

Legal Theory and The Holocaust: Between The Purposive and The Reflective

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Legal academia faces a perennial identity crisis. Law is a practical activity with real world consequences. Academic reflection on Law has a capacity to be similarly purposive and practical. Appellate courts often use academic insights to solve practice specific problems. On the other hand, most academics would balk at the idea that our thoughts are to be seen as a repository of suggestions for practice as to how it might go about its business. There must be space within legal academia for reflection on the broader context of human experience and what is said to us about human nature in law beyond the technical issues of the courtroom. There is a danger that in our debates on technical legal issues, we miss the point that law deals with human beings and tells us some profound truths about human experience. The same might also be said of debates within jurisprudence on discipline specific topics like ‘inclusive’ versus ‘exclusive’ positivism, or any theoretical approach that seeks to look at law from an ‘internal perspective’ or from the point of view of ‘the legal man’.

This tension is clearly seen in our responses to great human catastrophes like The Holocaust. Law faced a moral imperative to act in light of this atrocity. Important, immediate, practical problems were raised which required a purposive and creative response. This included the need to bring all of those responsible to justice for their crimes at a time when this was not a straightforward matter in principle or in practice. Legal academia played a vital role in meeting this demand. Yet in this rush to address such problems, there is a danger that reflection on what is being said to us about humanity might be lost. The sheer horror of these crimes also raised a moral imperative for thinking human beings everywhere to reflect on what man is capable of doing to his fellow man. A particularly radical form of detached reflection on The Holocaust has recently been put forward in legal academic literature. In this essay I argue against this utterly detached, ‘silent’ response. Practical, day-to-day needs must be the starting point for our contemplation of the human condition as it reveals itself through law or through horrific events like The Holocaust. No other starting point is possible or desirable, no other starting point is “human”. Our demand as legal theorists is to reconcile the purposive and practical with broader contemplation, not to forsake the former in favour of some ivory tower version of the latter.

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I CLAUD ROXIN AND 'THE LEGAL' RESPONSE TO THE HOLOCAUST

Claus Roxin provided a goal-oriented, practical academic reflection on The Holocaust. I introduce this practical response in order to contrast it with the radically detached and reflective response suggested by others. The argument for more detached reflection seems to have missed the important practical gains that abandonment of a more purposive approach entails.

The Frankfurt Auschwitz Trials (1963-1965) involved the prosecution of those that had participated in organized murder at the Auschwitz-Birkenau concentration camps. The trials were held in West German domestic courts. In seeking to prosecute middle to low level Nazi officials, German criminal law faced a problem. Culpability for a crime under German law at that time had been determined by the subjective 'will' of a perpetrator or co-perpetrators. There was a possibility of leniency in sentencing for accomplices to a criminal act; there was no such possibility for actual perpetrators. In practice this leniency was nearly always exercised.¹ In cases where two parties had been involved in committing the act, courts had generally considered one the perpetrator and the other an accomplice if their subjective intentions were different.² As a result it was difficult to attribute legal culpability *both* to those that physically carried out atrocities *and* to those that issued orders to do so in an organized system such as the Nazi regime.

German law's highly subjective theory of culpability was the reason for this problem. Until that point there were two conceptions of individual culpability for criminal acts in German law.

The *dolus* theory sought to identify an individual that had willed a particular outcome. In cases where multiple individuals were involved in committing an act, this led to a sharp distinction between the will to achieve a criminal outcome and the will to assist another in achieving that outcome. German courts had also recognised an *interest* theory of culpability. Under this theory, the individual with an interest in the criminal outcome is said to be the perpetrator. If an individual's interest in carrying out an act was to obey the orders of a superior, they were likely to be considered an accomplice. Neither of these theories was satisfactory in relation to Nazi atrocities at Auschwitz; obedience to a superior was the likely will or interest of anyone other than the most senior Nazi party members.

Roxin advocated a more objective approach to criminal culpability based on 'mastery over the act'. Under Roxin's approach one looks to the act in question and asks whether

¹ See Devin O Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of the Law*, (New York: Cambridge University Press, 2006) 61-62.

² The highpoint is *Baddenwannenfall* RGSt, vol. 74 (1940). A woman, who wished her infant dead, convinced her sister to drown the child. It was held that the mother was perpetrator, her sister merely an accomplice.

external indicia suggest that the accused has exercised voluntary control over this criminal outcome. *Whether* the accused had chosen to behave in such a way as to achieve a given criminal outcome is the important question; *why* the accused had chosen to do so (their ‘will’ or ‘interest’) is less significant. This theory of culpability allowed for more than one ‘master’ over an act. Several individuals, motivated by different ends and interests, might intentionally commit a criminal act together in which case each is blameworthy.

With regard to criminal organizations Roxin devised a theory of ‘domination over an organizational apparatus’. On Roxin’s theory, it is possible to have not only a perpetrator, but a perpetrator *behind* that perpetrator. In reference to The Holocaust, Roxin claimed that ‘what happens in such events is, to speak graphically, that a person behind the scenes at the controls of the organized structure presses a button’.³ The ‘button pusher’ has exercised mastery over the criminal act as subordinates in the Nazi hierarchy have been used as mere ‘gear[s] in a giant machine’.⁴ Importantly those that carry out such orders have also exercised mastery over the act. This machine *can only* work if subordinates are willing to carry out orders. Had they not been willing, they would have been replaced or the organizational apparatus would have failed. Those issuing orders, together with their subordinates, could be criminally liable as perpetrators rather than accomplices. Roxin thus met the moral imperative for law, and legal academics, to do something practical. Yet he lost this argument. His ‘mastery over the act’ theory and the idea of an ‘organizational apparatus’ were not adopted by German courts in the Frankfurt Auschwitz trial⁵. On the other hand, Roxin achieved a great deal in practical terms by simply participating in this debate. Roxin’s ‘organizational apparatus’ theory has had a huge influence in international criminal law. Article 25(3)(a) of the Rome Statute of the International Criminal Court is based on Roxin’s model, as recently acknowledged by Pre-Trial Chamber 1 of the International Criminal Court.⁶ Roxin’s theory has enabled domestic courts and the International Criminal Court to prosecute organizers of mass atrocity in addition to those that carry out their will.⁷ Even *unsuccessful* practically-oriented reflection can thus have profound practical importance.

