 4500-4000 BC and had undergone major dispersal by around 2,300-1,600 BC, which is approximately when the speakers of Greek are thought to have arrived in the territory of Greece.[23] Modern English, formed as it is for the most part by an unusual combination of Germanic and Italic influences,[24] with contributions from Greek, Celtic and others, represents a particularly rich intertwining – in some sense a "re-joining" - of several major branches of the Indo-European family of languages.

Scholars cannot agree as to the geographical origins of the people whom we call "Proto-Indo-European". In the words of Professor James Mallory, one can only ask of the specialists: "[w]here do they put it now?".[25] It is, he adds, a "Never-Ending Story".[26] If I, an outsider (blindfolded by the fact that my first discipline is law) were to pin a tail on the donkey based only on what the majority of expert etymologists seem to be saying on one side and the other, I would put the pin in the steppe land which lies to the north of the Black Sea and the Caspian Sea. The reconstructed Proto-Indo-European lexicon provides clues to locate its speakers in a temperate zone where snow is found but sun-baked bricks are not.[27] It is hard

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[23] Martin E Huld, "Indo-Europeans" in (eds.) M Gagarin and E Fantham, *The Oxford Encyclopedia of Ancient Greece & Rome* (Oxford, OUP, 2010) 63-65.
[24] W. Rothwell, " The Missing Link in English Etymology: Anglo-French" (1991) 60 *Medium Aevum* 173.
[25] J P Mallory, *In Search of the Indo-Europeans: Language, Archaeology, and Myth* (London, Thames & Hudson, 1989) 143; J P Mallory and D Q Adams, *The Oxford Introduction to Proto-Indo-European and the Proto-Indo-European World* (Oxford, OUP, 2006) 460. See, also, J P Mallory "The homelands of the Indo-Europeans" in (eds.) R Blench, and M Spriggs, *Archaeology and Language I: Theoretical and Methodological Orientations* (London, Routledge, 1997); C Renfrew, Archaeology and Language: The Puzzle of Indo-European Origins (London, Jonathan Cape 1987).
[26] J P Mallory and D Q Adams, *The Oxford Introduction to Proto-Indo-European and the Proto-Indo-European World* (Oxford, OUP, 2006) 442.
[27] "In short, the evidence for architectural terms in Proto-Indo-European is most consistent with an architectural tradition somewhere in temperate Eurasia where houses were exclusively built of timber rather than brick" (Mallory and Adams note 26 above at 228). There is an intriguing theory, widely-accepted by geologists, that the Black Sea was deluged from the Mediterranean around 5600 BC, causing it to expand greatly to the north west. Underwater excavation has apparently discovered rectangular settlement architecture at the

enough to pin the tail on a static donkey, but presumably the Proto-Indo-Europeans did not stand still during the hundreds of years in which their language achieved the wide lexicon which is attributed to it today. There is bound to be a margin of error in identifying the homeland of a pre-historic people, and very likely a wide one.

If there is chronic disagreement about the geographical homeland of the Proto-Indo-Europeans, there is also ongoing controversy concerning the nature of their culture. Perhaps the Proto-Indo-Europeans inhabited an agrarian idyll in which they worshipped their gods, administered justice amongst their people and kept themselves to themselves. For a people who achieved such linguistic imperium over the rest of the world, that image cannot tell the whole truth. Did a language ever achieve significant territorial dominion without militaristic expansion? (Witness the linguistic imperium of Chinese, English, French, Greek, Latin and Spanish.) Whatever the Proto-Indo-Europeans might have been to begin with, the ones responsible for taking their language abroad had a well-developed language of conflict. Their language is agrarian, but it is also aggressive. Mallory and Adams observe that within the reconstructed Proto-Indo-European lexicon:

> "the vocabulary of strife …is fairly extensive (at least twenty-seven verbs) and while a number may be dismissed as purely expressions of the general application of physical force, e.g. striking an object, others such as **seĝh*- 'hold fast, conquer' certainly make better sense in a military context".[28]

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pre-deluge shoreline, and one can speculate that the original shore-dwellers, who might well have been forbears of the Proto-Indo-Europeans, were driven north by the flood. The spread of the Proto-Indo-Europeans has frequently been attributed to a range of climatic and geophysical factors as well as the more straightforward factor of territorial acquisition by conquest.

[28] Mallory and Adams, note 26 above at 284.

A most striking and revealing feature of Indo-European-Language is the abundance of words for taking and seizing and the relative scarcity of words for donation.[29] The Proto-Indo-European instinct was to have and to hold. There was the instinct to *have* in the sense of "heave" or "grasp",[30] and there was the instinct to *hold* in the sense of "keep a settled hold of". The latter sense derives from the Latin *habere* and produces such modern English words as "landholding" and "habitat". The Latin *habere* can ultimately be traced back to the PIE base **ghabh-*, which is not without a sense of the PIE root **kap-* ("seize" or "grab") but also indicates a holding so settled that it can be given away (the Indo-European **ghabh-* is also the root of "give"). The close connection between "have" (as in holding) and "give" that the root **ghabh-* implies survives in the maxim of English law "nobody can give that which they do not have", which we still express in the Latin *nemo dat quod non habet*. Likewise, the so-called "*habendum* clause" in a lease or other deed of transfer often begins with the words "to have and to hold" even though it describes the asset that is being given away. These survivors support the view that in Proto-Indo-European society conquest, to whatever extent it existed, was closely accompanied by settlement. The Proto-Indo-Europeans were probably aggressive, but they were certainly agrarian; we know that livestock held a significant place in their society (in later societies "heads" of livestock eventually produced the language of "capital" and "chattels" from the Latin "*capita*").[31] In Proto-Indo-European society it is likely that young men of the tribe constituted a distinct warrior caste and that older members of the society who were settled in agrarian routines resented any call to military service. In

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[29] *Ibid* at 270.
[30] From the Proto-Germanic **haben-* from PIE **kap-* "to grasp". The Latin cognate of the English "have" is not *habere* "to possess" but *capere* "to capture" or "to seize".
[31] The word "hold" derives from the Proto-Germanic **haldanan* and originally indicated to keep and watch over livestock. It will not surprise us that the older form "holden" is now all but extinct except in legal vernacular. The law reports are replete with references to meetings of courts, trade unions, churches that were "holden" at some time or other. Even today Peers are summoned to attend a "a certain Parliament to be holden at Our City of Westminster" (see *Lord Mayhew of Twysden's Motion* [2002] 1 A.C. 109 at 115 (House of Lords)).

