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SUMMARY:
... Postmodernism undermines our contemporary theories of judging, even as it generates them. ... In what follows, I point to how Heidegger's understanding of thinking as handiwork, perception, and silence might help illuminate the problem of practical legal reasoning. ... In trying to convey what this deeper sense of thinking is, Heidegger at times speaks of thinking as handiwork, as perception, and as silence. ... In his later work, Heidegger makes the following comparison between thinking and handiwork:
... But Heidegger understands thinking differently. ... Heidegger contrasts this understanding of thinking as perceiving with that of thinking as representation of objects to a conscious subject, a sort of thinking that requires "consciousness" of oneself as thinking. ... Thinking is linked with the possibility of saying, according to Heidegger. ... Given Heidegger's layout of thinking, it is no surprise that judging cannot be made entirely self-conscious or reflective (which does not mean that it is "unconscious"), described by rules, or governed by rules. ... If Heidegger is right about the priority of practical reason, however, this flight will not help much. ... But even if prediction would work, a theory of judging focused on prediction only obscures the importance of coming to terms with uncertainty and handiwork by pretending they do not exist or can be made not to count. ...

HIGHLIGHT: "We must free ourselves from the technical interpretation of thought . . . . The characterization of thought as [theoria] and the determination of cognition as 'theoretical' behavior occur already within the 'technical' interpretation of thought. They constitute a reactive attempt [to save thought's] independence in the face of doing and acting. Ever since, 'philosophy' has faced the constant distress of justifying its existence against 'science.' It believes it accomplishes this most securely by elevating itself to the rank of science. Yet this effort is the surrender of the essence of thought."

— Martin Heidegger n1

TEXT:

[⁎647] INTRODUCTION

Once upon a time, we believed in natural law. Human affairs had a right course, dictated either by a benevolent god or by impartial rational reflection. The law written by legislatures and applied by judges, if it was right, reflected this natural law. If it was wrong, however, it was not law and had no claim to obedience, except for that which violence and oppression could induce. n2

But then we began to doubt the universality of either god or reason. What had seemed universal began to look like the
The vagueness and fuzziness of theories of practical reason, however, make it impossible to assume that judges can have conscious control over their "horse sense." n26 Indeed, both Karl Llewellyn and Benjamin Cardozo n27 concluded that "[*651] judges themselves have no idea how they do what they do. In light of this disappointing conclusion, this threat to the sovereignty of thought itself, we shy away from theory altogether, hoping to gain control more indirectly through scientific prediction. What rational reflection fails to achieve, psychology, perhaps, can.

One example of this sort of criticism of theory is Professor Brian Leiter's recent article, *Heidegger and the Theory of Adjudication.* n28 Leiter argues that Heidegger's account of practical reason proves there cannot be a descriptively adequate account of adjudication. If adjudication cannot be articulated or described, then it is "noncognitive," a collection of "mindless coping skills that resist theoretical articulation." n29 Leiter argues that, deprived of its role in providing a normative criterion, legal theory should instead
revisit the Legal Realist idea of aiming only for a descriptively adequate theory of what courts actually do, not in terms of what they say they are doing, but in terms of what causes them to do what they do. Such a theory would abandon the traditional aim of providing a rational reconstruction of judges' reasons. If successful, however, it would yield something much more practical: a guide to what courts will do. n30

In making his point about the inadequacy of descriptive accounts of legal theory, Professor Leiter rightly emphasizes not only that our practical "knowhow" determines our ability to explain and articulate what we do, but also that our practices are much richer, more fluid, more multi-form, and more capable of innovation and improvisation than any theoretical description of "our practices." n31 As he says, the signal failure of theories of adjudication to pin down how analogical reasoning works, especially with respect to the critical determination of what counts as a "like case" or a "relevant" precedent, is evidence of the inarticulateness, the "muteness" of practical reasoning. n32

Leiter concludes, however, that the descriptive failure of legal theory is evidence that legal reason is "mindless" and legal theory (mostly) superfluous, serving only to set the stage for empirical studies of judges' behavior. I believe these conclusions are not only wrong, but dangerous. Why I believe them to be wrong and dangerous requires a deeper look into Heidegger's work. The short answer, however, is that practical reason is thinking, and is not merely "mindless" habit, routine, "coping" skills, or robotics. Forgetting or lowering our esteem for practical reason is nihilistic. We should not devalue or attempt to control practical reason, through "real" theoretical or scientific thinking, but we should remember and celebrate it, for within our practices lie our aspirations, our self-knowledge, our history, our mutual connection, and our better selves.

Heidegger anticipates the retreat from law to science with a sense of loss, as the culmination of nihilism and, I would add, the death of law as normative. n33 Moreover, the empirical study of law is doomed to recreate the difficulties of theory: it can never capture the practices, let alone serve to regulate them, because it must redescribe and simplify them in order to make them the subject of scientific investigation. Prediction would be impossible, because it would require an account of all the factors involved in legal reasoning, and would fail for the same reason descriptive theory fails. Instead of fleeing from theory, we need to think again about thinking and judging. If we have gotten by so far without being able to reduce thought to a set of rules, perhaps we should not be so afraid. Perhaps thought is not an operation we perform (like algebra or addition), but perception.

In what follows, I point to how Heidegger's understanding of thinking as handiwork, perception, and silence might help illuminate the problem of practical legal reasoning. I then return to the theme of control, suggesting how our jurisprudential fears may be a feature of our world, not to be themselves controlled or fixed, but better understood. Above all, when we loosen thought from will and control, we see that the better and perhaps the best role of thinking is in keeping questions open, lingering in enlightened confusion, so that we do not miss the next insight when it comes. The openness of practical reason is cause for celebration, not devaluation.

I. THINKING AS PRACTICAL REASON

The usual place to begin looking for Heidegger's account of practical reason is in Being and Time, n34 where he points out the distinction between the Vorhanden and the Zuhanden, the "present-at-hand" and the "ready-to-hand." n35 The distinction refers to ways in which things we become involved with can show themselves to us. Usually, things show up as "ready-to-hand," that is, as things we can do something with. My two-year-old automatically gauges the rocks around her by whether they are "too heavy" or "good for throwing," the sticks by whether they are long enough or strong enough for poking into a crack in the stone wall. Or sometimes, the things around her suggest the purposes she might have: the blanket might make possible a tent or a game of hide and seek. Recently, she asked me about something: "What is that?" When I replied by giving her the name for the thing, she shook her head in consternation: "No, what is it for?"

But the ready-to-hand is never the object of our attention; our attention is directed at what we are doing and we use our tools or "equipment" n36 without really noticing them or thinking about them. In her spontaneous play, my daughter never contemplates things "in themselves," dissected for their properties or abstracted from her work/play. To do so would require being involved with things in a way which Heidegger calls the "present-at-hand." We begin to see the world as present-at-hand when things do not work, when they become mere "stuff" by failing to serve their purposes. My daughter cries in frustration when a stick breaks — it has broken up her play and become an obstacle, mere substance, unconnected with her and with other things. Seeing things as "stuff" that is separated from other things or from human purposes generates theoretical knowledge, a springboard for scientific investigation that makes possible attention to objects "in
themselves,” n37 questions about their “properties” and classifications not based directly on relations of use. Indeed, even the distinction between descriptive and normative, is and ought, is possible only in abstraction from the ready-to-hand.

As Professor Leiter points out, n38 the “ready-to-hand” is not only temporally prior in our experience of the world, as my daughter repeatedly demonstrates to me, but it is also prior in the sense that the kinds of theoretical distinctions and classifications that we think to make are inevitably based on how the world sorts itself out for us in work or play. n39 What we see things "as," when we look at them theoretically, has got to be driven by how we are already involved with them practically. Moreover, Leiter perceives, we cannot capture this way of involvement in a descriptive theory because the knowledge we have about how to act among things in the world “is not a tacit belief system, an implicit theory, but a learned way of acting — or ‘coping’ with things and situations — that renders the world meaningful.” n40

Leiter quite naturally understands Heidegger’s distinction between the ready-to-hand and the present-at-hand to capture the difference between practical reason (involvement with things in the course of practice) and theoretical reason (observation of things as objects of scientific or explicit theoretical investigation). n41 Because practical reason must be action “all the way down” in order to provide the foundation for theory that does not rest on theory, Leiter takes practical reason to be “mindless.” n41

Yet Heidegger himself does not take true thinking to be theoretical observation or any other sort of relation to the world that uncovers things as present-at-hand. Rather, true thinking is prior to both theoretical and practical reason. n42 In trying to convey what this deeper sense of thinking is, Heidegger at times speaks of thinking as handiwork, n43 as perception, and as silence. In the sections that follow, I explore these ways of understanding thinking.