³ Roxin’s work has never been translated into English, for this phrase see Mark Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’ (2005) 105 *Columbia Law Review* 1751, 1831.

⁴ *Ibid.*

⁵ See Pendas, above n 1, 296-99.

⁶ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 [Katanga] [496-99], see generally Osiel, above n 3, 1831-33.

⁷ See *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN. Roxin’s influence in domestic courts of Germany, Argentina, Chile and Spain is noted in *Katanga* [502]. This has also enabled us to label such criminals ‘perpetrators’. On expressivist theories of international criminal law see Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *International Criminal Law Review* 93, 117-24. Amann notes the significant influence of Schabas’ theory of genocide in this respect, *ibid*, 122-23, see William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000).

Merely entering these debates can assist in the achievement of moral and political goals far beyond the immediate legal problem under consideration.

II DETACHED REFLECTION: BEN-DOR AND HEIDEGGER

The general response to The Holocaust of academics like Roxin would appear to be beyond reproach ethically. Yet some have argued that any ‘legal’ response to an atrocity does more harm than good on a human level. In order to meet various practical demands, legal discourse obscures the human element, the sheer horror of what is being said to us about humankind when something like this happens. By participating in purposive reflection in response to The Holocaust, legal academics too have covered up what is said to us about Being as a unique and specifically human experience. They do not reflect on ‘Law’, but become part of ‘the legal’ by operating within a paradigm of rights, culpability and obligation. This is the central claim in Oren Ben-Dor’s recent monograph *Thinking About Law: In Silence With Heidegger*.

Ben-Dor’s position has enjoyed a very positive critical response. Yet his choice of philosophical guide for a more reflective approach toward Law and The Holocaust is extraordinary. Martin Heidegger was a member of the Nazi party and Rector at the University of Freiburg for a time during the Nazi regime. After the Second World War his Nazi involvement was deemed to be such that he was excluded from any university activities for a period of three years. Heidegger never publically distanced himself from The Holocaust or even addressed the issue after the Second World War. It is Heidegger’s very silence on this point that Ben-Dor finds so laudable. It is a response to atrocities and an attitude towards Law that Ben-Dor feels legal theorists ought to follow in order to ‘preserve Being in its essence’. The specific idea in Heidegger’s writing that Ben-Dor uses is the concept ‘Thinking’. Instead of becoming part of the legal in response to The Holocaust, the theorist should Think in silence with Heidegger about Law and The Holocaust.

Although Ben-Dor’s argument in favour of Heidegger’s Thinking response to The Holocaust is unique, there are several other scholars that have sought to Think about Law⁸. There is nothing in contemporary scholarship arguing against this position. In what follows I expose a central flaw in this approach. Thinking is too radically detached from practical, day-to-day concerns to offer a tenable solution to the danger of obscuring the human element through our theoretical approaches to law. Ben-Dor’s suggestion that Heidegger ‘Thought in silence about the atrocities of his generation’ is demonstrably false. When Heidegger faced a choice between engaging in the legal and

⁸ See Philippe Nonet, ‘Judgment’ (1995) 48 *Vanderbilt Law Review* 987; Philippe Nonet, ‘Antigone’s Law’ (2006) 2 *Law, Culture and the Humanities* 314; Alexander Carnera Ljungström, ‘The Silent Voice of Law: Legal Philosophy as Legal Thinking’ (1997) 8 *Law and Critique* 71. Ljungström claims jurisprudence “alienates law from human experience”, 73-75.

Thinking about Law he chose the former. While Heidegger never discussed gas chambers or the final solution, he most certainly engaged in a purposive way with the legal and state mechanisms that made The Holocaust possible. In Heidegger's own terms he ignored the 'call for Thinking', time and again, before, during and after the Second World War. That Heidegger did so is not simply a matter of hypocrisy on his part, it points to much larger problems with Thinking as a viable theoretical approach toward law and toward atrocity. The flaws in this approach will be used to offer a blueprint for how we might engage with the big question of what it means to Be on a uniquely human level without sacrificing the important practical gains that the goal-oriented approaches of writers like Roxin have given us.

III THE CENTRAL PROBLEM: THINKING IN OPPOSITION TO PRACTICAL THEORY

Heidegger claims that Thinking can 'preserve [Being] in its essence'.⁹ This is very different from any form of 'essentialism', the idea that man has an essential, immutable nature. Essentialism is precisely the sort of attitude that Heidegger wished to avoid; it reduces man to a mere object. Heidegger wished to get away from a philosophical attitude that talked of human beings as though they were matters of scientific investigation, like strange compounds in a laboratory. Heidegger and others within his tradition, such as Kierkegaard and Sartre, were trying to rescue questions about Being from this approach. The Being that Heidegger sought to harness by Thinking is an evolving and ongoing experience of existence itself. Thinking's most salient feature is one of withdrawal from any goal or purpose. Heidegger contrasts Thinking with *any* 'process of reflection in service to doing and making'¹⁰. He draws this contrast so starkly that he goes so far as to claim on several occasions that Thinking is resistant to being written down. Once we write down a Thought, we leave the 'draught of pure Thought'¹¹ and start reflecting towards some practical purpose. Thinking is something *beyond* day-to-day practical and theoretical encounters with the world. It is not something that we are generally engaged in. Yet the subject matter at stake is said to be the 'nearness of the nearest',¹² human Being itself.