Ancient Greece we know that “the absence of a citizen farmer on a military campaign, normally fought in the summer, might threaten the very survival of his family at home”.[32] Similar tensions between care for one’s own and conquest of the other must have existed in Proto-Indo-European society.

The plough or plow is a material key to Indo-European culture. The root **arə* “to plough” is attested in Celtic, Italic, Germanic, Balto-Slavic, and Greek,[33] and the idea of driving animals “underlies all of the cognates”.[34] Agrarian culture is plough culture. To plough you need to clear ground of trees. This is the job of an axe; which therefore becomes a symbol of both the aggressive and the agrarian aspects of Proto-Indo-European society.[35] Trees not used for fuel are used to form utensils, ornaments and, most significant in terms of settlement, fences and houses and communal buildings. One of the prime material indicators of Roman authority was the *fasces* - a bundle of sticks bound together with an axe. The fasces, with its connotations of communal, agrarian order defended by military force, epitomizes Aryan and other Indo-European culture. In the mid-20th century the atrocities perpetuated by the Nazis and their self-styled “fascist” allies perverted long-standing cultural associations of the words “fasces” and “Aryan”, but even today the symbol of the bundle of sticks survives, albeit frequently absent the axe, in the architectural rhetoric of such celebrated modern monuments to the rule of law as the US House of Representatives, the Lincoln Memorial and the statutes guarding the main stairway to the entrance of the US

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[32] Joint Association of Classical Teachers, *The World of Athens: An Introduction to Classical Athenian Culture* (Cambridge, CUP, 1984) 69.
[33] Warren Cowgill, A comment on Bernard Wailes, “Origins of Settled Farming in Temperate Europe” in G Cardona, H M Hoenigswald and A Senn, *Indo-European and Indo-Europeans: Papers Presented at the Third Indo-European Conference at the University of Pennsylvania* (Philadephia, University of Pennsylvania press, 1970) 279-305, at 301. Mallory and Adams identify the root in the complex code of the specialist etymologist as $h_2\acute{e}rh_3ye/o$- (note 26 above at 242-3).
[34] R K Barnhart (ed), *Chambers Dictionary of Etymology* (London, H Wilson and Company, 1988)
[35] *Ibid*.

Supreme Court building in Washington (the pediment of the front face of the building even contains the relief image of a Roman lector complete with fasces). The vestige of Proto-Indo-European thought has routinely been overlooked in modern legal architecture, and the argument of this paper is that it has likewise been routinely overlooked in modern legal language.

Stones, like trees, must be cleared before the plough, and would have been piled as boundary markers. Numerous ancient texts, including legal texts, attest to the significance of boundary markers; and ancient marble stones (*horoi*) can still be seen today at the site of the ancient *Agora* of Athens were they marked out the boundary of the market place half a millennium before Christ. Enclosure and plough culture are almost symbiotically connected – agriculture produces stone and wood boundaries; boundaries of stone and wood protect cultivated plots. The significance of this for present purposes is that enclosure remains a hard habit of legal thought in Europe and in jurisdictions established after European influence or example. That legal ideas of enclosure and privatization are not an inevitable fact of human relations to the natural environment is brought most clearly to light by land disputes between non-enclosure cultures, such as the aboriginal inhabitants of Australia, and jurisdictions of the European (we might say Indo-European) type.[36] Milner S Ball devotes his book *Lying Down Together* to exposing and critiquing the image of law as defensive wall which he identifies to be the self-image most powerfully promoted and perpetuated by European-type legal systems. He convincingly argues that "[l]aw as bulwark, or something very like it, is the present, predominate conception of law".[37] Describing the position in the US in terms which apply as well to England and to Europe as far back as the Indo-Europeans, he writes that, even though "[b]oundaries and fences now figure not so much in conquest as in ownership.

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[36] See, generally, Graeme J Neate, "Legal Language Across Cultures: Finding the Traditional Aboriginal Owners of Land" (1981) 12 Fed L Rev 207.
[37] Milner S Ball, *Lying Down Together: Law Metaphor and Theology* (Madison, The University of Wisconsin Press, 1985) 36.

The conceptual differences are not great. The bulwark is evident in the exhibition and defence of property holdings".[38] Earlier on the same page he had noted that "[r]ock walls were an import from Europe, the symbol of a life-style, a reinforcement of conquest ideology, and so a realization of bulwark thought and practice".[39] All of this might explain why the infringement of a legal duty has, since at least as far back as the Laws of Cnut (c.1025), been described using the same word – "breach" (from the PIE **bhreg-*) – that came to describe the infraction of a defensive barrier.[40]

The possibility of a gap in the legal defensive bulwark is regarded with the sort of disdain with which military defenders once regarded weaknesses in the castle wall. We frequently talk of legal "loopholes", but do we appreciate that a "loophole" denotes an arrow slit – a narrow point of vulnerability in a castle wall – and do we stop to consider what this might say about our image of the law? The very fact that the *inter*-disciplinary work in which some legal scholars specialize is sometimes considered to be "beyond the pale" by the main camps of legal practice and doctrinal scholarship is in itself a small proof of law's on-going habit of raising its drawbridge against the wider world.

