

The Scholarship of Resonance in an Era of Discord

*Frank Pasquale**

It is an honor to write a forward to this edition of the *Seton Hall Law Review*, dedicated to the scholarly legacy of Professor Marc Poirier. Marc was an exceptional scholar, teacher, and colleague. He was a deeply learned man, conversant in areas ranging from the jurisprudence of interpretation to the science of global warming.

He wrote on property, environmental law, and civil rights, and combined these fields in innovative ways. His “Virtues of Vagueness in Takings Law” was both widely cited and elegantly argued.¹ Essays like “Science, Rhetoric, and Distribution in a Risky World” were philosophically informed readings of fundamental controversies in environmental policy.² Throughout his scholarship, there was a concern for the marginal: the victims of environmental racism, sexual orientation discrimination, climate change, and many other contemporary scourges. But there was also a wise awareness of the limits of law and the complexities of advocacy.

Marc had many virtues, large and small. I particularly appreciated his ability to simply spend time with people: to listen with care and attention, to regale us with stories, and to celebrate occasions large and small. Every Mardi Gras he festooned himself, furniture, and fellow colleagues with glittering beads from New Orleans. He, a committed Buddhist, reminded us that the Catholic identity of the law school was not just an occasion for “thou shalt not’s” pronounced from on high. Rather, Seton Hall’s Catholic mission was properly imbued with joy and hope, celebration and repentance, generosity and self-restraint, all kept in balance by a spiritual perspective. Marc helped faculty and students of every faith—or none at all—maintain a sense of order and well-being. His way of being in the world reminds me of Clifford Geertz’s classic description of the religious perspective:

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¹ Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

² Marc R. Poirier, *Symposium on Bjorn Lomborg’s the Skeptical Environmentalist: “It Was the Best of Times, It Was the Worst of Times. . . .” Science, Rhetoric and a Distribution in a Risky World*, 53 CASE W. RES. L. REV. 409 (2002).

If we place the religious perspective against the background of three of the other major perspectives in terms of which men construe the world—the common-sensical, the scientific, and the aesthetic—its special character emerges more sharply. . . . The religious perspective differs from the common-sensical in that . . . it moves beyond the realities of everyday life to wider ones which correct and complete them, and its defining concern is not action upon those wider realities but acceptance of them, faith in them. It differs from the scientific perspective in that it questions the realities of everyday life not out of an institutionalized scepticism which dissolves the world's givenness into a swirl of probabilistic hypotheses, but in terms of what it takes to be wider, nonhypothetical truths. Rather than detachment, its watchword is commitment; rather than analysis, encounter. And it differs from art in that instead of effecting a disengagement from the whole question of factuality, deliberately manufacturing an air of semblance and illusion, it deepens the concern with fact and seeks to create an aura of utter actuality. It is this sense of the "really real" upon which the religious perspective rests and which the symbolic activities of religion as a cultural system are devoted to producing, intensifying, and, so far as possible, rendering inviolable by the discordant revelations of secular experience.³

Marc brought plenty of common-sensical, artistic, and scientific sensibilities to the academy as well. But I have a sense that his unique fit and resonance with Seton Hall was grounded in his ability to grasp and express the distinct and deep truths of religion and spirituality in a world where transcendence is so often crowded out by the din of commerce and the false promise of computational mimicry of human thought and feeling.

Marc also knew how to express his concern for others, and the earth, materially. He bought an extraordinarily comfortable chair for his office—ostensibly for naps caused by cancer-induced fatigue—but I rarely saw him in it. Rather, it was his way of inviting students and faculty to view his office as a place of refuge, a haven of conversation and inquiry. I often used it, happily sinking into it as we exchanged ideas, or simply indulged in the latest office gossip. His office was a haven for the thoughtful and the gabby—and he'd be the first to remind us that we're all a little of each!

³ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 111–12 (1973).

This sort of receptivity to people was also reflected in Marc's relationship to the world around him. He was a passionate environmentalist, who lamented the many ways that human neglect of seas, skies, and waters amounted not merely to "lost ecosystem services," but something graver—alienation, sin, or (in more Buddhist terms) a lack of skillfulness, grace, and awareness. Pope Francis's recent recognition of the interdependence and *interbeing* of humans and the planet we inhabit was resonant with Marc's scholarly sensibility:

[The earth] now cries out to us because of the harm we have inflicted on her by our irresponsible use and abuse of the goods with which God has endowed her. We have come to see ourselves as her lords and masters, entitled to plunder her at will. The violence present in our hearts, wounded by sin, is also reflected in the symptoms of sickness evident in the soil, in the water, in the air and in all forms of life. This is why the earth herself, burdened and laid waste, is among the most abandoned and maltreated of our poor; she "groans in travail."⁴