Thinking is thus *not* just an alternative within the broad scope of existing philosophy. Thinking is fundamentally different from any existing theoretical approach whatsoever. We simply cannot do both at the same time. Great harm is said to occur to Being itself because of the pervasive nature of what Heidegger termed 'technological' approaches. Technology is said to 'harm' Being by 'forgetting' this question and 'covering' it up.

⁹ Martin Heidegger, 'Letter on Humanism' reprinted in full in David Farrell Krell, ed, *Basic Writings: Martin Heidegger* (London: Routledge, 1996) 217, 220.

¹⁰ *Ibid*, 218.

¹¹ Martin Heidegger, *What is Called Thinking?*, ed by and translated by J Glenn Gray (New York: Harper & Row, 1968) 17.

¹² Heidegger, above n 9, 254.

There can be no true Thinking *within* a technological paradigm. ‘Nothing but mischief’ is said to come from trying to use the results of Thinking within technology, which includes existing theoretical perspectives on law.¹³

Significantly for the discussion at hand, ‘what is Law?’ fits comfortably alongside Heidegger’s examples of questions that ‘call for Thinking’. ‘What is science?’ ‘what is technology?’ and ‘what is poetry?’ are said to be questions that call us to Think about Being.¹⁴

The natural consequence of these claims is that in order to Think about Law we need to abandon our existing ‘legal’ approaches as harmful to Being and Thinking. As Ben-Dor correctly notes, this would include abandonment of even the most radical, critical approaches to legal theory that currently exist.¹⁵ My main target in this essay is Ben-Dor’s *Thinking About Law* and some of the wrongheaded conclusions that he draws in praising Heidegger’s silence on the Holocaust. Yet Ben-Dor’s approach is representative of positions adopted by recent writers that encourage us to Think about Law. These ‘Thinkers about Law’ are best understood not as providing instances of Thinking about Law; Thinking’s hostility to being written down would make this impossible. Instead, their focus is to explain how existing forms of legal theory are not sufficiently ‘fundamental’ and ‘ontological’ on Heidegger’s terms. For Ben-Dor and his fellow Thinkers about Law a more fundamental philosophy is one that is not derived from existing practices and all of their assumptions. Heidegger’s Thinking is seen as the only way of achieving fundamental ontology in stark, irreconcilable contrast to technological approaches which cover up and harm Being. They do so, according to Heidegger, by ‘enframing’ Being. They chop up human experience, in all of its richness and complexity, and take out the small snippets that are useful for their practice.

Although Heidegger notes the practical achievements of technology, he thus presents the legal scholar with a choice between Heidegger’s vision of Thinking and existing jurisprudence. If one were to accept Being as an important concern *and* accept Heidegger’s claim that practical reflection is harmful to it, one must also condemn even the most successful goal-oriented theoretical responses.

In spite of multiple claims about how damaging and harmful the legal is to Being, Ben-Dor never gives any illustrative examples of this point. This is particularly remiss when we turn return to Ben-Dor’s defence of Heidegger’s silence on The Holocaust. Roxin’s reflection on the meaning of culpability was goal-oriented and practical. There was no silent Thinking about what it is to ‘Be culpable’. Instead participators in the various

¹³ Heidegger, above, n 11, 7-8.

¹⁴ Ibid 32-33.

¹⁵ Oren Ben-Dor, *Thinking About Law: In Silence With Heidegger* (Oxford and Portland, OR: Hart Publishing, 2007) 79-104.

debates on this issue, including Roxin, sought a notion of culpability that might be put to practical use in order to achieve certain ends. By enframing the Being of those who have committed atrocities as various types of perpetrator, Roxin is part of the legal. The same can be said of those that argued against him, and of the German courts that considered this approach. All of these actors in the Frankfurt Auschwitz trials and the surrounding academic debates were treating the world as a “standing reserve” in which Being is enframed for the purpose of establishing guilt or innocence of those responsible for great evils. By even adding his voice to this technological enframing of concepts such as culpability, Thinkers about law must consider Roxin’s approach to harm Being. In trying to enframe ‘guilt’ for practical purposes, Roxin covered up the essential meaning of guilt on a human level.

Roxin writes in a post-Heidegger world, where Thinking has been introduced to philosophy. The practical uses discovered in Roxin’s work during the Frankfurt Auschwitz debates would have been lost to the global judicial community had Roxin (and others) chosen to follow Heidegger on the path towards silent Thinking about The Holocaust, in the manner that Ben-Dor and others encourage.¹⁶ This sort of sacrifice represents enormous real world harm. To take Thinking to its logical conclusion we would have to accept such harm for the sake of deep, detached contemplation of the evils of The Holocaust. If we must give up these practical benefits legal scholars would require a great deal of convincing that they should Think in silence instead.¹⁷ The great harm to detached contemplation of our Being that practical reflection is said to involve seems a price worth paying if it leads to saved lives, the prevention of persecution and the prosecution of those that commit mass atrocities.¹⁸

It is particularly difficult to accept that the legal, academic community should remain silent *while* atrocities are perpetrated in the hope that this will allow Thinking to flourish. Under Article 6(c) of The Nuremberg Charter, individuals can be prosecuted for the persecution, by a state, of its own citizens.¹⁹ This piece of international law came about

¹⁶ Ibid 376. Ben-Dor’s justification of Heidegger’s silence is unusual in *legal* scholarship. In mainstream philosophy others have interpreted Heidegger’s silence in this way without endorsing it; see George Kovacs, ‘On Heidegger’s Silence’ (1989) 5 *Heidegger Studies* 135; William Vaughan, ‘Heidegger *Silentio*’ in Alan Milchman & Alan Rosenberg, eds, *Martin Heidegger and the Holocaust*, (New Jersey: Humanities Press International, 1997) 70.

¹⁷ The legal response to Nazi war crimes was flawed, see David Luban, ‘The Legacies of Nuremberg’ in Guénaél Mettraux, ed, *Perspectives on the Nuremberg Trial* (Oxford and New York: Oxford University Press, 2008) 638. Criticism that the legal response failed to achieve some end is technological, it cannot be Thinking.