Plough culture of the sort that was central to Proto-Indo-European society shapes legal thought in another respect. It has been observed that "small ploughed fields are most economically of square or rectangular shape, particularly when adjoining to form a 'field system'".[41] Ploughing prefers straight lines and it prefers enclosures to be quadrilateral. Tim Ingold, in his study of the history of lines, attributes writing in straight lines to the ancient

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[38] *Ibid*. at 97.
[39] *Ibid*.
[40] Hence Shakespeare's famous lines: "Once more unto the breach, dear friends, once more, / Or close the wall up with our English dead." *Henry V* (3.1.1-2) in (eds.) J Bate and E Rasmussen, *The RSC Shakespeare: Complete Works*, London, Macmillan, 2007.
[41] Bernard Wailes, "Origins of Settled Farming in Temperate Europe" in (eds.) G Cardona, H M Hoenigswald and A Senn, *Indo-European and Indo-Europeans: Papers Presented at the Third Indo-European Conference at the University of Pennsylvania* (Philadephia, University of Pennsylvania Press, 1970) 279-305 at 283.

practice of weaving threads into textiles and to the practice of plotting land with threads.[42] If the latter explanation holds good, then it may be just another way of saying that writing in lines is a feature that follows the furrows of the plough. Some of the earliest species of writing were actually set out in exact plough-form, known by the Greek *boustrophedon* ("as the ox turns"), with alternate lines reading left to right then right to left down the tablet. The rectilinear frames of Proto-Indo-European thought which produced rectilinear regulation with strict (that is "straight") law might have its origins in the practical economies of ploughing in straight lines.

People of the plough need stable shelter for their animals and for themselves. Such "stability" – a word derived from the Proto-Indo-European base **stā-* or *stə-* or *sth-*. ("to stand") - is the origin of the political state. Legal language would not exist as we know it if embedded metaphors of stasis and standing were removed. As you read the following paragraph, make a note of the words which are ultimately derived from the PIE root **stā-* (*stə-* / *sth-*). You will no doubt be surprised to discover the pervasive influence of this one root in modern legal language and thought.

> Cases and statutes are the two key components of the corpus of common law, and both are underpinned by the constitutional authority of the State. One may initiate litigation provided that one has standing to appear. In court, one will present one's case as statements (made on a form drawn up by the law stationer). Having heard the case stated, the judge decides the matter bearing in mind the need to 'stand by' precedents established in the past, in accordance with the doctrine of '*stare decisis*' ('stand by the thing decided'). Precedents may be departed from in certain circumstances, one of which is where the precedent can be shown to have become

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[42] Tim Ingold, *Lines: A Brief History* (Abingdon, Routledge, 2008) 159.

> obsolete because it was decided *rebus sic stantibus* ('as matters then stood'). Having decided the case, the judge may stay execution. One of the key causes of chancery business is the legal estate (freehold or lease), and it is significant how closely social status (station in life) is aligned with a great landed estate…This is all supposing that the matter is a civil matter. If it is a criminal matter it will all start at the police station with a police constable.[43]

Another legal idea, a Roman one as it happens, which is thoroughly indebted to the PIE root **stā-* is "restitution", which denotes the process by which assets or funds are reinstated or, which is often the same thing, by which persons are returned to the position – the "*status quo ante*" (another legal **stā-* phrase) - in which they stood prior to some legally relevant action or occurrence.

There was an archaic form of *lis* ("lawsuit") spelled STLIS in inscriptions.[44] Lionel S Joseph observes that "[b]y the end of the Republican period, the forms in *stl-* are restricted almost entirely to the fixed phrase DECEMVIR STLITIBVS IVDICANDIS 'decemvir for judging lawsuits'".[45] He adds that the spelling with the prefix *stl-* was retained only by the jurists; in other literary language from Plautus onwards, *lis* appears in its more usual simplified form. Joseph acknowledges the argument that the additional "ST" may be a cognate of *stare* to stand,[46] but thinks that this is unconvincing semantically. Neverthless, it seems to this author to be at least plausible to suppose that the dominance of **stā-* in legal language might have turned *lis* into STLIS with something like the root for standing in mind,

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[43] A solution can be found in G Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford, Hart Publishing, 2009) 185, where a similar text is set out with the relevant **stā-* words underlined.

[44] Lionel S Joseph, "A Survival from the Italo-Celtic Legal Vocabulary" (1986) 37 *Ériu* 119-125, 121.

[45] *Ibid*.

[46] Note 45 above at 122 n.7.

especially when one considers that in this context we are talking about the inscription of legal language on one of the most ancient sites of legal text – a stele or standing stone. Admittedly, it is puzzling that in the later Roman period STLIS seems occasionally to have become, for no apparent reason, SCLIS, but this can perhaps be put down to error caused by the shorthand or abbreviated nature of stone-inscribed text, through which original meanings were liable to be forgotten. Whatever its origin, the fact that ST was exclusively retained in legal terminology confirms what was claimed at the outset of this paper - that legal language is peculiarly conservative. Further evidence in support of that view appears from the Celtic, where the prefix "es" appears in non-legal language but does not appear in formulaic legal language. The absence of "es" in this context has been attributed to the fact that the legal terminology was settled before "es" entered everyday language:

> "...the absence of **(e)s* in such legal formulaic utterances as *atmu* 'I grant', *aicdiu* 'I invoke as surety'…is in all probability pure archaism: these formulae would have become fixed already before **(e)s* had become a necessary component of all statements that were not replies to questions."[47]

Let us now go very deep; deeper even than the Proto-Indo-Europeans, to the first root of who we are – to our physically being human. Before language was written it was spoken and before it was speech it was only the sound of throat, tooth, palette, lip, and tongue. The very word "language" still recalls the last of these. Might it be that the "st" sound, which even

[47] Warren Cowgill, "Two Further Notes on the Origin of The Insular Celtic Absolute and Conjunct Verb Endings" (1975) 26 *Ériu* 27-32, 32. The author of this article suggests that **(e)s* had as its original function "that of an asseverative particle, etymologically **esti* '(it) is (s)' used in statements of fact".