A. THINKING AS HANDIWORK

In his later work, Heidegger makes the following comparison between thinking and handiwork:

A cabinetmaker’s apprentice, someone who is learning to build cabinets and the like, will serve as an example. His learning is not mere practice, to gain facility in the use of tools. Nor does he merely gather knowledge about the customary forms of the things he is to build. If he is to become a true cabinetmaker, he makes himself answer and respond above all to the different kinds of wood and to the shapes slumbering within wood — to wood as it enters into man’s dwelling with all the hidden riches of its nature. In fact, this relatedness to wood is what maintains the whole craft. Without that relatedness, the craft (Handwerk) will never be anything but empty busywork, any occupation with it will be determined exclusively by business concerns. Every handicraft (Handwerk), all human dealings are constantly in that danger. The writing of poetry is no more exempt from it than is thinking. n44

In this passage, Heidegger rejects the dichotomy between “coping skills” and “theory” that Leiter finds in Being and Time. True handiwork is not "mere practice," nor is it "gathering knowledge." It is not rote or mindless repetition, or a set of beliefs or propositional attitudes. Instead, handiwork requires being responsive to the possibilities that are already set before one in the practice. It is much more an unselfconscious listening than a believing or telling.

And, while practice cannot be expressed in sentences describing or prescribing it, that does not mean it is insignificant or senseless or thoughtless. Even as he describes practice as "mindless," Leiter shows that he knows it is not:

Our mindless coping skills invest things and circumstances with a meaning, but they do so without that meaning being a matter of tacit beliefs, of implicit propositional attitudes. I believe that my wife is the most wonderful person in the world and I wish to spend the rest of my life with her . . . . Yet one would surely have a very thin picture of intimacy in its "everydayness" if one thought that a "theory" based on these implicit or explicit beliefs and desires was descriptive and explanatory of a loving relationship. Anyone who has been part of an intimate relationship knows that its meaning is defined most immediately by the whole way of being and acting that one shares with the loved one. With a person with whom one is intimate, one has a wholly different and special sense of personal space, of the boundaries of privacy, of the propriety of physical contact, of what can be talked about, of how it can be expressed . . . . The "skills" we deploy in intimacy — the frequent overstepping of personal space, the physical touching, the unselfconscious opening to view of relatively private activities . . . . — it is precisely these noncognitive skills that mark a person as one with whom we are intimate. As Heidegger notes, "we do not, so to speak, throw a ‘signification’ over some
naked thing which is present-at-hand”; rather, our preexisting “involvement” with that thing or person, the “mindless coping skills” we deploy unconsciously, invest the thing or person with a signification already. But if these skills, these ways of acting, are not themselves tacit propositions, then the meaning they embody (for example, that this is a person with whom I am intimate) will not be amendable to theoretical articulation, which is essentially propositional in form. n45

[*656] Why does Leiter—who understands that practice is significant, meaningful, not rote—think that it is nonetheless “mindless?” Because it is not “self-conscious” and it is not “propositional.” According to Leiter, if practice is not self-conscious, then making judges conscious of what they are doing by giving them new knowledge in the form of theory (propositions) would make judging impossible: you cannot think about what would count as intimate behavior without ceasing to be intimate, because in intimacy your attention must be on your lover, not on formulating or following rules. And that is just what theory up to this point has tried to do. So, Leiter concludes, we can no longer have a theory of judging, just prediction.

But Heidegger understands thinking differently. It is neither “consciousness” nor “gathering knowledge,” but rather handiwork itself: “We are trying to learn thinking. Perhaps thinking, too, is just something like building a cabinet. At any rate, it is a craft, a ’handicraft’ [Handwerk].” n46 Practice is significant and meaningful; the “working relations” between persons and persons, and between persons and things, give meaning. Practice allows things to be “as” something else, allows for “like” cases and “relevant” precedents, signs, and symbols. Hence practice, thought of as the relations we see in our experience of working in the world, is significant, because significance is the tracing of connections. These connections make possible what we do — they are the shapes slumbering in the wood, the potential tent in the blanket, the music that a vibrating string in a mathematic and artistic tradition makes possible. The possibilities that we see when we make cabinets and when we judge cases are given to us from the past, not made by us. They are not just morally neutral or pre-moral possibilities waiting for us to price and evaluate them, but they are already-directed ways which form and inform any abstract discussion of ethical theory. These possibilities for us also direct any description of what we do, predetermining what features of a practice we deem worthy of inclusion in any story about the practice, already sorted by relevance, already shaded into foreground and background. So, “thinking as handiwork” is in part being open to the possibilities opened by practice.

That handiwork is not “self-conscious” is no objection, but is part of what it is to be a tool. In his later writings, Heidegger recognizes the importance of a tool’s ability to disappear from view so that the work can go on. This character he calls Verla [beta] lichkeit, usually translated as “reliability.” As always, however, Heidegger pays attention to the root of the word, here “lassen,” which calls up the sense of “letting” and “leaving alone.” Good tools leave us alone to focus on the work and are thereby “reliable.” They do not intrude in the way of the “present-at-hand,” but stay in the background, allowing us to attend to the work. “By virtue of this reliability the peasant woman is made privy to the silent call of the earth; by virtue of the reliability of the equipment she is sure of [657] her world.” n47

Our craft and our work connect us to the world and each other, just as my grandfather’s armchair, in which he collapsed each night after milking the cows, still has the imprint and salty-hay smell of his body, and my grandmother’s pie tin still bears the marks of her pie server. These things connect me to them, and to the solidity of their world and their work. Likewise, I feel at home in my kitchen, where everything is right at hand, making my work smooth and graceful. Or, I reach for the familiar books on my bookshelf, dog-eared and underlined in just the right places, falling open to the passages I need. There is a fit to this, a stability, that is not the stability of a prediction but the stability of a familiar world.

Perhaps the ceremonies of the courtroom, the depressions in the courthouse marble stairs, the formalities of the trial, and the rituals of judgment have this feel as well, making the craft of judging more stable, more graceful, more “reliable.” n49 Perhaps the smell of leather and mold, the opposition of counsel tables, the elevation of the jury, the black robes, the etiquette and ritual, gather the quietness, the solemnity, the sense of history, heaviness, consequence, and blood, that is necessary for stern and thoughtful work. These practices form the backdrop that allows us to focus our attention, to be ready for the innovation or improvisation of justice to strike us. They enable us to be ready for perception.

B. THINKING AS PERCEPTION

Heidegger also likens thought to perception, to listening and looking, just as the German word for reason means also insight and perception (Vernunft). n50 But this understanding of perception is connected with practice, because it is not
"mere" sensation. The sort of perception Heidegger speaks of is already meaningful, already in the middle of a web of connections in which we are at work:

Thinking is a listening [Erhören] that brings something to view. Therefore, in thinking both ordinary hearing and seeing pass away for us, for thinking [*658] brings about in us a listening and a bringing-into-view . . . . When we perceive something in hearing and seeing, the manner in which this happens is through the senses, it is sensible. This assessment is correct. Nevertheless it is still untrue, for it leaves out something essential. Of course we hear a Bach fugue with our ears, but if we leave what is heard only at this, with what strikes the tympanum as sound waves, then we can never hear a Bach fugue. We hear, not the ear. Of course we hear through the ear, but not with the ear if "with" here means the ear is a sense organ that conveys to us what is heard. If at some later time the human ear becomes dull, that is, deaf, then it can be, as is clear in the case of Beethoven, that a person nevertheless still hears, perhaps hears even more and something greater than before.

Heidegger explains that the original meaning of logos, which the history of philosophy translates in English as reason, is λεγo - - - - ‘to gather,’ ‘to-lay- -next-to- -each- -other.’ n52 The legacy of this word means "allowing-to-lie-present that brings something to shine forth.” n53 Letting what lies before one show itself, then, is thinking.

Heidegger contrasts this understanding of thinking as perceiving with that of thinking as representation of objects to a conscious subject, a sort of thinking that requires "consciousness" of oneself as thinking. n54 The difference between the two ways of explaining thinking lies in what one takes to be fundamental about thinking. For the Greeks, Heidegger says, thinking was being attentive to how the world showed itself. n55 For the enlightenment philosophers, thinking was only a reflection of the world in a consciousness, a consciousness that was alien to the world and hence could never understand the world "in itself." To understand thought, in enlightenment terms, was to investigate the consciousness, not to investigate the world. n56

Heidegger rejects the separation of thought and world, n57 and hence the sense in which world becomes simultaneously forever out of reach and nothing but a creation of man's imagination. His entire philosophical endeavor might be understood as the effort to remind us that we are not Subjects imagining [*659] Objects, but beings-in-a-world, those who see as the world shows itself. The world, in turn, is not the rock-and-molecule world that hides its objectivity from us, but the world we inhabit, the world that is already meaningful for us, the "world" of history and culture and nature. Heidegger insists that we try to remember we are not the masters of the universe, but engaged and enrapt spectators within it. The world is not a creation of our consciousness or our experience, but, as our surroundings, it gives itself to us to think. We need to focus on that giving. Hence, thinking is looking and listening, not self-reflection or conscious re-presentation (presenting the world again to ourselves).

Thinking in this sense is not propositional knowledge expressible through theory. Thinking in this sense is an "oh yes, now I see" that finds the fulcrum of a dispute, the distinction "with a difference," the "relevant" analogy. I remember reading and rereading Spinoza when I was an undergraduate. I understood each sentence on its own, but I could not "see" what he was getting at. Then, one afternoon as I was walking across a parking lot, I "saw" it — I understood what "picture" of the world Spinoza was trying to show me. My insight then was not "propositional," but rather an appreciation of what was at stake in his thinking, so that I was able to see how all the propositions he advanced fit together, and why he asked the questions the way he did.