¹⁸ Van der Walt briefly notes this concern in an otherwise unequivocally positive review of Ben-Dor’s work, Johan Van der Walt, ‘The Murmur of Being and the Chatter of Law’ (2011) 20 *Social and Legal Studies* 389, 398.

¹⁹ Article 6(C), ‘Charter of the International Military Tribunal’, *Trial of the Major War Criminals Before the International Military Tribunal*, I.II

precisely because people lobbied for it as a direct response to reports about the sheer horror of The Holocaust.²⁰ The debates that informed the creation of The Nuremberg Charter are technological responses to an atrocity. So too are efforts by Hannah Arendt to understand the possibilities of such an atrocity and suggest ways in which it might be avoided in future and Karl Jaspers' attempt to come to terms with the question of 'German guilt'. I do not wish to argue against the idea that The Holocaust says something terrifying and significant about Being; my argument is against *utterly* detached reflection as a response. The practical sacrifice required in order to Think in silence about these atrocities is clear. Thinkers about Law fail to address this problem at all.

Giving up these practical solutions in favour of silent reflection is supposed to bring us closer to Being itself, closer to humanity. This is highly counter-intuitive. To jettison such vital real world benefits would be *inhuman*. Far from bringing us closer to our humanity, it would require us to act in a way that is utterly unnatural. There is no better example of this than Heidegger's own attitude toward law and toward The Holocaust in the aftermath of the Second World War.

IV HEIDEGGER DID NOT THINK ABOUT 'THE ATROCITIES OF HIS GENERATION'

For Ben-Dor, Heidegger shows us a way towards Thinking through his silence on the issue of the Holocaust. His silence, therefore, is not only defensible but worthy of praise as Heidegger 'refused to compromise [his] ethical position'.²¹ Ben-Dor's suggestion that Heidegger Thought in silence about the 'atrocities of his generation'²² is simply incorrect.

There are examples of Heidegger engaging, practically, with 'the legal' in a way that relates directly to those atrocities. These examples come before, during and long after the rise of Nazism in Germany. In 1929 Heidegger wrote to a senior official in the Ministry of Public Education in Baden. In it he stated 'either we restore genuine forces and educators emanating from the native soil to our German spiritual life, or we abandon it definitively to the growing Jewification'.²³ This anti-Semitism presents a serious challenge to any Heidegger apologist. Furthermore, Heidegger voluntarily offers advice on a matter of public policy here. Yet Heidegger claims that Thinking *cannot* 'give practical instructions' or 'offer advice' in public policy matters.²⁴ During the Nazi regime itself Heidegger was appointed Rector at the University of Freiburg shortly after

²⁰ See Arieh J Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill and London: University of North Carolina Press, 1998) 146-71.

²¹ Ben-Dor, above n 15, 376.

²² *Ibid.*

²³ Emmanuel Faye, *Heidegger: The Introduction of Nazism into Philosophy* translated by Michael B Smith (New Haven and London: Yale University Press, 2009) 34.

²⁴ 'Only a God Can Save Us: *Der Spiegel's* Interview with Martin Heidegger' in Richard Wolin, ed, *The Heidegger Controversy: A Critical Reader* (New York: Columbia University Press, 1991) 91, 114.

the 'Law for the Reestablishment of the Professional Civil Service' was enacted.²⁵ Nineteen of his former colleagues had already been forcibly retired by this point. The Act was one of a number of pieces of legislation aimed at the systematic disenfranchisement of 'non-Aryans' and the removal of potential threats to Nazism from positions of authority. The process became known as 'the bringing into line'.²⁶ These laws called for Thinking, in Heidegger's terms. Heidegger's repeated response was technological. Heidegger apologists and Heidegger accusers disagree on the extent of Heidegger's involvement, yet neither side could defensibly argue that he Thought in silence about these laws. On the contrary both sides point to Heidegger's practical engagement with this legislation, whether to implement it wholeheartedly or circumvent it, in order to accuse or defend him.²⁷ Heidegger practically engaged with 'bringing into line' legislation, the only question is whether he subtly protested against it or wilfully enforced it.

The debate on the extent of Heidegger's Nazism is known as 'The Heidegger Controversy'. It will not be entered into here. In this essay we are concerned with academic *responses* to The Holocaust. Heidegger did not 'Think in silence' at this point either. There are a number of rational, practical and humane reasons that we might give for his 'failure' to do so. None of these can be reconciled with Thinking. This shows how the sort of radically detached reflection Ben-Dor and Heidegger promote is irrational, impractical and ultimately inhumane.

²⁵ 1933 Reichsgesetzblatt, 175, Art 1-18, 7 April 1933, available in *Nazi Conspiracy and Aggression: Vol III* (Office of United States Chief of Counsel For Prosecution of Axis Criminality, United States Government Printing Office; Washington, 1946) 981, 982.

²⁶ Diemut Majer, "*Non-Germans*" under the Third Reich: *The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland, 1939-1945*, translated by Peter Thomas Hill, Edward Vance Humphrey & Brian Levin (Baltimore & London: Johns Hopkins University Press, 2003) 79-185.

²⁷ Although Heidegger's Nazism will not be addressed here, Thinkers about Law need to respond to this claim. As more information comes to light, Heidegger looks increasingly indefensible, see his central involvement in the Herman Staudinger affair, Hugo Ott, *Martin Heidegger: A Political Life*, translated by Allan Blunden (London: Harper Collins, 1993) 210-23. This took place in 1934, a point at which Heidegger claims to have become disenchanted with Nazism. More generally see Ott, *ibid*, 113-260, Karl A Moehling, 'Heidegger and the Nazis' in Thomas Sheehan, ed, *Heidegger: The Man and Thinker* (Chicago: Precedent Publishing, 1981) 31, Richard Wolin, ed, *The Heidegger Controversy: A Critical Reader* (New York: Columbia University Press, 1991) and Faye, above n 23. It is little short of astonishing that Ben-Dor has not addressed mounting evidence of Heidegger's Nazism while praising his silence on The Holocaust.