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today so dominates legal language, is a primitive example of "sound symbolism"?[48] The sound itself, like the metaphor of physical standing and stability which it expresses, has an arresting quality. The swift flow of breath is stopped by tongue on tooth. The moving becomes still. The moving sound of the "s" is terminated by the "t" and the resulting "st" becomes a perfectly efficient expression of the very thing it stands for – which is movement coming to a standstill.[49] Society becomes state. Justice becomes statute. Culture becomes constitution. Watkins observes similar sound symbolism in the fact that:

> "a final labial stop or nasal is extremely characteristic of words meaning 'take, seize, hold' and the like in a variety of languages. Cf. Lat. *rap-iō*, *cap-iō*, *carp-ō*, Gk. *harpázo*, Skt. *grabh-*, Russ. *xap-at'*, Hitt. *ep-zi*, OIr. *gaib-id*, or Eng. *grab*, *cop*, *clasp*, *nab*…".[50]

In these examples, the physical enclosure of the lips signifies the conceptual enclosure expressed by the sense of the words.

According to Mallory and Adams, "it seems fairly clear that the Proto-Indo-Europeans occupied substantial houses rather than flimsy shelters" .[51] For this one needs level ground, and perhaps a fabricated foundation, all of which ties in with the earliest metaphors for legal social order. As Maine observed: "the earliest notion of order doubtless involved

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[48] On sound symbolism generally see, for example, David Reid, *Sound Symbolism* (Edinburgh, T & A Constable Ltd, 1967); Roman Jakobson and Linda R Waugh, *The Sound Shape of Language* (Bloomington, Indiana University Press, 1979); Leanne Hinton, Johanna Nichols and John J Ohala (eds.), *Sound Symbolism* (Cambridge, CUP, 1994).
[49] Compare Raymond W Gibbs, Jr., Dinara A Beitel, Michael Harrington, and Paul E Sanders, "Taking a Stand on the Meanings of *Stand:* Bodily Experience as Motivation for Polysemy" (1994) 11 *Journal of Semantics* 231-251.
[50] Calvert Watkins note 13 above at 328.
[51] Mallory and Adams note 26 above at 227.

straight lines, even surfaces, and measured distances".[52] Mallory and Adams add that with regard to "actual house structure, it is certainly easiest to imagine some form of timber-built structure given the abundance of words for post…and perhaps the word for floor (*$telh_x$-*om*)".[53] As further evidence for this, the authors cite PIE words for wattle and daub. The authors also provide evidence of internal compartmentalization, with reference to the large number of root words for "chambers" (note the ongoing significance in modern law of cells, judicial chambers and hearings *in camera*) which they say "suggests the presence of either multi-room constructions or specialized outbuildings for storage and other purposes".[54] They observe, further, that "[t]he reconstructed lexicon also indicates some form of nucleated settlement, i.e. a group of houses" and "[w]e have a series of words for some form of enclosure".[55] The first root word which the authors list in the "enclosure" series is **ghórdhos*, which derives from **gherdh-* ("to gird"). The PIE root **ghórdhos* became *chórtus* (farmyard) in Greek, *hortus* (enclosed garden) in Latin and later *court* in French and English.[56] It is sobering to think that even today when a police constable takes a prisoner from court to the cells of the police station, the prisoner is feeling firsthand the fearful life of captives in a Proto-Indo-European settlement. The long arm of the law stretches across millennia.

So far I have portrayed Proto-Indo-European architectural and agricultural settlement as a process designed to dominate nature by capture and exclusion. In a similar critical vein, Linda Mulcahy sees the evolution of legal architecture in terms of a gradual enclosure of

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[52] Sir Henry S Maine *Ancient Law* (London, John Murray, 1861) (London, Dent 'Everyman' edn, 1917) at 34.
[53] Mallory and Adams note 26 above at 228. Even at a very early date some buildings were laid out on the rectangular plan that is ubiquitous in "Western" architecture today (see note 27 above and note 60 below).
[54] Mallory and Adams note 26 above at 228.
[55] *Ibid*. at 227.
[56] *Ibid*. at 221, 232.

space and exclusion of free access to that space.[57] There is clearly much truth in that view, especially when one bears in mind (as Mulcahy invites us to bear in mind) that the first courts met in the open air beneath trees. There is, however, an alternative and more hopeful, perhaps too optimistic, way of reading the development of courtrooms and judicial spaces. The "multi-room constructions", which Mallory and Adams attribute to Proto-Indo-European society, developed in some early European civilizations to produce vast building complexes; of which the Palace of Knossos in Crete is an impressive early example. In the Palace of Knossos a labyrinthine network of rooms was grouped around a central court. In the days before effective artificial lighting, large architectural developments required open courts to admit natural light into the heart of the structure. [58] Courts, in the judicial sense, can therefore be regarded as an attempt to bring the lights of natural justice into the artificial confines of legal regulation and compartmentalization. Close critical examination of our received habits of legal language and legal thought reveals the possibility of cultivating a new language from the roots of the old. It cannot be denied that "court" is the etymological cousin of "gird" and "yard", with all the connotations of capture, exclusion and measurement those words imply, but "court" is even more closely related to "garden" and the garden of the law, which we are accustomed to regard as a site of seclusion and exclusion might, if we imagine a different history, be considered a site of openness and light.

If the Proto-Indo-European world seems to us to have been a darkly primitive world of warfare and servitude to fixed categories of social status, it was nevertheless a world in

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[57] Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Oxford, Routledge, 2011).