Rather than "master[ing]" the earth, we are called to another relation with it—realizing that we "are dust of the earth; our very bodies are made up of her elements, we breathe her air and we receive life and refreshment from her waters."⁵ I call this realization (and the sense of moral obligation properly shaped by it) an ethic of attunement.⁶

Behind any particular ideological stance there lies a worldview, philosophy, metaphysics, imaginary, or mythos, which either answers or tries to deflect foundational questions about the nature and purpose of human existence.⁷ In advanced (and advancing) economies, dominant

⁴ PAPA FRANCISCO, ENCYCLICAL LETTER LAUDATO SI' OF THE HOLY FATHER FRANCIS ON CARE FOR OUR COMMON HOME, ¶ 2 (citing *Romans* 8:22), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [hereinafter LAUDATO SI'].

⁵ *Id.* (internal citation omitted).

⁶ I loosely borrow the metaphor from WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 29 (1991) ("A third doctrine opposes these two quests for mastery. It sees more than indifference in nature; it discerns a bent or direction in the world to which the self and the community must strive to become attuned. The self becomes more free by becoming more attuned to the deepest purposes inscribed in its community, and the community becomes more free by becoming more attuned to the bent of nature in the self and the world. Freedom involves above all attunement to a higher direction or harmony; it is fulfillment and harmonization.")

⁷ Richard H. Brown helpfully catalogs such overarching terms of moral and ontological orientation. RICHARD HARVEY BROWN, *A POETIC FOR SOCIOLOGY: TOWARD A LOGIC OF DISCOVERY FOR THE HUMAN SCIENCES* 125–26 (Cambridge University Press,

ideologies of cost-benefit analysis and technocracy have attempted to evade or avoid such larger questions in the name of neutrality and pragmatism. Elites assure us that the present flow of events is largely unalterable; where change is possible, it should be little more than tinkering to better reflect the positive and negative externalities of market actors. Whatever more robust ethical systems may demand for the further future, they can have little effect now. “Ought” implies “can,” and there is no alternative to current forms of economic growth, financialization, increased trade, and technological advance.

Marc helped us think beyond this technocratic cost-benefit analysis. His article “Natural Resources, Congestion and the Feminist Future” drew both on communitarian and feminist frameworks to promote an alternative attitude toward the environment: nature is not simply a standing reserve to be manipulated to our ends, but something we are indebted to, something to appreciate for its own sake. Apart from whatever instrumental value it has to us, it also has an intrinsic value.

In *A prayer for our earth*, at the end of the encyclical *Laudato Si'*, Pope Francis offers this formulation as an initial step toward awareness:

All-powerful God, you are present in the whole universe and in the smallest of your creatures. You embrace with your tenderness all that exists. . . . Teach us to discover the worth of each thing, to be filled with awe and contemplation, to recognize that we are profoundly united with every creature as we journey towards your infinite light.⁸

Receptivity is an aspect of the unity here prayed for—an ability to have some sense of solidarity with creation, an exhilaration at its splendor and majesty, pain at its needless squandering at the hand of misguided or excessive development, and more subtle, bittersweet emotions (at, say, the sprout of a morning glory through a cracked sidewalk in a nearly paved-over city). Spiritual practice both creates the space in mind and heart for these experiences, and is reinforced by them. Marc devoutly maintained a meditation practice, both as a leader of group meditation sessions and a member of area sanghas. He offered his teachings to all at Seton Hall, and organized sittings and other opportunities for us to experience meditation’s compelling combination of relaxation and focus. I will always be grateful to Marc for bringing these practices to Seton Hall.

Accelerationists—those who welcome rapid technological change in both social relations and in the natural world—may view spiritual

1977).

⁸ LAUDATO SI', *supra* note 4, ¶ 246.

practice affirming ordinary life either quaint or mystical. But it is hard to see how accelerationists could consistently protect humanity from the type of rapid manipulation humans favor for the planet on which they evolved. After all, why shouldn't we solve the problem of scarcity by genetically engineering human beings to be satisfied with the status quo? Why not promote deeply egalitarian social relations by medicating away any striving for superiority? To guarantee a truly humane future, we will need institutions and economies that can keep the tendency toward mechanization, standardization, and the diminution of human experience in check. Respect for the stability of what is—be it nature or human nature—will be indispensable. Marc helped us cultivate that respect both intellectually, and spiritually. He was a devout Buddhist who tried to bring the peace of meditative practice to those around him—always as an invitation, never as an imposition, in the best spirit of ecumenical unity.⁹