An attorney or judge may also have this experience while figuring out a new area of law. I know, for example, that "suspect classes" require "strict scrutiny." But until I see the cases, blended together, until I "get a feel for" what kind of issues they concern, I do not understand the doctrine. Thus, again, thinking is perceiving, not re-presenting sense data to a consciousness that can conceptualize and manipulate them deductively.

Because thinking is perception, it cannot be specified in advance by rules; rules would close off the possibility of seeing. Deductive reasoning, the thinking most capable of reflective control, is self-contained and closed off from anything outside the scope of its premises. Before deductive thought is possible, thinking must be open, waiting to be "struck" by what can then become premises in a syllogism.

What we can see, however, is intimately connected with language. We can see, that is, only so far as language has already opened a way for us. In the section that follows, I explore this connection between language and thought.
C. THINKING AND LANGUAGE

Thinking is linked with the possibility of saying, according to Heidegger. But, what language is, changes too. Language is not a means of communicating what is in my consciousness to your consciousness, because, again, that view portrays thinking as reflection, not perception. It also portrays language as a human creation made for expressing thought. That, too, is a mistake. Language is a gift from the past — necessarily public, necessarily in the world.

The legal academy is already familiar with the connection between language and practice through the work of Ludwig Wittgenstein. We are used to the idea that words are multivocal, that meaning is contextual, that words change their sense as they find their place in new practices, making meaning a matter of "family resemblance" rather than dictionary definition. Heidegger would agree with all of this, though he would stress that we find words for what we see, what the world shows us; we do not "manufacture" them. Even our "invented" words are metaphors from the past to say what we see: auto-mobile, aqua-lung, tele-phone, facsimile (Fax). These inventions have a use and a sense because they are connected to what has gone before — so, we can say what they are.

This understanding of language also helps make sense of Heidegger's use of etymology to uncover the significance of past understandings of words: If words have meaning through context and those meanings are the connections between contexts, then etymology traces those connections. Hence, Heidegger says,

language speaks, not humans. . . . Therefore the polysemy of a word does not primarily stem from the fact that when we humans talk and write we at times mean different things with one word. Polysemy is always an historical polysemy. It springs from the fact that in the speaking of language we ourselves are at times . . . struck, that means addressed, differently by the being of beings.

If language is understood as the way the world shows itself, with all its myriad connections, then it is not surprising that the Greek root of both language and logic (thinking) means "to lay out," in the sense of saying what has been laid out before us. Saying something makes explicit its connection with other things, because saying connects an experience with a word that has already been given, and with the other contexts in which it is appropriate to use that word. It is in part in this sense that Heidegger says language "gathers." Indeed, because language is so important to what we can see and say, Heidegger says language speaks, not humans.

Again, watching my two-year-old learn a language makes explicit that words are connections and memory. In her first attempts at speech, she used the word "Daddy" to refer to everything she connected with her father — airplanes, briefcases, telephones. Likewise, the phrase "higher, higher" comprised swings, playgrounds, the beach near the playground, any beach, and swimming. Speaking was connecting and therefore remembering what she saw. A mention of the word "comet" still reminds her of when we used to look at the comet Hale Bopp together, even though it was many months ago that it appeared in the sky.

Because language connects us to the past, not only our personal past but the past of our culture, Heidegger calls it the "house" of Being — that which holds and keeps and connects our world. And thinking/saying, the logos, the laying out and gathering that speaking does, is also remembering. In English and German, the root of think is also the root of thank. And thanking is remembering. Likewise, Heidegger points out that voelv, the Greek word for thinking, is a "taking-to-heart."

Silence is also thought. If thinking is listening and looking and remembering, then it is no wonder that Heidegger says we think and we speak when we are silent. We sometimes describe thinking as "searching for the right words." When we are silent, we are listening, remembering, paying attention to the world. We remain silent to show respect, to await words of wisdom from the wise. We are silent, too, to show respect for the dead, calling a halt to all our frantic and distracted activity to focus our attention. We are silent in prayer. We are silent in the company of those who are dearest to us, with whom we need not "make conversation." On the other hand, when we "use" language in chatter or "small talk," we are often not paying attention to what we are saying. And we are not thinking. Silence, by contrast, creates the space within which we can receive — comfort, love, memory, ideas, awe.

Nor are we doing our best thinking when we reflectively represent the world in theoretical cognition. We miss what is essential by trying to sever the connections among objects in order to see what they are "in themselves," and to represent them to ourselves as they "really" are apart from the distortions of our perception. Understanding is always
from something to something, an intuition or perception of likeness, a comparison or contrast. In understanding, we, like spiders moving from corner to corner, keep our web trailing behind us.

So thinking is "practical reason" in the sense that it is not conscious of itself as thought, necessarily relies on a legacy of significance already at work (an established "practice" and language), and cannot be articulated in necessary and sufficient definitions or rules. It is handiwork in the sense of working attentively with the possibilities opened by the past. Above all, thinking is open, ready to receive, and attentive.

D. PRACTICAL REASON AND JUDGING

Given Heidegger's layout of thinking, it is no surprise that judging cannot be made entirely self-conscious or reflective (which does not mean that it is "unconscious"), described by rules, or governed by rules. Self-reflective judging would focus attention on the judge, the judging rules, the gaps in the judging rules, the following or not following of the rules, etc. — not on the case — missing the attentiveness that is necessary to thinking. Self-reflection is a present—at-hand way of being in the world; a judge could not hope to describe her own thoughts without distorting and simplifying them in the way of any description. As anyone who has learned a skill knows, focusing on changing one aspect of one's "game" inevitably breaks one's rhythm and distorts other aspects of it. Of course, self-reflective focus is necessary for the novice or for the occasional retraining of the expert. But such self-consciousness can never encompass all aspects of the game at one time, and it tends to get in the way of focusing on the game.

Likewise, rule-bound judgment would involve a misunderstanding of the relation between thinking and speaking. Language is not a body of concepts or general categories to be deployed deductively, but a series of connections made by the constantly evolving tradition. "Applying" a rule presupposes that one has already "seen" it as relevant to the case. And rules themselves are necessarily [*663] only rules of thumb, revisable by new insights and connections that show up in the cases. n72 We know that good judgment has more to do with discerning and perceiving what is at stake in the case, what the case is "about," than with applying or articulating rules.

Yet judges must "give reasons" for their decisions. Traditionally, this did not mean describing judges' thought-processes or formulating rules that would guarantee their decisions were grounded in something other than "subjectivity," but rather meant connecting the cases to a tradition of prior cases — to precedent. This procedure seems puzzling to us — to echo Jonathan Swift, why should the silliness that has gone before go on again? n73 Hence, modern judges look to moral reasoning, or law and economics, or an overarching "policy" rationale, to shore up their precedential arguments (or to avoid precedent).

But is there another account of the role precedent plays in the traditional judicial opinion? Why should precedent govern, and in what sense? Heidegger's distinction between the German word "Tradition" and "Uberlieferung," often translated as "legacy," n74 may provide guidance on these questions. At some level, we have no choice but to act from our past, from our history, since that is the way things show up "as" connected and significant. The problem, however, is not that we are restricted by the past because it limits our vision, but that we are restricted by the past because we have forgotten it. Every word we use has a history of connections, but most of them we have forgotten. Because we have forgotten this richness of resonance, we are restricted to the contexts in which the words are used by our contemporaries — in small talk, in mass media. Thoughtless repetition, in these contexts, makes words trite, cheap, and meaningless: think how "genocide" and "harassment" have become commonplaces with relatively little power to move us. Because we have forgotten the richness of the interpretive possibilities opened by the past, we are doomed to mindless repetition of the same ideas. These ideas show up as "self-evident" or "obvious" so that we no longer question them. This "self-evident" mere repetition is "tradition," which Heidegger says "blocks our access to those primordial 'sources' from which the categories and concepts handed down to us have been in part quite genuinely drawn." n75

On the other hand is Uberlieferung, a legacy, which "raises concealed riches of what has—been into the light of day." n76 Heidegger here stresses the root sense of "freeing" in "liefer"; the past frees us by giving us possibilities. Heidegger digs out the roots of the words we use so thoughtlessly in order to uncover [*664] connections that we had forgotten. These new/old connections, in turn, provide new/old possibilities for future understanding. For example, because we can now hear "logos" to mean not just reason or language, but laying out and gathering, n77 we have the possibility of understanding language differently. A legacy is not a dead past, but the past as possibility for the future. n78

In the context of common-law reasoning, we see examples of scholars and judges digging out new possibilities from old case law. Warren and Brandeis's famous article about privacy, n79 Judge Cardozo's celebrated opinion in MacPherson v. Buick Motor Co., n80 are great works of the common law precisely because they do not rest with the "treatise" account
of prior cases which becomes "doctrine" (Tradition), but look back at the constellation of facts and connections in the original opinions to find a new "gathering" of significance, a new polestar for relevance, that gives guidance in the case to be decided. n81

I am reminded of an appellate case I worked on as a law clerk. The case involved the Colorado River abstention doctrine, n82 which had been distilled by subsequent lower court cases into a multifactor test. n83 Because the district court had dutifully totted off the factors and abstained, I recommended affirming. Assessed deductively, the facts of the case at bar satisfied the "test." My judge, however, directed me to look back at the Colorado River decision itself, rejecting any rote application of a multifactor test, to see whether there was any sense in abstaining in the case sub judice. Much to my surprise, the Colorado River case itself contains no multifactor test at all! Moreover, it did not seem to have anything to do with the case at bar. The panel reversed. n84 I should have known better than to take such a superficial view of doctrine.