[58] William Bell Dinsmoor, *The architecture of Ancient Greece: An account of its historic development* 3rd revised edition (London, B T Batsford Ltd 1950) 4. This author observes that "[o]n the Greek mainland…the normal form of the earliest houses was the circular hut common to all nomadic peoples….The gradual straightening of the walls until the sides become parallel, with a façade wall at right angles containing the doorway, marks the beginning of the rectangular plan" (Pages 5-6). The Palace of Knossos was built, over hundreds of years, in the middle of the second millennium B.C.

which, in theory at least, justice was conceived in terms of striving to attain and maintain an order sanctioned as much by spiritual as by secular powers.[59] Mallory and Adams write that:

> "Our recovery of legal institutions, at least on the basis of the reconstructed lexicon, is meager. There seems to be an acceptance of a concept of *h_a*értus* 'what is fitting', i.e. the cosmic order that must be maintained. This should be done by adhering to **dhé$h_1$mi-/men-* 'what is established, law', here generally taken (on the basis of Greek and Indo-Iranian comparative studies) to be the law that has been established (*dhéh_1*) by the gods for humans".[60]

The Latin *jus*, which produces "justice" and our words for speaking justice (including "judge", "adjudication" and "jurisdiction") is of unknown origin, but it might well derive from the PIE base **yewes-* via the Old Latin *ious*, which connotes a process of ritual purification (this is the sense of the Avestan *yaozda*, and the same sense is retained, for example, in the Christian doctrine of spiritual "justification" through faith). If you assault me and break my bone, we say that I have suffered an injury, but it may be more accurate, etymologically speaking, to say that you have inflicted an injury on yourself. Etymologically, "injury" seems to fit better as a description of the perpetrator's taint than as a description of the victim's harm.

We can summarize this part, and preface the next, with the words of Calvert Watkins who observes that the tripartite characterization of Indo-European society as "a society of priests, warriors, and farmers - can be applied with profit to aspects of Indo-European law".[61]

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[59] Mallory and Adams note 26 above at 285.
[60] Mallory and Adams note 26 above at 276.
[61] Note 22 above at 29

Legal language

There is no statistically reliable method of delineating the content of legal language in any modern jurisdiction. In the spirit of experiment (and with no pretence to having carried out a scientific survey) I have conducted a statistical analysis of the lexicon used in one recent case decided by the Supreme Court of the United Kingdom. The case title is an efficient epitome of legal jargon:

Hilary Term

[2011] UKSC 10

On appeal from: [2009] EWCA Civ 1159;

[2009] EWCA Civ 1211

JUDGMENT

Sienkiewicz (Administratrix of the Estate of Enid Costello Deceased) (Respondent) v Greif (UK) Limited (Appellant)

Knowsley Metropolitan Borough Council (Appellant) v Willmore (Respondent)

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The vernacular of this case heading, with its modern abbreviations and Latin terms of art, must be virtually impenetrable to the uninitiated. Even seemingly familiar words appear in unfamiliar form. For example, there is no "e" in the middle of the "judgment" because the word is being used here in a judicial context. This is a shibboleth for the identification of non-lawyers so subtle that there is not so much as a clue in the sound of the word to tell whether the middle "e" is present or not. Marginally less subtle is the letter "v" which connects the

parties in the title of case. In the jurisdiction of England and Wales it is proper form for lawyers to pronounce this "and"; preferably not "versus", and certainly never "vee".

So much for the heading of the report. Turning to the substance, we discover that the case concerns the liability of defendants who were the sole known source of the claimants' occupational exposure to asbestos dust. Cases in different fields of law produce somewhat different lexical distributions. There is naturally a difference in the legal lexicon when one moves from, say, the context of tortious litigation to property disputes to family cases to crime – but close attention to any case reveals something of the general nature of legal linguistic usage. In the present case of *Sienkiewicz* v *Greif*, when one removes general non-technical English words such as "the, be, to, of" and "and",[62] and such narrowly fact-specific words as "exposure", "mesothelioma", "epidemiological", "dust" and "dermatitis", the most common words which have a specific technical signification in law are as follows (the number in parenthesis indicates the frequency of references to the word):

caused$^{(167)}$ causation$^{(137)}$ cause$^{(81)}$ causes$^{(33)}$

case$^{(179)}$ cases$^{(138)}$

risk $^{(250)}$

prove$^{(61)}$ proved$^{(36)}$ proof $^{(33)}$ probability$^{(93)}$

defendant$^{(118)}$ defendants$^{(54)}$

evidence$^{(155)}$

Lord $^{(85)}$ Lords $^{(30)}$ LJ (ie. Lord Justice)$^{(38)}$

claimant$^{(145)}$

materially$^{(61)}$ material $^{(49)}$

[62] These happen to be, in that order, the first most common words in practical use in the English language. http://www.oxforddictionaries.com/page/oecfactslanguage/the-oec-facts-about-the-language (accessed: 30th October 2011).

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appeal[(69)] appeals [(30)]

balance[(98)]

injury[(90)]

court[(88)]

apply [(30)] applied [(43)]

victim[(72)]

v (ie. "versus")[(72)]

rule[(69)]

law[(61)]

fact[(59)]

judge[(58)]

duty[(58)]

liable[(55)]

breach[(51)]

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The preceding list includes all "legal" words, which, with their inflections and close variations (eg: prove and proved), receive more than fifty mentions in the report of the case. Let us suppose, which seems reasonable to suppose, that the high incidence of words denoting "causation" and "risk" should be demoted, because such concepts are unusually pertinent to the particular issue in dispute in this case (that is, the issue of liability for causing disease through exposure to asbestos dust). We are then left with a revealing top rank of words. First on the list is the word "case", which, if the reader will excuse the pun, we will consider as a special case towards the end of this paper. That word is followed, in rough order of precedence, by the categories of persons involved ("defendant", "claimant", "law lord", "victim"); by an extensive set of words concerned with the trial of fact ("evidence",

"balance", "proof", and so forth); and then, in quick succession, by the words "injury", "court" and "rule" (whose Proto-Indo-European credentials have already been outlined in this paper). The concerns and content of the language as one continues down the list are revealed to be wholly contemporary and yet entirely archaic. We will now briefly consider each of the two major word sets – the status of persons and the trial of fact - in turn. Before we do so, it may be reassuring to point out that the example of *Sienkiewicz v Greif*, though it was chosen somewhat arbitrarily, nevertheless appears to be fairly representative. I conducted a survey of the lexicon in another recent decision of the UK Supreme Court case chosen at random, the case of *Roberts* v *Gill & Co Solicitors*,[63] and found that it was similarly replete with frequent references to the status of relevant persons and the process of trial.[64] This is, of course, precisely what we would expect to find in a report of litigation that has reached the highest court in the land. We might expect to find a rather different distribution if we were to examine other varieties of documentary repositories of legal language, such as a statute, a law review article, a legal dictionary, or even documents (such as a will or a commercial lease) which are drafted to meet the particular needs of named individuals. As was said earlier, it is not within the scope or purpose of this paper to present a statistically comprehensive survey of the lexical distribution of legal terminology, still less to attempt the foolishly ambitious task of drawing up a definitive dictionary of modern language in most frequent use. It will suffice to observe that legal language employed in the ancient social context of judicial dispute resolution appears still to address timeless concerns using language which for the greater part continues to hark back to origins in Proto-Indo-European culture and thought.