This respect also permeated Marc's work on LGBTQ rights. A fundamental insight he had—and one that motivated him even from his time in law school—was that gay and lesbian individuals were part of nature—not deviations from it.¹⁰ Dramatically evoked by films like *The Twilight of the Goulds*, or poems like Gerard Manley Hopkins's *Pied Beauty*, this ethic of affirmation is of a piece with Marc's scholarship and spiritual practice. As Hopkins put it,

Glory be to God for dappled things—
For skies of couple-colour as a brindled cow. . . ;
All things counter, original, spare, strange;
Whatever is fickle, freckled (who knows how?)
With swift, slow; sweet, sour; adazzle, dim;
He fathers-forth whose beauty is past change:
Praise Him.¹¹

⁹ Those interested in continuing this tradition might consult resources on bringing meditative practice to the legal profession. See, e.g., STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999). While some might see meditation as an unlikely practice for lawyers, Marc helped us understand both professional judgment and spiritual practice as complementary ways of gaining a broader perspective on reality. Groups like the Association for Contemplative Mind in Higher Education have shown how important these opportunities can be for both faculty and students alike.

¹⁰ See generally Marc L. Poirier, *One L in a Different Voice: Becoming a Gay Male Feminist at Harvard Law School*, SSRN (Dec. 9, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520924. Of course, the natural is not always normative. But it is useful to mark this point, because natural law accounts all too often fail to acknowledge the persistence and prevalence of same-sex attraction. Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law Theory*, in *NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS* (Robert George ed., 2001).

¹¹ Gerard Manley Hopkins, *Pied Beauty*, in *POEMS OF GERARD MANLEY HOPKINS*

This kind of pluralism and affirmation of the mystery and diversity of reality *as it exists*—not as some idealized or standardized vision—is a hallmark of a spirit that goes beyond tolerance and respect, toward a kind of grace and understanding that is so necessary in our age.

It is thanks to the efforts of people like Marc that marriage equality has come to America. I say this not only because an article like “The Cultural Property Claim in the Same-Sex Marriage Controversy” clarified the stakes of the term “marriage” so eloquently and empathetically.¹² Marc’s service and faculty advising modeled, for all of us, a patient way of working for justice in slow-moving courts and agencies, and in institutions affiliated with a “church that can and cannot change.”¹³

Marc’s patience recalls the virtues of the “slow professor” in the accelerated academy.¹⁴ We often hear that, in an age of social acceleration, life has become too fast: There is too much to do, too much to see, we are overwhelmed by messages at work and even from media at home.¹⁵ (Consider, for instance, the infinite feeds of Twitter and Facebook.) But Marc’s wisdom went beyond merely urging persons to breathe, to step back and consider the big picture, and their place in it. He achieved a kind of resonance with the law school, the community of legal scholars, and other communities. As German social theorist Hartmut Rosa explains the term:

You’re non-alienated from your work, for example, or from the people you interact with, when you manage to have a responsive, transformative, non[-]instrumental relationship to them, a resonant relationship. The difference is you don’t try to manipulate the other side, which could be a person or an idea or a piece of music or nature, or to control it instrumentally or make it disposable and available. Instead, you try to listen and to answer. And whenever you are in that state of experience, when you listen to some music for

(Robert Bridges ed., 1918).

¹² Marc R. Poirier, *The Cultural Property Claim within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 414 (2008) (describing that “marriage’s ritual, identity, and status” can help “alleviate the stigma caused by the reiteration of longstanding,” unfounded insults about homosexuality). Marc explored gender and LGBTQ equality in so many dimensions: legal, sociological, anthropological, economic. I have little doubt that his work will be consulted again and again, as scholars reflect on his illuminating efforts to balance liberty and equality, tradition and innovation, individual self-expression and institutional self-governance.

¹³ See JOHN T. NOONAN, *THE CHURCH THAT CAN AND CANNOT CHANGE* (2005).

¹⁴ See BARBARA SEEGER & MAGGIE BERG, *THE SLOW PROFESSOR: CHALLENGING THE CULTURE OF SPEED IN THE ACADEMY* (2016).