[*665] Going back to the source, getting to the heart of the doctrine, is of course the essence of all law teaching. That is why we discourage reliance on legal outlines in class. That is why we require students to recite the facts of cases. That is why we continually search for new ways of "laying out" and saying what the case means, badgering our students to see the possibilities inherent in the past. This is common law reasoning at its best; it is what we expect judges to do, and what we expect lawyers to learn.

Relying on precedent as Überlieferung does not lead to predictable decision-making. The past is rich, it is freeing, it is multivalent, reactionary, and revolutionary. Yet Heidegger tries to show us that this is not an objection. If our past were rigid, we could not see the world as it continues to unfold. n85 Debates about the intentions of the Framers, debates about legal formalism, debates about "technical" languages n86 all have in common a terror of ambiguity. But perfect, complete knowledge is death. It cannot respond to the world. Any attempt to confine language within settled definitions is doomed to fail; it is for this reason that the best dictionaries are etymological. Language is a making of connections and gathering them together in words. If language did not allow for new connections, it would not be significant or meaningful; it would not be a constant thread connecting us with what has gone before.

But looking past the doctrine does not mean that one must look past all the doctrine all the time. Doctrine, too, serves its purpose as a placeholder — an unopened file that is indexed for us. When we are not concerned with the "issue" it contains, we thumb past it, mention it in "boilerplate," and leave it to one side. Doctrine then serves its purpose as a "tool," locating us in the legal field, and then relapsing into the background so that we can focus our attention on something else. n87 As Wittgenstein notes, we do not always need explanations for everything all at once. n88

Though this way of looking at judicial decisionmaking as handiwork cannot give us a theoretical or normative account of a good judge, it resonates with and reminds us of what we already know: a thoughtful judge is one who listens (a court proceeding is called a "hearing," after all), n89 who responds to possibilities opened by past practices, who is more silent than loquacious, who is focused on the case, who is humble, and who is not trying to apply any theory of adjudication, grind any political axes, or control the future. The thoughtful judge, like the thoughtful craftsman, looks for the shapes of justice that are slumbering in the case.

[*666] Why can we not articulate what that "justice" is? Both because theoretical cognition has to lag behind practical reason in time, and because it must be satisfied with a comparatively schematized and impoverished understanding. We cannot construct theories yet for the new significances or possibilities that appear to us in our practices. Nor can we reconstitute those practices as rules without killing the very multivalence that makes new insights and connections possible. n90 Our first experience of the world is in the course of doing — seeing, making connections. Because we are beings in time, we work with and respond to what we did not create, do not understand, and cannot control. Openness to our world is our best thinking, at least apart from the thinking that rightly sees our need to be humble and to thank, an acknowledgment of our finitude that must precede any attempt at doing, and that makes doing itself possible.

But how do we know that judges are doing a good job? Just as we know how to appreciate a Cardozo or a Harlan. Good judges let us "see" the law in a way that "fits." Their account of what the relevant precedents are, though perhaps at first disconcerting or contrary to the dogmatic doctrine of tradition, ultimately "rings true" and "looks right." Judging judges, like judging cases, is a handiwork. We can and do applaud a good decision. We cannot, however, "predict" it, because that would assume we already "saw" it as the good judge showed it to us. And the thing about good judges is that sometimes they show us justice in a light we had not seen before.

Likewise, we deplore a bad decision. Dred Scott v. Sandford, n91 despite its apparent adherence to rules, plain
language, etc., lives in infamy, as do Gitlow v. New York, n92 Whitney v. California, n93 and perhaps now Bowers v. Hardwick. n94 Doctrine, rules, and theories are propounded in order to control judicial discretion, so as to protect us from tyranny and injustice. But they do not, as these decisions attest.

Hence, we cannot develop comprehensive, systematic normative theories to "confine" judges n95 — though we can certainly talk in the present—at-hand way [*667] about some of the things we see in good judging. As Professor Philippe Nonet, who has tried to follow Heidegger's lead, has said more eloquently than I can:

What then is it to hear and keep the word of law? . . . Never can it be captured in anything like the proposition of rules, principles, theories, interpretations, etc. Any attempt to do so would produce only sterile dogma.

To keep the word of law is to stay in awe within the truth of an advent, namely the advent of the gift of understanding. n96

II. THINKING AS POWER AND CONTROL

Yet the urge to "control" judges is not satisfied. We fear the uncertainty inherent in a state of affairs that does not allow us reflective control over our institutions. The idea that adjudication is "unconscious" and "mindless" in Leiter's sense sounds pejorative to us precisely because it puts adjudication outside our control. As we have in dealing with the natural world, we flee to science for a better explanation of ourselves, for better self-control. n97

If Heidegger is right about the priority of practical reason, however, this flight will not help much. We cannot conduct experiments to help predict judicial behavior until we have already defined our project by abstraction from practice. Not only will those abstractions fail to describe all the sorts of things that judges do, or to incorporate all and the right variables of decisionmaking, they also will soon become stale in light of new factors "influencing" judgment. We are beings in time. We cannot control the future through what is past, though we always leap into the future on the basis of the past. We cannot keep the world still in order to measure it. n98 However interesting or illuminating the results of social science, they are always descriptions of something less than ourselves.

But even if prediction would work, a theory of judging focused on prediction only obscures the importance of coming to terms with uncertainty and handiwork by pretending they do not exist or can be made not to count. This sort of theory undermines the remaining normative force of law and the "humanity" of humans. Human beings become the "mindless" objects of scientific control. We do not trust judges, so we predict, and in predicting, we control them. We come to understand law itself as social control. n99

[*668] Prediction, rationalization, and control are also coming into vogue within areas of legal doctrine. Instead of defining due care in tort law as reasonableness, we define it as economic efficiency — as what sanctions are necessary in order to control behavior and organize energy effectively. n100 Contracts is no longer about honor or promises, n101 but about regulating or deregulating behavior to produce economically efficient distributions of capital. n102 Tax law is not seen as determining what we owe for the common weal after accounting for any contributions to it we have already made (like giving to charity, or raising children), but as a collection of "incentives" to "cause" us to give to charity or raise children. Talk of law is replaced everywhere by talk of "regulation." n103 Evolution, biology, sociology, economics, and psychiatry are harnessed to provide better predictive models and achieve more effective regulation of human behavior. n104

In criminal law, traditionally restricted to punishing responsible actors, the change is most striking of all. We are becoming less interested in mens rea, and more interested in controlling crime. For example, when the news reports that a felon who has served his sentence commits yet another heinous crime, we direct our outrage not at the felon, but at the system that failed to protect us. n105 [*669] "Crime" itself may come to be replaced by "dangerousness" as we concentrate more on incapacitation than on righting wrong, aiming our sights at predicting and controlling rather than chastening or reconciling or grieving.

The move toward incapacitation and the blurring of the line between crime and danger are evident in the Supreme Court's recent opinion in Kansas v. Hendricks, n106 upholding Kansas's Sexual Predator law. Mr. Hendricks, who had already served a ten-year sentence for child molestation, was immediately reincarcerated under the law because his uncontrollable propensity to molest children made him "mentally ill" and "dangerous." He was responsible enough to be convicted of a crime, but not responsible enough to control himself. n107 He was a human/nonhuman "predator," to be regulated and controlled and treated. Although the Supreme Court split over whether the State should have waited until after he had served his criminal sentence to invoke civil commitment, there was surprisingly no dissent that a merely
"volitional" defect, a tendency to weakness of will in the face of temptation, could render one "mentally ill." As the Court draws the picture, we see ourselves as effects of causes, victims of syndromes, predators and prey. Our weakness of will makes us not-responsible -- incapable, that is, of self-directed response. So, in the traditional sense, we are also not punishable. We can only be "managed," "treated," "incapacitated," and "regulated."

Both Nietzsche and Heidegger foresaw the emergence of this mode of thinking/being that Heidegger calls technology, though the term is easily misunderstood. We usually think of technology as a set of tools or machines that enable us to reach our goals more efficiently and completely. But the mindset that thinks in terms of means and ends, causes and effects, is not itself a mere tool. Its way of looking at nature, the world, and even human talent as raw material for achieving human goals is itself what opens the possibility of building and using machines. As Heidegger says, "our age is not a technological age because it is the age of the machine; it is an age of the machine because it is the technological age." Technology, he says, is the way of being in the world in which everything appears as a stockpile of fungible stuff to be ordered and used, managed and regulated, as we will. All matter (the effect of a cause) is transformable to energy (the cause of an effect). All is either cause or effect; our physics and metaphysics are inhabited only by fungible energy/matter shifting and moving. Our role in this monochromatic universe is to predict, and ultimately harness, the patterns of cause and effect. We ask not, "what is it?" but only "what is it for?" or "what can we do with it?"

But eventually, as the human sciences turn humans into objects of study, we even see ourselves as "human resources" to be predicted, controlled, ordered, and managed. The tendency of law to dispense with obligations, and to talk instead in terms of regulation and incentives, shows us to ourselves as the effects of causes.