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[63] [2010] UKSC 22, UKSC 2009/0071.

[64] The top-50 ranked words having distinctly legal significance in this case are as follows (the frequency of the occurrence of each word is indicated in parenthesis): Action (179); claim (169); party (117); court (116); v (ie. "versus")(110); case (88); lord (85); limitation (81); circumstances (67); capacity (66); derivative (65); proceedings (59); estate (59); beneficiary (59); administrator (56); section (52); rule (52); CPR (ie "Civil Procedure Rule(s)) (52); trustees (51) .

The status of persons

Steven L. Winter argues that the legal metaphor of standing originates in the physical act of standing near the seat of judgment and that the related idea of status indicates a physical state of standing with proximity to the seat of judgment.[65] At the seat of judgment we find the king or lord, who in the present case appears in the figure of the "law lord". "Lord" is a word heavily-loaded with significations going back to the Proto-Indo-European. The PIE root **wordhā* means "guard" or "warden" from whose remuneration we derive one of the earliest instances of an "award" or "reward". The law lord, and by extension even inferior judges, can therefore be regarded as a sort of guardian. The precise derivation of "lord" indicates a "loaf ward", which is to say a keeper of the stores of grain or bread.[66] Wearing optimistic spectacles a judge can therefore be seen to be a guardian of the commonwealth and the protector of citizens' goods and welfare; although, through a more critical lens, the judge may be considered to occupy the uppermost place in a hierarchy that ensures its own reward through monopolistic control of access to basic communal benefits. One does not have to move far along the more critical path to discover that the etymological distinction between lord and lady enshrines a curious gender distinction which almost certainly establishes a further level of social hierarchy in favour of the lord and at the very least establishes a peculiar functional distinction between the man who is perceived to guard the goods and the woman who, as "lady" or *læfdige* (Middle English) was the one tasked with kneading the dough.

"Claimant" is another word worthy of critical attention from the etymological point of view. The claimant is the one who clamours or calls out for justice (from the Old French *clamer*, which in turn derives from the Latin *clamare* "to cry out"). Ultimately, the word is

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[65] SL Winter, "The Metaphor of Standing and the Problem of Self-Governance" (1988) 40(6) *Stanford Law Review* 1371–1516, 1383, fn 63.
[66] From the Middle English "*laverd"* or "*loverd"* from the Old English "*hlaford*" and even earlier "*hlafweard*".

etymologically and onomatopoeically derived from the cockerel's "cock-a-doodle-do", so a legal claim is, and has been since the earliest times of domesticated society, a sort of wake-up call.[67] As such, it is rarely welcome or sweet-sounding. A legal claim that resonates beautifully on the ear must be as rare and fantastic as Chaucer's cockerel Chauntecleer, who was said to sing with a voice "merier than the mery orgon".[68] The word "appeal", which also appears high up the rankings in *Sienkiewicz v Greif* might seem at first sight to have an exclamatory connotation not dissimilar to that of "claim". Such are the perils of untested etymological assumptions. In fact, the word "appeal" is closer in signification to the word "propel". An "appeal" connotes a process of pushing or driving on.

The description "defendant" sounds passive, but it is actually, in its etymology, more active than the current sense of the word would suggest. The party who actively raises a defence, as much as the party who pursues a claim, ensures the continuation of litigation. One might almost say that the person who sets up a fortified position commits as socially-damaging an act as the one who would seek to tear a barrier down. There is arguably a certain active violence inherent in the seemingly submissive act of setting up a fence, even if the fence is erected in self-defence of one's own territory. Tangible evidence for this is seen in political *pali* (Latin "fences") from the Great Wall of China and Hadrian's Wall to the Anglo-Irish "Pale" and more recent examples such as the partition walls of Berlin, Belfast and Gaza. Etymology attests to the violence inherent in defence. The Latin *defendere* derives from *fendere* "to strike, push" and ultimately from the PIE base **gwhen-* which means "to strike" or "to kill".

So far as the descriptions of the interested parties are concerned, the most haunting of all the echoes of the ancient world may be those that resonate around the word "victim". The

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[67] The PIE root **kele-* which means "to call" is onomatopoeic for a cockerel's "dawn-calling". (note that the Sanskrit and Middle Irish words for "cock" are, respectively, "*usakala"* and "*cailech"*).
[68] Geoffrey Chaucer, *The Nonnes Preestes Tale*.

word derives from the PIE root **weik-* and indicates one who is spiritually and socially set apart, much as a living creature might be set apart for sacrifice.[69] The word is imbued with a strong sense of taboo and social taint. Witches, or self-styled "Wicca", are etymologically associated with victims through the PIE root **weik-*. Historically speaking it is undoubtedly true that Witches were set apart from society and, whether or not they sacrificed innocent victims to their craft, it is clear that they have long been victims of judicial process. Thus in the Laws of Ælfred we find the following edict set down: "*Ða fæmnan þe gewuniað onfon gealdorcræftigan & scinlæcan & wiccan, ne læt þu ða libban*" ("Women who practice in enchantment and sorcery and witchcraft, you should not allow to live"). Earlier in this paper we observed that the consequence of a harm is to taint the perpetrator with an injury that sets him apart from society, but now we can see that there is a cultural sense in which harm also sets the innocent victim apart from the group. This sense is powerfully expressed by Antonio, the title character of Shakespeare's *The Merchant of Venice*, who, as he sits constrained in the Ducal court anticipating Shylock's blade, describes himself as a "tainted wether of the flock, / Meetest for death".[70] Although arguably it is even more graphically expressed in the fate of Shylock himself, who is truly ostracised by the action of the play and may be considered the real victim of the trial.