¹⁵ JUDY WAJCMAN, *PRESSED FOR TIME: THE ACCELERATION OF LIFE IN DIGITAL CAPITALISM* (2014).

example — or when you talk with people or when you do your work right, i.e. when you're in resonance, when you feel that the thing you interact with is important, then it speaks to you, it touches and affects you. . . . You are touched, affected.¹⁶

I am told that, when Marc was first being interviewed for a position at Seton Hall, he played a piano for the hiring committee, to everyone's delight. I love that image—of a talent hard-won, serendipitously displayed, to leaven a tense moment, or even bring a glimmer of transcendent beauty to the weary.¹⁷

Each of the contributors to this volume capture facets of that transcendence in their appreciations of Marc's work. For example, Kali Murray explains how the "Poirean Perspective" develops communitarian principles to describe "the ways in which law and lawyers can perform to mediate the dialogic tensions posed by the different ideological and cultural tensions posed in property law."¹⁸ Murray's *Trademark in the Time of Kulturkampf* contextualizes Marc's work in the broader school of "progressive property theory." Both her insightful work, and Marc's, demonstrate just how artificial distinctions between real property and intellectual property can be.¹⁹

In *Property without Personhood*, Shelly Kreiczer-Levy further develops the enlightened communitarian perspective that inspired Marc's work on the claims that communities can make on shared spaces.²⁰ She develops the concept of "access" as a way of sharing resources in order to maximize social impact while reducing ecological and other harms. Work like this may help revive the original, idealistic aims of partisans

¹⁶ Eli Zaretsky, *The Crisis of Dynamic Stabilization and the Sociology of Resonance: An Interview with Hartmut Rosa*, PUBLICSEMINAR.ORG (Jan. 18, 2017), <http://www.publicseminar.org/2017/01/the-crisis-of-dynamic-stabilization-and-the-sociology-of-resonance/#.Wjk5hvrKUK>.

¹⁷ The spontaneity and joy here is in many ways the opposite of the totally administered, "algorithmic self," which is so often the model of selfhood pressed upon us by modern pressures of school and work. See Frank Pasquale, *The Algorithmic Self*, THE HEDGEHOG REV. (Spring 2015), http://www.iascculture.org/THR/THR_article_2015_Spring_Pasquale.php.

¹⁸ See generally Kali Murray, *Trademark Law in the Time of Kulturkampf: The Poirean Perspective*, 47 SETON HALL L. REV. 717 (2017).

¹⁹ See Michael Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

²⁰ See generally Shelly Kreiczer-Levy, *Property Without Personhood*, 47 SETON HALL L. REV. 771 (2017). See also Marc R. Poirier, *Gender, Place, Discursive Space: Where is Same-Sex Marriage?*, 3 FIU L. REV. 307 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421168; Marc R. Poirier, *A Very Clear Blue Line: Behavioral Economics, Public Choice, Public Art and Sea Level Rise*, 16 SOUTHEASTERN ENVTL. L.J. (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118327.

of the sharing economy—a term which is all too often invoked as a marketing ploy by platform capitalists.²¹

Anna di Robilant's *A Research Agenda for the History of Property Law in Europe, Inspired by and Dedicated to Mark Poirier* is a simultaneously reflective and enthusiastic reflection on legal history.²² Inspired by the concept of a "right to the city," aspects of di Robilant's article resonate with the "access" principles of Kreiczler-Levy's. Both consider the "social question" in property law, including the responsibility of the state not merely to enforce property as a right to exclude, but also to recognize the many claims of community and neighbors that may need to be reflected in laws as diverse as those concerning easements, zoning, nuisance, and water rights.

Finally, Paula Franzese's *The Power of Empathy in the Classroom* is a *tour de force* tribute, condensing into words aspects of Marc's personality that his students and advisees will easily recognize.²³ Marc was a very committed teacher. He went above and beyond in his administrative law class to include extra material on state and local government that few other courses in the area covered. The standard for his seminars was exceptionally high, and he would have frequent meetings with students to help them perfect their papers. He was available all the time, and always happy to talk.

I will always remember Marc as wonderfully effervescent. He was such a delight to have lunch or dinner with. And he would talk about just about anything: how to argue a difficult point in an article, how to navigate administrative mazes, or what were the best parks and beaches in New Jersey. He was such a good listener. I think this was part of his meditative practice: to open himself up to whatever colleagues or students wanted to chat about, knowing exactly when to inject a note of skepticism, a considered reflection, a guffaw.

I will so miss those conversations with Marc. There is some small sense of consolation in reading his articles, artifacts of a gentle yet meticulous intellect making connections among concepts that only someone of his deep understanding and learning could accomplish. But I wish we'd had more time to learn from him. I hope we can do some justice to his memory by trying to imitate the empathy, reflectiveness, and openness he showed to so many.

²¹ Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL'Y REV. 309 (2016), http://ylpr.yale.edu/sites/default/files/YLPR/pasquale.final_2.pdf.

²² Anna di Robilant, *A Research Agenda for the History of Property Law in Europe, Inspired by and Dedicated to Mark Poirier*, 47 SETON HALL L. REV. 751 (2017).

²³ Paula Franzese, *The Power of Empathy in the Classroom*, 47 SETON HALL L. REV. 693 (2017).