The irony is, of course, that if everything we do is due to something else, there is no one to direct all the regulation and management. The causes operating upon us predetermine even our purposes and management. No one is left to be responsible for all the managing and regulation: no one is left to choose among purposes. We are all transformed into the objects of prediction and control, creating the combination of domination and lack of responsibility that is so vivid in totalitarianism and its evil banalities. Law as norm disappears. Only power remains. But the power is itself an undirected power, an irresponsible power: in Friedrich Nietzsche's vocabulary, a will to power for its own sake.

This homogenization and devolution of everything as raw material or "standing reserve," Heidegger argues, is the way the world is revealing itself to us in the modern age. It is inevitable; we cannot will it to change, or control or predict it. Yet technology's very imperviousness to control and prediction demonstrates that there remains something that is not the object of our control and prediction. And that, Heidegger says, is what we must think about.

Hence, Leiter's argument that theory must turn from normative description to prediction is itself a "natural" move on the way to a completely "technological" understanding of law. Our fear of the uncertainty inherent in our modern discovery that we do not live in a stable cosmos, but in time and in a "world," precipitates ever more desperate attempts to keep things ordered, to keep judges under control.

III. SHOULD WE CARE? OR WHAT CAN THEORY DO NOW?

The turn to technological understandings of law is a dangerous one — one that turns us from responsible moral actors into objects to be predicted and controlled. But how can one be responsible if one is simply participating un-self-consciously in practices that one is thrown into by birth and circumstance. What alternative is there for thinking about law?

The answer is that while we cannot change the technological colonization of law, we can think about it and what it means. We can notice that we are losing traditional ways of seeing ourselves as actors-with-free-will, though those ways have lost their groundings. We can notice that the picture of the world painted by technology is one in which we humans become increasingly less in control, as our efforts to control are directed against ourselves. And we can still notice the interesting irony that the drive for prediction and control is uncontrollable.

Heidegger says that within the greatest danger hides the saving power. Thus, using Heidegger's insight that the words we use give us our history and connect our world, it is enlightening to look at the root of the word "danger" itself. Ironically, "danger" derives from the Latin word for domination, or lordship — the danger, in other words, is domination, power-hunger, control-mania. Danger originally meant being at the mercy of, in the jurisdiction of, or liable to punishment by a powerful lord. It was a specifically human risk, not a risk from the natural world, and one closely related to the exercise of power.
"Peril" was the closest medieval equivalent to our more generic understanding of danger as a risk of harm, yet peril was not something to be avoided at all costs. It derives from the Latin root of "experience," and includes a sense of trial or test. One learns through experience, through peril and risk.

Thinking about technology as a way we are, that has been given to us, reminds us that we are not in control — not even in control of our control-mania. This is our saving thought: we can still see at least something that is given to us, something that we cannot manage, create, stockpile, or upgrade. So the truth is that we cannot reject science but instead should become more scientific, more like good scientists. And science is experimental, always uncertain, always open to being proved wrong in the future, never itself completely a master.

Modern physics has had to redefine the universe as finite and changing. The "material" world is only a form of "energy," an insight that blurs the difference between the sensible and the supersensible, between matter and thought, and indeed, as Heidegger understood, renders these categories anachronistic. Physics deals in probabilities, "virtual particles," "anti-matter," "space-time" — ideas that simply do not fit the vision of the world that is built into the linguistic tradition of dividing the world into subjects and objects, causes and effects, thoughts and things. We have yet to assimilate these new/old ideas. We confront the limits of our finite understanding as we do the limits of the finite universe — we can see no faster than the speed of light.

If legal theory is indeed useless to govern and control practice, and if thinking is something other than constructing new sets of norms, what is the point of theory? What does thinking do? Reconceived as reflection and remembering, legal theory can still point out contradictions and presuppositions; point out aspects of "technological colonization"; point out important legal concepts left behind by technological thinking; try to remember what force words of law used to have (a remembering which opens new/old possibilities for the future); point out the consequences of technological thinking; and, at its very best, reconcile us to the (partial, uncertain, always shadowy) truths of the postmodern world. Legal theory cannot, however, provide a stable basis on which to judge judges, re-establish clear, predictable rules, stand outside legal practice to provide a comprehensive set of norms for adjudication, regulate the world, or even give a stable account of what judges do that will enable us to make firm predictions.

Above all, for all law we need a new/old account of responsibility, based on a new/old understanding of the essence of being human — an account that does not require an all-powerful will of a self-conscious thinker. Perhaps one is available to us from the past. Heidegger himself points part of the way — responsibility is grounded in responding to what is not within our control. Freedom is not infinite possibility, but only those finite possibilities opened by our past. This does not negate choice; rather, it means that we have a choice that is sufficiently limited to be choosable.

What is the relation of this new understanding of humanity to law? It is that we are neither victims nor predators. Rather, we are beings with limited choices, beings who are responsive to the world, attentive to what reveals itself to us. How can we incorporate these truths into law remains to be "seen." Nothing more "practical" can be done until we know what possibilities are open to us. We who try to engage in this work must try to be quieter, so that we can listen more carefully and see more clearly.

"Thought by its speaking traces insignificant furrows in language. They seem even more insignificant than the furrows the peasant with deliberate steps traces in the field."
profound philosophical problem is resolved, as will be seen even more clearly later, quite simply into an empirical fact.”).


n8 See, e.g., WITTGENSTEIN, supra note 4, at paras. 39–53.


n10 See THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (an attempt to meet the challenge of no "objective" standpoint); WILLIAMS, supra note 9 (same).

n11 Two excellent and interesting attempts are FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) and Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Reasoning by Analogy, 109 HARV. L. REV. 923 (1996). But the interesting part of the process remains mysterious: how we see this rule rather than that one as relevant, this analogy as informative. See Brewer, supra at 954 ("there is inevitably an uncodifiable imaginative moment in exemplary, analogical reasoning.").

n12 See, e.g., SCHAUER, supra note 11, at 53–76.


n15 For similar, and much more detailed, accounts of the recent history of jurisprudence, see generally GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END (1995); Marianne Constable, Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law, 19 L. & SOC. INQUIRY 551 (1994).

n16 Jerome Frank makes the point that our formalist need for control stems from a desire for a father who lays
down the law. See JEROME FRANK, LAW AND THE MODERN MIND 203 (1930).


n19 See Anthony J. Sebok, Misunderstanding Positivism, 93 MICH. L. REV. 2054 passim (1995) (separating legal formalism from legal positivism and holding the former unsupported and unsupportable).


n23 Practical reason is often associated with "pragmatism" more generally. However, pragmatism is both more general and more consequentialist than theories of practical reason need be. See Thomas F. Cotter, Legal Pragmatism and the Law and Economics Movement, 84 GEO. L.J. 2071, 2129-39 (1996) (arguing that some forms of pragmatism may be compatible with law and economics; identifying as key characteristics of pragmatism contextualism, instrumentalism, antifoundationalism, and perspectivism). Practical reason could embrace contextualism and antifoundationalism without necessarily embracing instrumentalism. Professor Kronman, for example, would take this view (though without excluding prudence, which he would class differently from instrumentalism), while Professors Rorty and Farber would embrace all four. See generally PRAGMATISM IN LAW & SOCIETY (Michael Brint & William Weaver eds., 1991); BRIAN Z. TAMANAH, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 26-57 (1997); Cotter, supra, at 2071 n.1; Daniel Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 VAND. L. REV. 533 (1992); Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615 (1987); Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. CAL. L. REV. 1569 (1990).

For reasons explained infra Part II, a Heideggerian account of thought cannot be instrumental. See RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 116 (1989) ("Heidegger thinks that if we are to avoid just this identification of truth with power — to avoid the sort of humanism and pragmatism advocated in this book, forms of thought which he took to be the most degraded versions of the nihilism in which metaphysics culminates — we have to say that final vocabularies are not just means to ends but, indeed, houses of Being.").

n24 See, e.g., WESLEY NEWCOMB HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1919), reprinted from 23 YALE L.J. 16 (1913).

n25 See RONALD DWORIN, LAW’S EMPIRE 228-75 (1986).

n26 See Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773, 1774 (1987). According to Fish,

Playing [baseball/judging] has nothing to do with following words of wisdom, whether they are
Weaver's or Aristotle's, and everything to do with already being someone whose sense of himself and his possible actions is inseparable from the kind of knowledge that words of wisdom would presume to impart. In short, what Weaver says amounts to "Go out and do it," where "do it" means go and play the game. That is why both Weaver's counsel and Martinez' response must be without content. What they know is either inside of them or (at least on this day) beyond them; and if they know it, they did not come to know it by submitting to a formalization; neither can any formalization capture what they know in such a way as to make it available to those who haven't come to know it in the same way.