A Denazification

'Denazification' was an attempt by allied forces to remove the influence of Nazism from public life in post-war Germany. The legal basis is the Potsdam Conference, 1st August, 1945. Article II (A) paragraph 6 of the proceedings reads as follows:

All members of the Nazi Party who have been more than nominal participants in its activities and all other persons hostile to Allied purposes shall be removed from public and semi-public office, and from positions of responsibility in important private undertakings.²⁸

Control Council Directives 24 and 38 implemented these proceedings;²⁹ responsibility was devolved to occupying Allied forces in their respective zones. The University of Freiburg fell within the French zone. The French administration allowed universities to address matters internally first. As a result, the University of Freiburg set up its own denazification commission which had a quasi-judicial function. The commission investigated the level of involvement by former Nazi party members among academic staff. The goal was to categorize such participants as 'nominal' or as 'more than nominal'. The commission then made recommendations to University senate.

In Heidegger's case, issues included the manner of his appointment as Rector, the degree to which Heidegger had helped to implement the 'Fuehrer principle' and whether Heidegger had used his Rectorship as a means of promoting Nazism.

In Heidegger's terms two things are apparent in these proceedings. First, they are a good example of 'the legal' as 'technological'. The proceedings were goal-oriented, that goal was to 'enframe' the Being of those accused as 'nominal participants' or more committed party members. The quest was for correctness in this enframing process rather than any preservation of Being in its essence. Furthermore this use of the legal to enframe existence and cover up Being 'called for Thinking' under Heidegger's criteria. Categorizing 'persons' in terms of their Nazi involvement in this way says much to us about our Being and the essential nature of how humans look at each other. Needless to say Nazism itself and its rise in 1930s Germany also tells profound and complex tales about the human condition, including the way in which Nazi 'law' was used to achieve the most heinous ends imaginable.

So Heidegger faced a clear choice. He could have responded with the 'Thoughtful silence that Ben-Dor and others laud in his response to 'The Holocaust. Attentiveness to the 'murmur of Being' uncovered by Law in this process would have required

²⁸ *Protocol of Proceedings of the Berlin Conference, July 17-August 2, 1945*, U.S. Department of State Press Release, March 24, 1947.

²⁹ *Enactment and Approved Papers of the Control Council and Coordinating Committee* Vol II, 16, Vol V, 12 available online at the Library of Congress: http://www.loc.gov/rr/frd/Military_Law/enactments-home.html

Heidegger to relegate himself to the role of passive onlooker at his own hearing. The alternative was to respond technologically with an active, traditional defence.

Heidegger chose the legal over silent Thinking. He wrote a letter to the new Rector, in which he portrayed himself as victim. This letter claims that his appointment to the Rectorship had been by democratic vote, not by the appointment of the Nazi party. It further claims that he joined the party to influence it for good from within. Heidegger went on to argue that he had done his best to oppose National Socialism, citing several instances including the claim that he prevented a book burning and the display of anti-Semitic signs.³⁰ In addition, Heidegger enlisted Karl Jaspers to deliver expert testimony to the commission, a plan that backfired when Jaspers' report was largely damning.³¹

The credibility of Heidegger's defence will not be debated here. The important point is that Heidegger engaged with 'the legal' when his own practical goals and interests were involved. He participated in the denazification process by attempting to 'enframe' his own Being as a lesser category of Nazi party member. He did so by pointing to the 'correctness' of certain facts. There is no more technological or 'legal' engagement that one can have with law than to defend one's actions as reasonable in the circumstances, deny allegations that cannot be backed up by empirical proof, and introduce expert testimony in order to support the argument.

Heidegger's case lasted from 1945 until 1949. Throughout this period Heidegger wrote and lectured on Thinking.³² If technology is harmful to fundamental ontology, then Heidegger is responsible for harming Being by fully and voluntarily participating in this process. He did so instead of trying to preserve Being by listening in silence.

Heidegger refers to Socrates as 'the purest Thinker of the West' and alludes to Socrates' trial, claiming that the latter remained a Thinker 'right up until his death'.³³ Accounts of Socrates' attitude at trial provide a useful contrast to Heidegger's approach. According to Plato's *Apology*, Socrates expressly eschewed conventional legal defence of the time. He sought to remain true to his *daimon*, acting as a 'stranger to the language of the court

³⁰ Martin Heidegger, 'Letter to the Rector of Freiburg University, November 4, 1945' in *The Heidegger Controversy*, above n 27, 61. These claims are disputed, see Faye above n 23, 42-58 and Ott, above n 27, 140-48 and 187-209.

³¹ Karl Jaspers, 'Letter to the Denazification Committee' in *The Heidegger Controversy*, above n 27, 147.

³² The concept first appears in *Letter on Humanism*, written in 1946. In 1949 Heidegger delivered the first of the lectures that would become *The Question Concerning Technology, and other essays*, ed by and translated by William Lovitt (London and New York: Harper & Row, 1977), lectures published as *What is Called Thinking?* were delivered in 1951-2. "Excusing" Heidegger's failure to Think about Law on these grounds is not open to Thinkers about Law; they do not distinguish Heidegger's early and later positions. Ben-Dor interprets early Heidegger *in light of* later writings, see Ben-Dor above n 15, 34-35.