The process of trial

A set of words pertaining to the process of trial appears high up the ranking of the legal lexicon in *Sienkiewicz v Greif.* When those words are considered closely one discovers that they are all clearly and directly derived from metaphors that express basic aspects of material

[69] Mallory and Adams note 26 above at 412.
[70] William Shakespeare, *The Merchant of Venice* (4.1.113-4) (this text is from J Drakakis (ed.), *The Merchant of Venice*, The Arden Shakespeare Third Series (London, Methuen Drama, 2011)).

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life, many of which would have directly concerned our ancient ancestors. The relevant group of words includes, in ranking order: [prove(61), proved(36), proof (33), probability(93)], evidence(155), [materially(61), material(49)], [appeal(69), appeals(30)], balance(98), [apply(30) applied(43)].

The meaning of "appeal" was considered earlier, as was the link between "balance" and bodily stability which we saw adds a material dimension to that word that goes beyond its traditional and well-known association with the set of scales or balances that have been used in just trade, and images of justice, since ancient times.[71] The word "apply" is worth brief mention. It means to "lay on" (from the Latin: *ap-* "on" and *plicare* "to lay fold, twist") and in its earliest origins described the laying on of threads in the process of plaiting (from the PIE base **plek-* "to plait, twist"). The word "apply" stills serves very well, therefore, as a metaphor of the lawyer's art of laying down the law to fit upon a factual base. The words "materially" and "material" that appear in the "process of trial" set of words are perhaps not so distinctively "legal" that they deserve a place in the lexicon, but they have been included to emphasise the point made earlier - that the law's concern with evidential matters is dominated by metaphors directly derived from the material world. The remaining words in the set very clearly bear this out. The word "evidence" is concerned with visual appearance, and the group of "proof" words (prove(61), proved(36), proof (33), probability(93)) derive from the closely related metaphor of probing the materials of surface appearance.[72] The word

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[71] For example, the Egyptian goddess Maat, a goddess of law and order, was sometimes depicted with a set of balances. See, generally, J Resnik and D Curtis (eds.), *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven and London, Yale UP, 2011) ch 2.

[72] The equivalence of "probing" and "proving" is of uncertain antiquity, but dates back as least as far back as the Middle Ages. See, generally, G Watt, [Reference to follow]. In its oldest etymological origins "probe" and "prove" suggest a strong sense of appearance or "front" (literally "being before" or "*pro*-be" from the PIE *probhows*).

"evidence" is also evidence of the dominance of visual metaphors in legal thought.[73] Justice, it is said, must not only be done but must be seen to be done, so it may seem strange to us now to realise that it was not until the latter part of the 15th century that vision was directly associated with "sense of sight". The original etymologically of vision indicated "knowledge", so the law's concern with the visual and the evident goes back to the fact that in pre-technological societies there was generally no gap between appearance and reality: to see was to know; to know as to see.[74] That said, a powerful exception to that materialist view can be seen in the fact that primitive societies revered those who, by means of unusual capacities, were able to see (even to foresee) what others did not. These seers were called the "wise" (the etymological synonym of "visionary"); a virtue which we still like to associate with our judiciary.

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"…the case is altered"[75]

Excepting the set of words concerned with "cause" and "causation", the top-ranked word in the lexicon in *Sienkiewicz* v *Greif* is "case". If you were asked to sketch the first thing that comes into your mind at the mention of the word "case", it is almost certain that you would draw an enclosed container of some sort; probably something like a briefcase. How many of you would draw a waterfall? Etymologically speaking, that is what we ought to draw. A legal case is not a box; it is a thing that falls. Its etymological brethren are not the casement or casket but the chase of water or cascade. The word derives from the Latin *casus* which denotes an event that befalls someone, and *casus* derives from *cas-* which is a stem of the verb *cadere* ("to fall"). Latin words from this stem describe, not only events that befall

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[73] Bernard J Hibbits, "Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse" (1994) 16 Cardozo Law Review 229.
[74] Latin *videre* "to see" from PIE base **weid-* "to know, to see".
[75] The Earl of Warwick in William Shakespeare, *III Henry VI* (4.3.33).

individuals, but also great changes of state (such as the fall of Troy) and, most tantalising of all from a legal perspective, the falling into place – that is, the ordering or settlement - of the heavenly spheres. The latter sense is a survivor of the PIE base **kad-* which signifies, amongst other things, to "lay out, fall or make fall". The word "law" itself denotes a layer (from the PIE root **legh-*),[76] and even today we talk of "laying down" the law.[77] The sense that law is a thing laid down sits well with the idea that a case is a thing that falls down or is handed down, and of course it is still commonplace to regard written law as a deposited or posited thing. The idea of "case" as a falling thing might have its prehistoric source in the fall from the firmament of such stuff as rain or hail.[78] For a prehistoric society, what greater symbol for the dispensation of divine justice or the positing of divine law can one imagine than the regular falling into place of the heavenly spheres and the life-changing fall of water from the heavens to earth? The fall of rain, with the associated blessing (or, in extremity, curse) of swift-flowing rivers and waterfalls, speaks of provision from an unseen powerful source. There is also a certain sense of justice inherent in the physical properties of water, given its natural predisposition to humble itself by falling to the lowest place it can find and there to find a perfectly straight level free of all unevenness and bias. All in all, we can say that anthropologically, even psychologically, there is a stronger natural sense of justice in the notion that a case is something that falls from the facts of social life than there is in the jaundiced view that a case is something that lawyers capture and contain. At this juncture it is interesting to recall that the words which came first in the frequency rankings in our statistical survey of legal language in *Sienkiewicz* v *Greif* was the set of words concerned with "cause" and "causation". The medieval word "cause" clearly derives from the Latin "*causa*" which was frequently used to describe a reason for action, and not least a reason for

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[76] Mallory and Adams, supra note 26 above at 277.
[77] Daniel Greenberg, *Laying Down the Law* (London, Sweet and Maxwell, 2011)
[78] The modern Irish word for "shower" is *casair*.

legal action. The idea of a legal "cause" is sometimes used in effect as a synonym for legal "case", and although there is no clear support for an etymological connection between the two words, it can be observed that the various senses of the words "cause" and "causation" are connected by the sense that one thing "flows from" another. This, one can speculate, might suggest an early etymological association between "case" and "cause". The sound symbolism of both words might be informative. Whereas the sound of the legal staple "st" in "statute" "constitution" and so forth stops the flow of breath, "cas" has the opposite effect of releasing the flow of breath from a state of capture.