Id.

n27 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 9 (1921) ("Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth."); LLEWELLYN, supra note 18, at 53-54; see also Jerome Frank, What Courts Do in Fact, 26 U. ILL. L. REV. 645, 653-55 (1932) (arguing that judges make rulings based on intuition and then find principles to support them); Joseph C. Hutchinson, Jr., The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions, 14 CORNELL L.Q. 274, 281-82, 285 (1929) (describing use of intuition in deciding cases).

n28 Leiter, supra note 22, passim.

n29 Id. at 254.

n30 Id. at 282.

n31 Id. at 264-71. These criticisms are reminiscent of those made by Fish, supra note 26, at 1774.

n32 Leiter, supra note 22, at 259-61.

n33 Heidegger, supra note 1, at 271.

n34 Leiter, supra note 22, at 264.


n36 See id. at H.97, trans. n.1 (translating German word "Zeug" as "equipment").

n37 Heidegger reconceives the Kantian idea of a "thing-in-itself" that is the elusive object of science in the Critique of Pure Reason. The concept of a thing-in-itself, divorced from or hidden from us, is a misunderstanding of a phenomenal experience of the ready-to-hand "withdrawing" from view. HEIDEGGER, supra note 35, H.75-76. Instead of seeing the withdrawal as part of a thing's connection to us, traditional philosophy has taken it to be evidence that objects are divorced from, rather than inextricable from, relations of use, significance, and virtue.

n38 Leiter, supra note 22, at 268.

n39 This point is disputed in Joseph P. Fell, The Familiar and the Strange: On the Limits of Praxis in the Early Heidegger, in HEIDEGGER: A CRITICAL READER 65 (Hubert L. Dreyfus & Harrison Hall eds., 1992) (noting Zuhandenh only temporally prior but not fundamentally prior), but I think Leiter is right.

n40 Leiter, supra note 22, at 268.

n41 Id. Leiter relies on Hubert Dreyfus's phrase "mindless coping skills" in BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I, at 3 (1991). But Dreyfus himself recognizes that Heidegger later equates thinking with forms of practice. See Hubert Dreyfus, Heidegger's History

The difference between Heidegger's early work in Being and Time and his later work is his explicit recognition that we cannot "will" our way out of decadence and his heightened awareness of the destructive side of his earlier view that practical reason was associated with seeing things as "tools" for human exploitation. See id. at 182–84. This difference in Heidegger's works is a result, perhaps, of his own (at least partial) disavowal of the seduction of National Socialism and other political efforts to "recreate" a "golden" age. See William Barrett, Introduction to Phenomenology and Existentialism, in 3 PHILOSOPHY IN THE TWENTIETH CENTURY, supra note 1, at 163 ("As . . . [Heidegger] severed his ties more and more with the Nazis, he began to speak more strongly against the will to action that is central in so much modern philosophy: the crowning error, for Heidegger now, is to locate the essence of man in his becoming the master of this planet. His political disillusionment and his philosophical change do not seem here to be unconnected."). Though Leiter believes he can take Heidegger's thoughts without the Nazi baggage, he takes only that part of Heidegger that can be used to further efforts at prediction and, with it, human domination of the world. Hence, he has not really avoided the problem. See infra Part II.

Heidegger, supra note 1, at 298.

n42 As Heidegger says in the Letter on Humanism:

This thinking is, insofar as it is, the recollection of Being and nothing else. Belonging to Being, because it is thrown by being into the trueness of its truth and claims for it, it thinks Being. Such thinking results in nothing. It has no effect. It suffices its own essence, in that it is. But it is, in that it expresses its matter. At each epoch of history one thing only is important to it: that it be in accord with its matter. Its material relevance is essentially superior to the validity of science, because it is freer. For it lets Being — be.

n43 The usual translation for the German "Handwerk" is craft, but the roots of "craft" mean power, so I shy away from it here as unfaithful to Heidegger's sense. See infra Part II. "Handiwork" seems to be a more appropriate word, though it has a connotation of a "quick fix" or "provisional solution" that may not be in keeping with the German sense.


n45 Leiter, supra note 22, at 268–69 (footnotes omitted).

n46 HEIDEGGER, supra note 44, at 16.

n47 Martin Heidegger, Origin of the Work of Art, in POETRY, LANGUAGE, AND THOUGHT 34 (Albert Hofstadter trans., 1971); see also Martin Heidegger, The Thing, in POETRY, LANGUAGE, AND THOUGHT, supra, at 165.

n48 This connects to Heidegger's insight that every understanding is from a certain "Befindlichkeit" — where one finds oneself, one's mood, attunement, or emotion. HEIDEGGER, supra note 35, at 390. Moods are not emotional disturbances that interfere with cognition, but instead provide the receptivity that lets things in the world appear to Dasein. Quietness and patience reveal the lattice-work of a bird's wing, or a new way to fix a faulty ignition. Love discovers the subtle inflections of a look or a characteristic gesture. Anger reveals obstacles and injustices. Sadness remembers.


(1990), in the process of fishing Fish.

n51 HEIDEGGER, supra note 50, at 47; see also id. at 67 (quoting letter of Mozart's in which Mozart speaks of hearing music in his mind "all at once" as though "I look over it with a glance in my mind as if it were a beautiful picture or a handsome man") (internal quotation marks omitted).

n52 Id. at 107; see also HEIDEGGER, supra note 44, at 196-215.

n53 HEIDEGGER, supra note 50, at 107; see also HEIDEGGER, supra note 35, at H.32-34.

n54 Hence, Descartes's attempt to find the ground of truth ends in his awareness of his own subjectivity. Cogito ergo sum. RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY 24 (Laurence J. Lafleur trans., 2d ed. 1960) (1641).

n55 HEIDEGGER, supra note 44, at 44.

n56 Id. at 37-45.

n57 Though I cannot lay it out here, Heidegger reconstructs our basic understanding of reality. It is not as though we are minds in a world of matter, and hence, always alien to the world. Instead, we "minds" are the receivers of a significance that is already there in things — Being (Sein), or giving of significance, is the counterpart, not the alien, of humanity (Dasein), those who are receiving and attending. This is the central thought that Heidegger elucidates and elaborates in Being and Time. See HEIDEGGER, supra note 35, passim.

n58 HEIDEGGER, supra note 44, at 204-07 (connecting logos to noein).

n59 HEIDEGGER, supra note 35, at H.162-65. Language is not utterance, either, because silence itself can be significant. MARTIN HEIDEGGER, ON THE WAY TO LANGUAGE 122 (Peter D. Hertz trans., 1971); see also NANCY BONVILLAIN, LANGUAGE, CULTURE, AND COMMUNICATION: THE MEANING OF MESSAGES 47 (1993) ("Our tendency to describe silence as an absence of speech reveals a particular cultural bias, implying that something is missing, but silence is a 'something' with purpose and significance."); HEIDEGGER, supra note 35, at H.164 ("To say and to speak are not identical. A man may speak, speak endlessly, and all the time say nothing. Another man may remain silent, not speak at all and yet, without speaking, say a great deal.").

n60 HEIDEGGER, supra note 35, at H.161-63. The idea that there is no "private" language is one shared by Wittgenstein. See WITTGENSTEIN, supra note 4, at paras. 243-429.

n61 See WITTGENSTEIN, supra note 4, at paras. 66-76. Even formalists now must accommodate these ideas. See, e.g., SCHAUER, supra note 11, at 38-52.

n62 See HEIDEGGER, supra note 35, at H.161 ("The intelligibility of something has always been articulated, even before there is any appropropriate interpretation of it."); HEIDEGGER, supra note 59, at 59 ("But when the issue is to put into language something which has never yet been spoken, then everything depends on whether language gives or withholds the appropriate word."); id. at 135, 146-47 ("the poet must renounce having words under his control as the portraying names for what is posited.").

n63 HEIDEGGER, supra note 50, at 96.

n64 HEIDEGGER, supra note 44, at 208; HEIDEGGER, supra note 59, at 126; see also id. at 133 ("All language is historical"); id. at 135 (language is "the house of Being").

n65 HEIDEGGER, supra note 59, at 123-24.

note 39, at 247 (calling the idea that language comes before any human construction or "use" of it a "constitutive" view of language). The idea that we "use" language to express an idea we "already" have is made almost comical by linguistic anthropology. Bonvillain's example of the different ways in which speakers of English and Navajo express their intentions and actions clarifies this point:

   English speaker: I must go there.
   Navajo speaker: It is only good that I shall go there.
   English speaker: I make the horse run.
   Navajo speaker: The horse is running for me.