³³ Heidegger, above n 11, 17.

law'.³⁴ Socrates did not 'produce his children in court... together with a host of relations and friends' as character witnesses, a practice so standard that Socrates felt it may be considered 'offensive' not to do so.³⁵ Heidegger bowed to this convention through Jaspers and others. Standard accounts also suggest that Socrates used his trial as an opportunity to exercise the provocative questioning that he practiced outside the courtroom. He denounced the court as 'a place not of instruction but of punishment'.³⁶ Socrates did not introduce evidence against the charge of corrupting the young but argued against the very logic of such an accusation.³⁷ Against the charge of atheism, Socrates attacked the inconsistency of the accusation.³⁸ He also unapologetically reaffirmed his belief in the supernatural 'voice' which he sought to follow in all of his affairs.³⁹

The denazification process became unpopular among both academic commentators and the general populace.⁴⁰ It was ultimately abandoned. The idea of rebelling against these trials was nothing like as controversial as Socrates' stance. Yet Heidegger's defence bears little similarity to Socrates' attitude, at least according to interpretations of Plato's and Xenophon's accounts that were available at that time. There are conflicting descriptions of Socrates' trial. One account suggests that Socrates literally said nothing throughout. This would appear to be precisely the sort of silence that Thinking requires, but the claim is largely discredited.⁴¹ The generally accepted interpretation in Heidegger's time was that the *Apology* portrays Socrates as provocative and 'tactless'.⁴² This interpretation would have us believe that Socrates stood outside traditional legal practice, as Plato's *Apology* suggests. Heidegger embraced the legal, and all that it supposedly does to cover up and harm Being. If Heidegger was serious in his commitment to Thinking, and his desire to follow Socrates, his self-defence in the denazification process was a failure to do so.

V HUMAN REASONS FOR HEIDEGGER'S DEFENCE

Heidegger comes out of this episode badly. It appears that he was willing to encourage silent reflection when the most basic needs of others were involved, but failed to live up to this standard when his own practical needs and wants were threatened in a way that is

³⁴ Plato 'Apology' in B. Jowett, ed, *The Dialogues of Plato: Volume I*, 4th ed (Oxford: Clarendon Press, 1953) 341.

³⁵ Ibid 359.

³⁶ Ibid 350.

³⁷ Ibid 349-50.

³⁸ Ibid 350-53.

³⁹ Ibid 356.

⁴⁰ See John H Herz, 'The Fiasco of Denazification in Germany' (1948) 63 *Political Science Quarterly* 569 and Luban, above n 17.

⁴¹ See Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (London: Faber & Faber, 2009) 12.

⁴² Ibid 18.

minor by comparison. Quite aside from Heidegger's failure to practice what he preached, the denazification episode is instructive for the discussion at hand. It illustrates an important flaw in Thinking about Law or any form of radically detached reflection. When the stakes are highest in practical terms Thinking about Law requires us to act in a way that seems inhuman. It simply asks too much of any person. This is a serious charge against a form of engagement that is supposed to bring us *closer* to our Being. There are a number of rational excuses that we might make for Heidegger's failure to Think. Each is untenable on Heidegger's own terms, in spite of some intuitive, logical, appeal.

A *Expediency*

One might argue that Heidegger's hearing was simply not the time for philosophy or Thinking. Heidegger makes a point of commenting on the practical merits of technological reflection. We need this approach in our day-to-day lives.⁴³ Thinking cannot replace practical achievement; it was never meant to.

There are several reasons why this excuse fails. While Heidegger preserves a hard distinction between practical engagement and Thinking,⁴⁴ the two will inevitably conflict. To make a practical expediency argument about Heidegger's attitude during the denazification hearings is to concede that practical concerns should trump Thinking in the event of a clash. This position undermines the very idea of Thinking about Law. The priority in Thinking is to preserve Being in its essence. That priority means little if it comes with the caveat that it no longer applies when there is something really important on a practical level at stake. The intellectual tradition that Heidegger seeks to dissociate from is based upon questions that we consider important, whether practically or theoretically. If we should not Think about Law where matters of the utmost practical importance are at stake, then almost anything that calls for Thinking seems likely to fall within this category. It is likely that there is a high degree of overlap between 'pressing practical concerns' and 'things that call for Thinking'. This unquestionably includes legal (and other technological) responses to The Holocaust.

In any event, Heidegger suggests that the stakes should not have been particularly high for him during denazification. Socrates' approach again provides an instructive contrast. According to Plato's *Crito* and other sources, Socrates accepted punishment of death as the outcome of his trial, eschewing an opportunity to escape and flee Athens. He was prepared to die for the sake of his commitment to doing right.⁴⁵ Heidegger's trial was not a full legal one, his hemlock nothing like as lethal. The least favourable outcome

⁴³ Heidegger, above n 11, 32-33 see also Thomas A Fay, *Heidegger: The Critique of Logic* (The Hague: Martin Nijhoff, 1977) 62.

⁴⁴ Heidegger, above n 11, 7-8.

⁴⁵ Plato 'Crito' in *The Dialogues of Plato*, above n 34, 371. As with the *Apology* this account is questionable.

possible was a recommendation that Heidegger be prevented from teaching at Freiburg and that he lose any association with the university. Exclusion from one institution ought not to have been a great punishment for someone who consistently denounced the liberal, western ‘Americanized’ version of ‘the university’ from 1929 and who insisted that fundamental ontology was not possible within this system.⁴⁶ Heidegger had other options. His work was acclaimed outside Germany during the immediate post-war period. As the denazification process unfolded, the careers of influential Heidegger-inspired philosophers were taking off. Jean-Paul Sartre successfully championed Heidegger in France.⁴⁷ Even if Heidegger could justify technological engagement with the legal in certain circumstances, the situation here was not *utterly* dire. There were willing fora for his work and he was guaranteed at least some income. This was a long way from Socrates’ choice between life and death. As such any practical exception that we might carve out for Heidegger would make prioritizing practical engagement over detached and silent reflection look more like a rule than an exception in law.

In addition, Heidegger revisited these events long after the committee had heard his case. Heidegger was invited to consider denazification and his involvement with Nazism twenty years later in an interview with *Der Spiegel*. The interview was conducted on condition that it would be published after Heidegger’s death. During this interview Heidegger remained silent on the systematic murder of Jews and dissenters in Nazi concentration camps. Yet, when asked about his association with Nazism, Heidegger broke this silence again. In doing so he largely repeated the arguments that he had made during the committee hearings.⁴⁸ Heidegger thus turned away from Thinking about Nazi law and denazification at a point when there was no practical concern that might have compelled him to do so.