The purpose of our close examination of the word "case" is to demonstrate that we are prejudiced to regard law as a rectilinear domain of capture, compartmentalization, containment and exclusion. We have seen that much of this prejudice is culturally ingrained in our legal language and thought and has been since the days of the Proto-Indo-Europeans. In the case of "case", we have inadvertently suppressed the original PIE sense of a moving, flowing judicial process under a closed and contained concept that might itself have been cultivated in us by Proto-Indo-European language and thought. The hope is that, being alert to the subtle influences of etymology we will be able to critique them and resist them and reform them where necessary. Let us return, briefly, to "statute". Is the great pillar of legal thought – the stele or standing stone – as immovable as it seems? Not if it can be persuaded to move through an imaginative engagement with legal language. The PIE root **stā-*, which gives us "statute" and "statute", also gives us *stasis*. All these words connote unmoving states, but we often overlook the fact that *stasis* connotes a state that is only *temporarily* unmoving. In rhetoric, *stasis* denotes a fixed or stubborn truth-claim on which one takes a stand; but stasis can only be temporary in the context of an art which is designed to move

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hearts and minds.[79] In medicine, stasis indicates an interruption in the normal flow of blood. The root **stā-*, which indicates standing, has been too readily and too completely associated with unmoving states. We have tended to ignore the fact that a standing thing is only a moving thing paused or that, even in the apparently motionless state of bodily standing, a great deal of muscular tension and constant adjustment is devoted to keeping the appearance of balance and poise.[80] One only has to consider Stonehenge to witness that even when great stones are set up to stand for all time, they remain moving things – they are moved over long distances to their standing spots but their motion does not end there - eventually they topple down. Installation is only stalled motion. Statues fall down. Ozymandias fell. Statutes too are movable things. Every lawyer knows that texts are to a large degree open to interpretation, but this paper has shown that an imaginative engagement with legal language has the power to move even the settled meaning of an individual word, and as it were to bring a dead letter back to life.

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Conclusion

The scholarly study of Proto-Indo-European language and culture is deeply dependent upon legal materials and indeed indebted for its very existence to the philological work of an English judge and yet legal scholarship has so far been at best indifferent to, and at worst ignorant of, the ongoing domination of Proto-Indo-European language and the ongoing influence of Proto-Indo-European thought upon modern legal language and thought. A search for the term of "Proto-Indo-European" within the "Combined World Journals" on Westlaw – a compendious collection of legal journals throughout the Anglo-American and British

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[79] See, generally, H F Plett, T O Sloane and P L Oesterreich (eds.), *Rhetorica Movet: Studies in Historical and Modern Rhetoric in Honour of Heinrich F. Plett* (Leiden, Brill Academic, 1999).

[80] RW Gibbs, JR, D A Beitel, M Harrington and P E Sanders (eds.), "Taking a Stand on the Meanings of Stand*:* Bodily Experience as Motivation for Polysemy" (1994) 11 *Journal of Semantics* 231-251 at 250.

Commonwealth traditions - produces just seven hits.[81] If this is ignorance then it is ignorance of a potentially dangerous sort, for Proto-Indo-European thought is potentially a dangerous species of thought. Of course, the neglect of etymology in law and legal scholarship is only partly because of ignorance; it is also attributable to pragmatic resignation. Proto-Indo-European is our language and it is our thought. By what means can we speak other than by *our* speech? By what means might we think other than by *our* thought? We might as well object to the fact that we stand on two legs as to object to the essence of our linguistic structures. And yet, even if we cannot uproot the roots of who we are, we nevertheless have the power to resist them and irritate them. And resist we must, for lawyers who purport to play with words without respect for the original power of words will find to their cost that the words are playing with them.

Respect for etymology and appropriate resistance to the historical force of words can form part of a wider project of speaking in a way that is living rather than dead. For James Boyd White, "living speech" is the key to resisting what he calls the "Empire of Force".[82] What this paper has sought to show is that one source of the forces that form our modern habits of thought is the Proto-Indo-European lexicon and, with it, the cultural vestiges of Proto-Indo-European society. In a similar spirit, Milner S Ball offers the following call to future progress based on a critical appreciation of ongoing historical influences:

> "unearthing law rocks – the stone tablets, steles, codes, regulations, rules, principles, reports of opinions, and casebooks – may be fruitful survival work if turning them up leads us to find something of the *corpus juris* or our own buried life. And laying down the law may prove promising if the law laid down is not like rocks for a dam in

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[81] As at 25th October 2011.
[82] JB White, *Living Speech: Resisting the Empire of Force* (Princeton, Princeton University Press, 2006).

opposition to life, but like stones on a creek bank along the axis of revolutionary movement. The end is not stasis but circulation".[83]

If we cultivate what James Boyd White referred to as "the legal imagination"[84] we will come to appreciate that statutes need not stand still, that courts need not enclose and exclude, and that cases need not be shut up. Our legal thought often takes linguistic form in conflict, conquest and exclusion - too much either of having or holding. Looking back we can blame the Proto-Indo-Europeans for giving us the linguistic tools that frame those thoughts; looking forward we have only ourselves to blame for what we make of them.

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[83] Milner S Ball, *Lying Down Together: Law Metaphor and Theology* (Madison, The University of Wisconsin Press, 1985) 33.
[84] JB White, *The Legal Imagination* (Boston, Little, Brown, 1973).