BONVILLAIN, supra note 59, at 70; see also DOROTHY LEE, FREEDOM AND CULTURE 78, 80–88 (1959) (pointing out the less dominating sense of man's relation to world that comes out of the Navajo language). Language gives us the possibilities for what we can say; we can only repeat what our language has already "said."

n67 HEIDEGGER, supra note 59, at 63, 135; Heidegger, supra note 1, at 300.

n68 HEIDEGGER, supra note 44, at 244.

n69 Id. at 208–15.

n70 See supra note 59.

n71 This is true not only of our own "moments of silence," but of those in other cultures as well. See Gregory O. Nwoye, Eloquent Silence Among the Igbo of Nigeria, in PERSPECTIVES ON SILENCE 186 (Deborah Tannen & Muriel Saville-Troike eds., 1985).

n72 See LLEWELLYN, supra note 18, at 179 ("rules are not to control, but to guide decision"); Frederick Schauer, Is the Common Law Law?, 77 CAL. L. REV. 455 (1989) (book review) (stating the common law results in "rules of thumb").

n73 JONATHAN SWIFT, GULLIVER'S TRAVELS 275 (Novel Library 1947) (1726).

n74 HEIDEGGER, supra note 35, at H.21; see also HEIDEGGER, supra note 50, at 102 (stressing root of "liberating" in Überlieferung).

n75 HEIDEGGER, supra note 35, at H.21.

n76 HEIDEGGER, supra note 50, at 102.

n77 See supra note 52 and accompanying text.

n78 See HEIDEGGER, supra note 35, at H.386 ("history has its essential importance neither in what is past nor in the 'today' and its 'connection' with what is past, but in that authentic historizing of existence which arises from Dasein's future"); see also ALAISDAIR McINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 223 (1981) ("an adequate sense of tradition manifests itself in a grasp of those future possibilities which the past has made available to the present."); FRIEDERICH NIETZSCHE, THE USES AND ABUSES OF HISTORY 22-23 (Adrian Collins trans., 1957) (history must serve life, otherwise it is merely "an enormous heap of indigestible knowledge-stones that occasionally rattle together"); Rebecca L. Brown, Tradition and Insight, 103 YALE L.J. 177 (1993); Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029, 1064–68 (1990).


n80 111 N.E. 1050 (N.Y. 1916) (holding manufacturer of car liable in tort to consumer for defect even though
consumer not in privity of contract with manufacturer).

n81 For a fuller account of common-law reasoning that I still think is right, see Linda Meyer, Nothing We Say Matters: Teague and New Rules, 61 U. CHI. L. REV. 423, 465–76 (1994).


n83 Among the "factors" are the following: parallel action in state court, inconvenience of federal forum, source of governing law not federal, state court obtained jurisdiction first and case is further along, desirability of avoiding piecemeal litigation, adequacy of state forum to protect parties, state has jurisdiction over a res. See, e.g., Darsie v. Avia Group Int'l Inc., 36 F.3d 743, 745 (8th Cir. 1994); United States Fidelity & Guar. Co. v. Murphy Oil, USA, Inc., 21 F.3d 259, 263 (8th Cir. 1994).

n84 See Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193, 1195 (9th Cir. 1991) (holding that Colorado River abstention inappropriate despite parallel proceedings in Switzerland).


n86 For a taste of the philosophical debates about natural language, see P.M.S. HACKER, WITTGENSTEIN'S PLACE IN TWENTIETH-CENTURY ANALYTIC PHILOSOPHY 19–21, 123–30 (1996).

n87 I am grateful to Neal Feigenson for pointing this out, though he might not quite agree with the way I have put it.

n88 WITTGENSTEIN, supra note 4, at para. 87.

n89 I am grateful to Marianne Constable for this point.

n90 Hear Nietzsche's lament:

Alas, what are you after all, my written and painted thoughts! It was not long ago that you were still so colorful, young, malicious, full of thorns and secret spices — you made me sneeze and laugh — and now? You have already taken off your novelty, and some of you are ready, I fear, to become truths: they already look so immortal, so pathetically decent, so dull.

FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 236 (Walter Kaufmann trans., 1966).

n91 60 U.S. (19 How.) 393 (1856) (holding that a freed slave is not a U.S. citizen).

n92 268 U.S. 652 (1925) (holding that criminal anarchy statute did not violate First Amendment).

n93 274 U.S. 357 (1927) (holding that criminal syndicalism statute did not violate First Amendment).

n94 478 U.S. 186 (1986) (holding that state ban on homosexual sodomy does not violate Due Process Clause).

n95 The understanding of judging I have tried to sketch here has affinities with Jack Balkin's work and Duncan Kennedy's work insofar as it stresses the connection between thinking and the world and the importance of culture and tradition in practical reason. See generally KARL LLEWELLYN, supra note 18; J.M. Balkin, Law and the Postmodern Mind: Ideology as Cultural Software, 16 CARDOZO L. REV. 1221 (1995); Duncan Kennedy, Toward a Critical Phenomenology of Judging, in THE RULE OF LAW: IDEAL OR IDEOLOGY 141 (Allan C. Hutchinson & Patrick Monahan eds., 1987). It also overlaps with the current interest in practical reason and analogical reasoning. See Brewer, supra note 11; Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741 (1993).

n97 We used to believe self-control came from a "willing" that could conform itself to reason and law. KANT, *supra* note 17, at 40. Now we just take serotonin reuptake inhibitors.

n98 *See* STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 54–55 (1988) (explaining Heisenberg’s uncertainty principle — our efforts to observe the world change it, making it impossible to observe the world “in itself”).

n99 *See* TAMANAH, *supra* note 23, at 109–11. Tamanaha points out that law and social science has missed through this definition of law those aspects of law that are “facilitative, performative, status conferring, defining, legitimative, integrative, distributive, power conferring, and symbolic.” *Id.* at 109 (citations omitted).

n100 *See*, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1992); *see also* Linda R. Meyer, *Just the Facts?*, 106 YALE L.J. 1269, 1297–99 (1997) (contrasting law as a set of penalties with law as a set of obligations).

n101 Peter Goodrich suggests that significant elements of contract law (like the mailbox rule) derived from spousal contracts, “within which it would be ethically absurd to allow the man to escape his duties and dishonourable in the extreme to leave a woman in suspense or unprotected.” Peter Goodrich, *Habermas and the Postal Rule*, 17 CARDOZO L. REV. 1457, 1473 (1996).

n102 *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (a failed resurrection); *see also* Pro CD. Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (applying economic analysis to contract case).


n104 Along this line, Anthony Kronman laments the "managerial model" of judging in which judges allocate their precious time to the cases involving the highest dollar value. *See* KRONMAN, *supra* note 20, at 337–42.

n105 An excellent example of this phenomenon is provided by the testimony of Carla Stovall, Special Assistant to the Attorney General, in favor of passing a Kansas statute allowing civil commitment of recidivist sex offenders:

Not passing this bill would allow convicted rapists and child molesters to walk through prison gates and back into our communities to rape and molest again . . . . Because of the nature of sexually violent crimes and the psychological makeup of those who are prone to commit them, we must take extraordinary precautions to protect society from them . . . . We cannot open our prison doors and let these animals back into our communities. If we do — we are accomplices to the atrocities which they will surely commit.

explanations. While everything is open as a possible strategy for such a risk management approach, including punishments, there is no investment in punishment as a political ceremony. A security regime, in the end, is not there to enforce individual adherence to performance norms except where that is an effective way to minimize cost."; Stan C. Proband, Wisconsin Task Force Proposes New Model for Corrections Systems, OVERCROWDED TIMES, Dec. 1996, at 1 ("The task force called for a partial return to individualized sentencing and recommended increased grants of discretion to officials who, by imposing and enforcing individualized conditions and controls on offenders, would manage and try to minimize crime risks.").

n106 117 S. Ct. 2072 (1997). The Court majority held that the incapacitation of a convicted sex offender whose "volitional defect" rendered him likely to continue to commit sex crimes was not "punishment," and therefore did not violate the Ex Post Facto Clause, substantive due process, or the Double Jeopardy Clause. Id. at 2086. The dissent, while agreeing in principle that such incapacitation statutes could be civil rather than criminal, thought that the fact that Mr. Hendricks was not provided treatment either before or after his prison term expired unmasked the fact that the state was interested in punishing, not just treating or incapacitating one it could not treat. Id. at 2093-94. Both the majority and the dissent agreed that incapacitation, as opposed to deterrence or retribution, could be a goal of either the criminal justice system or civil commitment. Id. at 2083, 2090-91.

n107 See Stephen J. Morse, Blame and Danger: An Essay on Preventive Detention, 76 B.U. L. REV. 113, 136 (1996) ("it seems perverse to claim that a person is responsible enough to deserve criminal punishment — the most serious, affective state intrusion on liberty — but is not responsible enough to avoid preventive confinement for potential harmdoing." (footnote omitted)).

n108 Hendricks, 117 S. Ct. at 2081, 2089. For criticisms of this view, see Michael Corrado, Punishment and the Wild Beast of Prey: The Problem of Preventive Detention, 86 J. CRIM. L. & CRIMINOLOGY 778, 787-88 (1996); Morse, supra note 107, at 138 ("[P]otential predators[ have strange or alarming desires, but they are perfectly capable of planning and executing the means to fulfill them. It is possible that the strength of their desires makes it difficult for sexual offenders to assess the probability that they will be caught, but this would not distinguish these offenders from other impulsive offenders, and impulsivity does not warrant an irrationality excuse."). But see Michael Ross, The Urge to Hurt, UTNE READER, July-Aug. 1997, at 43-46 (reprinting letter from convicted serial rapist/murderer Michael Ross in which Ross reports that Depo-Lupron, a drug that reduces the body's production of testosterone, produced "nothing less than a miracle," causing his "obsessive thoughts and fantasies . . . to diminish," so that he "finally . . . felt the profound sense of guilt that surrounds my soul with dark, tormented clouds of self-hatred and remorse." He urges that "tragic murders such as those I committed can be avoided in the future, but only if society stops turning its back, stops condemning, and begins to acknowledge and treat the problem.").

n109 See, e.g., R.I. MAWBY & S. WALKLATE, CRITICAL VICTIMOLOGY 69–94 (1994) (documenting the "rebirth" of the victim as a significant actor in the criminal justice system).

n110 Note that thinking in terms of incapacitation goes even further than deterrence theory in thinking of humans as effects. Deterrence, at least, presupposes a minimally rational actor who can and will act to maximize pleasure or minimize pain. But incapacitation talk eliminates even this vestige of "free will."