B *The Holocaust as a Unique Event*

A second possible excuse for Heidegger’s engagement with ‘the legal’ is to distinguish The Holocaust from other ‘atrocities of [Heidegger’s] generation’. One might argue that there is no parallel between Heidegger’s involvement with various pieces of legislation enacted during the Nazi regime and The Holocaust itself because the latter is such a catastrophic, époque-defining event. As a result, the argument might continue, The

⁴⁶ See generally Alan Milchmann & Alan Rosenberg, ‘Martin Heidegger and The University as a Site for the Transformation of Human Existence’ (1997) 1 *The Review of Politics* 75. Heidegger justified his Nazi membership on the basis that he saw it as an opportunity to turn universities into Thinking institutions, Heidegger, above n 24. This is consistent with his rectoral address in Wolin, *ibid* 29-39.

⁴⁷ For Heidegger’s assimilation into post-war French philosophy see Rüdiger Safranski, *Martin Heidegger: Between Good and Evil*, translated by Ewald Osers (Cambridge, MA: Harvard University Press, 1999) 342-52. Sartre’s endorsement coincides with the start of denazification. Heidegger was also a hired public speaker during this time, *ibid* 390-403.

⁴⁸ Heidegger, above n 24, 91-104.

Holocaust calls for Thinking whereas ‘the bringing into line’ process and the denazification hearings do not.

This suggestion has appeal; we can sympathize with the general notion that there is a part of our reflection on events like The Holocaust that standard, practical and legal responses do not encapsulate. One might also feel that purposeful reflection is more important to us in our day-to-day affairs, and that only unique, special events, such as The Holocaust, cause us to reassess what we had thought about the human condition itself. On Heidegger’s terms, however, this suggestion must be rejected. By his own standards, Heidegger failed to engage on a fundamental ontological level with The Holocaust *itself*. Heidegger’s claims about our relationship with time form a crucial part of his philosophy. An ‘inauthentic’, technological attitude sees past, present and future as isolated events. This attitude leads us to ‘forget’ about Being.⁴⁹ Fundamental ontology, on the other hand, has an authentic attitude towards time that sees past, present and future as part of the continuance of Being.⁵⁰ To isolate the ‘now’ from what has happened before and what we can project in the future is the hallmark of inauthenticity – it is to ignore our Being as continuously unfolding. Given all of this, we simply cannot accept Heidegger’s silence on The Holocaust itself as Thinking when he engaged technologically in discussion of the legal mechanisms that enabled it. The Holocaust was only possible once those that might defend its victims had been eradicated from the power structure. To Think about what the Holocaust says to us about Being, one must Think about the past that led to it. The Nazi rise to power, the bringing into line legislation and the establishment of the Fuehrer principle are part of what The Holocaust tells us about Being. To separate The Holocaust from these laws and the subsequent denazification of public bodies is to see the past of the bringing into line as an entity ‘side by side’ with The Holocaust as another entity.⁵¹ It is to see them as one off, isolated events, rather than pieces in the unfolding continuance of human existence. Heidegger’s participation in the legal before the Holocaust, during denazification and again in 1966 negates any claim that he had engaged with The Holocaust on his own ‘fundamental ontological’ level.

Ben-Dor notes how Levinas employs a ‘punctuated’, ‘inauthentic’ attitude towards time, by regarding past, present and future as isolated events; as such Levinas does not engage in the sort of detached reflection that Ben-Dor advocates as the only way to access Being.⁵² Yet Ben-Dor does not hold Heidegger to the same standard – he disregards the ‘punctuated’ attitude towards time that treating The Holocaust as a singular event would require. This is a good illustration of how Thinkers about Law do not reflect critically

⁴⁹ Martin Heidegger, *Being and Time*, ed by and translated by John Macquarrie & Edward Robinson (Oxford: Basil Blackwell, 1962) 398-99.

⁵⁰ *Ibid* 373-75.

⁵¹ *Ibid* 81.

⁵² Ben-Dor, above n 15, 246-62.

on Heidegger's work. Ben-Dor and other Thinkers about Law do not even judge Heidegger on his own terms. While Thinkers about Law may argue that their aim is to faithfully apply Heidegger rather than critique it, such an assertion cannot work here. Heidegger's treatment of the Holocaust as a singular event utterly contradicts his claims about Being. One cannot faithfully apply Heidegger's claims about 'Being' yet ignore 'Time'. Consequently, one cannot faithfully apply Heidegger's claims about time and accept his silence on The Holocaust as an example of Thinking.

Leaving aside this core, fatal, objection, Heidegger does not set the minimum requirement for what 'calls for Thinking' anything like as high as The Holocaust. Ben-Dor convincingly argues that a transformative event such as the Holocaust calls for Thinking. Nevertheless, much had happened prior to The Holocaust in Nazi Germany that was also transformative and also 'calls for Thinking'. Heidegger uses the example of coal-mining to 'Think' about what our technological approaches tell us about Being. The practice of coal-mining itself is technological. Yet this practice calls us to Think about how we treat the earth as nothing more than a 'standing reserve' to be mined and used for our needs.⁵³ If coal-mining calls us to Think about the harmful effects of the technological for Being, the disenfranchisement of certain citizens, state-sponsored anti-Semitic propaganda, and the trampling of civil liberties that took place from the moment the Nazi Party came to power must do so too. Ben-Dor asks us 'to be with [Heidegger] in silence, listening to the evident that lurks in the language of legal materials, case law [and] theories of law'.⁵⁴ The 'bringing into line' legislation contained much that was 'evident' about Being and 'lurk[ing] in the language'. Had Heidegger truly Thought about the atrocities of his generation, he would have listened in silence to that which was 'murmuring in the unsaid' about Being in this systematic removal of non-Aryans and dissenters from political life. Heidegger, Ben-Dor, Ljungström and Nonet write of law's destructive power, which is revealed if we Think about Law.⁵⁵ If ever one needed an example of Law's *deimon* ('terrible power')⁵⁶ to harm humanity, the bringing into line legislation is it.