n111 HEIDEGGER, supra note 44, at 24.

n112 See HAWKING, supra note 98, at 20–21 (explaining Einstein's formula, e=mc²).

n113 Even theorists who try to avoid traditional accounts of thinking still want thought to promote control, rather than, say, modest self-understanding. See, e.g., Winter, supra note 50, at 644–45 ("Second, and more important, I do not believe that everything is 'always and already' all right. Consequently, I am interested in doing the kind of 'theory' (we might call it theory with a small-t) that 'better enables us to harness the power of our understanding to transform the world in which we live.'" (quoting Steven L. Winter, Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law, 137 U. PA. L. REV. 1105, 1107 (1989))).

n114 This is not a new point. H.L.A. Hart argues something similar when he rejects John Austin's account of
positivism as a command backed by a threat. Legal theory, he says, must also account for the "internal standpoint" of law as norm. H.L.A. HART, THE CONCEPT OF LAW 83-85 (Joseph Raz & Penelope Bulloch eds., 2d ed. 1994). Law cannot be equated with predicting the actions of judges, because that would look like a game of "scorer's discretion," not a game governed by norms. Id.; see also Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 685 (1995) ("The prediction model requires lower court judges, as well as the lawyers and clients who appear before them, to conceive of law as a prediction of how the particular individuals sitting on the high court would resolve the issue presented. This conception is inconsistent with central specific practices of American law -- including the norm of the impartial adjudicator, the doctrine of stare decisis, and the institutional integrity of courts. More broadly, the prediction model is inconsistent with the overarching theme of the rule of law, of which these specific practices are manifestations.").

n115 Heidegger makes this point in The Question Concerning Technology:

Yet when destining reigns in the mode of Enframing, it is the supreme danger. This danger attests itself to us in two ways. As soon as what is unconcealed no longer concerns man even as object, but does so, rather, exclusively as standing-reserve, and man in the midst of objectlessness is nothing but the orderer of the standing-reserve, then he comes to the very brink of a precipitous fall; that is, he comes to the point where he himself will have to be taken as standing-reserve. Meanwhile man, precisely as the one so threatened, exalts himself to the posture of lord of the earth. In this way the impression comes to prevail that everything man encounters exists only insofar as it is his construct. This illusion gives rise in turn to one final delusion: It seems as though man everywhere and always encounters only himself. Heisenberg has with complete correctness pointed out that the real must present itself to contemporary man in this way. In truth, however, precisely nowhere does man today any longer encounter himself, i.e., his essence. Man stands so decisively in attendance on the challenging--forth of Enframing that he does not apprehend Enframing as a claim, that he fails to see himself as the one spoken to, and hence also fails in every way to hear in what respect he ek-sists, from out of his essence, in the realm of an exhortation or address, and thus can never encounter only himself.


n116 See FRIEDRICH NIETZSCHE, THE WILL TO POWER 549-50 (Walter Kaufman trans., 1968) (humanity and world are will to power, without an external good).

n117 According to Philippe Nonet,

In claiming the power of universal legislator, fallen man fancies he has overcome his finitude, risen above all beings as their enlightened master and protector, free from the shackles of faith, tradition, and soon even death. Under the spell of this 'positive law,' thought decays into the ratio of rational calculation, which sets itself as the measure of all knowledge and wisdom. The 'legal' becomes identical with the rational. Philosophy too falls in the service of the methodical rationalization of all spheres of thought, and makes language into a system of symbols fit for the smooth functioning of calculators. 'Rules' and their unruly words give way to the calculable formulas of 'policy.' All beings, including man, are reduced to the standing of a mere asset, der Bestand, priced quantities of disposable energy. The superstitious pursuit of the 'realization of values' enthrones itself as the highest enlightenment of liberated humanity.

Yet even in this nearing of the oblivion of law lurks the presence of a sign of the law. There reigns amidst the wealth of values a strange absence of the good. Values devalue themselves in the debasement of their own appraising and pricing, so that an eerie devastation follows the progress of man's conquest of the earth. The endless restlessness of his pursuits oppresses man like an everpresent ghost of his unfulfillment. The deafening bombardment of 'communication' destroys the silence of listening, and confines men to senseless isolation. The busy, all-intrusive making and remaking of 'policy' denies its own 'decisions' all power of direction. The dulling glare of sensation robs the eyes of the sight in which
beauty might appear.

Nonet, supra note 96, at 1005-06 (internal citation omitted); see also id. at 1005-06 ("When man revolts against his desolation, or takes it as a challenge to his creative will, he only sinks to greater depths of the same. Every posing of the 'problem' of modern man as an object of reflection and purposive action further entangles man in that very mode of thinking and being out of which the 'problem' first arises. No exertion of will can ever accomplish an 'overcoming of nihilism,' for the rationality of rational man is itself no achievement of his will, but an astounding work of the law. The law itself allows beings to approach man as possible objects of his knowing and willing. The same law saves itself from the reach of this will by denying itself to the sight of man. By this very absence it allows the nearing of its own oblivion.").

n118 According to Heidegger,

As the essencing of technology, Enframing is that which endures. Does Enframing hold sway at all in the sense of granting? No doubt the question seems a horrendous blunder. For according to everything that has been said, Enframing is, rather, a destining that gathers together into the revealing that challenges forth. Challenging is anything but a granting. So it seems, so long as we do not notice that the challenging- forth into the ordering of the real as standing-reserve still remains a destining that starts man upon a way of revealing. As this destining, the coming to presence of technology gives man entry into That which, of himself, he can neither invent nor in any way make. For there is no such thing as a man who, solely of himself, is only man.

HEIDEGGER, supra note 115, at 31.

Furthermore, Heidegger states:

Every destining of revealing comes to pass from out of a granting and as such a granting. For it is granting that first conveys to man that share in revealing which the coming-to-pass of revealing needs. As the one so needed and used, man is given to belong to the coming-to-pass of truth. The granting that sends in one way or another into revealing is as such the saving power. For the saving power lets man see and enter into the highest dignity of his essence. This dignity lies in keeping watch over the unconcealment — and with it, from the first, the concealment — of all coming to presence on this earth. It is precisely in Enframing, which threatens to sweep man away into ordering as the supposed single way of revealing, and so thrusts man into the danger of the surrender of his free essence — it is precisely in this extreme danger that the innermost indestructible belongingness of man within granting may come to light, provided that we, for our part, begin to pay heed to the coming to presence of technology.

Id. at 32.

n119 See Constable, supra note 15, at 572-88 (arguing that modern theories of law can be seen in a progression toward nihilism).

n120 See MINDA, supra note 15, at 1 (noting proliferation of law and social science); J.M. Balkin, Interdisciplinarity as Colonization, 53 WASH. & LEE L. REV. 949 passim (1996) (arguing law is particularly susceptible to theoretical colonization, but also puzzlingly resistant as practice); Nonet, supra note 103, at 363 (arguing with the law and society movement, "the last bastion has fallen").

n121 HEIDEGGER, supra note 115, at 28.

n122 Domination, of course, comes from dominum (house dweller, or male head of household) and domus (domos) or house. Those who dwell in houses must have a stable supply of food (they no longer have to wander). Hence, those who dwell in houses must be able to control the earth, cultivate it, and tame it (domesticate it). At least one author has located the beginnings of the age of domination in the switch from hunting/gathering to farming.
See DANIEL QUINN, ISHMAEL 151-84 (1992). Heidegger would reject the idea that "technology" began in any particular period of human history, as technology is not an event. See HEIDEGGER, supra note 115, at 22-23 (arguing the essence of technology is not the development of modern science or machines, but "the way in which the real reveals itself as standing-reserve.") But the image of the domination of nature is a powerful one.

n123 Sitting at my new pentium-chipped, color-monitored, Intel-inside computer, I very much doubt such ludditism is thinkable.

n124 See Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 103 HARV. L. REV. 1, 2 (1989) ("The formalist philosophy which views science as a 'collection' of the 'proven' or even of the 'provable' is based upon an inappropriate reification. The better vision of science is as a continual and, above all, critical exploration of fruitful insights; the better metaphor is that of a journey . . . . To look to the natural sciences for authority — that is, for certainty — is to look for what is not there.").

n125 HAWKING, supra note 98, at 35-51.

n126 Id. at 63-97.

n127 This does not rule out, by the way, talking about good and bad decisions or judges in the way lawyers and citizens always have. It only rules out the presumption that theory should dictate norms to judges in order to "control" them. Theorists, of course, like everyone else, can engage in normative debates about good and bad decisions.

n128 For attempts to come to terms with the irony of responsibility, see, perhaps, NUSSBAUM, supra note 9, at 318-72, 397-421, and BERNARD WILLIAMS, MORAL LUCK 20-39 (1981).

n129 See HEIDEGGER, supra note 35, at 330 H.284 ("The Self, which as such has to lay the basis for itself, can never get that basis into its power; and yet, as existing, it must take over Being-a-basis." (emphasis added)).

n130 See id. at 331 H.285 ("Freedom . . . is only in the choice of one possibility — that is, in tolerating one's not having chosen the others and one's not being able to choose them.").

n131 Writing this essay may itself be an effort to convince and control instead of directly to take on the task of searching for our past and our future. It is so hard not to want control.

n132 Heidegger, supra note 1, at 302 (emphasis added).