C Expecting Heidegger to Think about Denazification expects too much

To expect Heidegger to Think about Law instead of defending himself is too much to expect of anyone in the circumstances. Faced with accusations of central Nazi involvement and the consequences that this would have for his career, reputation and

⁵³ Heidegger, above n 32, 12.

⁵⁴ Ben-Dor, above n 15, 397.

⁵⁵ Martin Heidegger, *An Introduction to Metaphysics*, ed by and translated by Ralph Manheim (New Haven, CT: Yale University Press, 1959) 134, Ben-Dor, above n 15, 141-50, Ljungström, above n 8, 73-75, Nonet, 'Judgment' above n 8, 1004-07, and Nonet, 'Antigone's Law' above n 8, 325-27.

⁵⁶ Ben-Dor in particular focuses on this term, above n 15. The use of Greek words as a vehicle for Thinking is discussed below.

legacy, it seems perfectly reasonable, perfectly human, that Heidegger should try to defend himself.

I offer no counter-argument to the suggestion that nobody should be expected to reflect silently on Being to the detriment of their own legal defence. Yet to exonerate Heidegger on these grounds is to accept the fundamental inhumanity of the type of detached response to law that Ben-Dor and others advocate. To expect Heidegger to Think about Law during his denazification hearing is to expect a superhuman level of commitment and restraint. To expect the superhuman is to expect the inhuman. That Thinking should lead us to this conundrum is profoundly problematic. If we accept the excuse suggested here for Heidegger's failure to Think about Law during his own trial, we accept that Thinking about Law would have made Heidegger *less* human.⁵⁷ Thinking was supposed to preserve humanity, not suppress it.

It is difficult to believe that anyone has ever Thought about Law instead of defending themselves or pleading guilty in court. Heidegger's example of Socrates as someone who Thought 'right up until his death' is dubious. The account of Socrates' trial presented in Plato's *Apology* may fit with the conception of Socrates as Thinker. As noted, the accuracy of this account is contested. 'Fiction theory' interpretations of Plato's *Apology* hold that it is part of a genre of Socrates literature in which authors used 'Socrates' the character to put their own ideas forward. Even 'accuracy theorists' concede that Plato exaggerated somewhat.⁵⁸ An alternative accuracy theory has recently emerged. Brickhouse and Smith suggest that the account in the *Apology* is largely correct, but that it is a mistake to view Socrates' approach as radically outside the parameters of normal legal defence for the time.⁵⁹ There is a compelling argument that the defiant 'Thinking' Heidegger found so laudable, yet failed to follow, was actually an engagement in the legal. Heidegger may have unwittingly followed Socrates after all in prioritizing practical concerns over detached reflection when his own interests were at stake.

There are several rational excuses that we might make for Heidegger's failure to maintain silent contemplation during the denazification process. None is compatible with Thinking. It makes sense to us that a pressing practical concern should trump silent contemplation about what it means to Be, but Thinking cannot support this suggestion because practical engagement is said to damage Being. We might feel that the question of the meaning of human existence is a special one that only gets triggered in response

⁵⁷ For a similar conclusion see William S Wurzer, 'Heidegger's Silent Inhumanity: "To Think the Nobility of Being..."' in Alan Milchman & Alan Rosenberg, eds, *Martin Heidegger and the Holocaust* (New Jersey: Humanities Press International, 1997) 39.

⁵⁸ Thomas C Brickhouse & Nicholas D Smith, *Socrates on Trial* (Oxford: Clarendon Press, 1989) 2-10.

⁵⁹ Ibid 210-14 see also C D C Reeve, *Socrates in the Apology: An Essay on Plato's Apology of Socrates* (Indianapolis, IN: Hackett Publishing, 1989).

to specific, cataclysmic events but Thinking cannot support practical engagement with events that lead up to such a human catastrophe nor does Heidegger limit what calls for Thinking to these sorts of unique events. Heidegger explicitly rules each of these possibilities out. The only rational explanation left for Heidegger's failure to Think during denazification damns Thinking as an unrealistic and inhuman response to crises.

VI THE ARBITRARINESS OF THINKING

So far we have noted how the sort of radically detached reflection that Ben-Dor and Heidegger advocate takes us away from humanity instead of bringing us closer. A second negative consequence of this approach can be seen in the sweeping, arbitrary claims that Thinkers about Law make because their detached reflection refuses to accept any input from more purposive, fact-based reflection.

The arbitrariness of Thinking is particularly apparent in claims about Law that are based on word origins. Language is said to be the 'house of Being'.⁶⁰ Thinkers focus on the etymology of words for clues to help us uncover the essence of the concept in question and of what is 'unsaid' in language. This is done in order to 'denote the primordial signification of essences';⁶¹ when man attempted to capture some concept in a word he tried to represent the meaning of that concept for our Being.

Heidegger uses German and Greek. Legal Thinkers Nonet, Ljungström and Ben-Dor follow Heidegger directly in this regard; Ben-Dor also uses Hebrew and French.

These legal Thinkers focus on two concepts. The Greek term *dikē*, roughly meaning 'justice', is subjected to sustained analysis. Much is made of its common root with the word *deinon* meaning 'strange', 'terrible' or 'overpowering'.⁶² Significance is also attached to the role of the goddess *Dike* as 'one who enforces the destined order'.⁶³ In various ways, Thinkers claim that the Being of justice is a destined order. A second concept discussed at length is *logos*, which has no direct English translation. Its multiple meanings include 'reason' and 'word'. Thinkers claim that there is an important point about the Being of Law in the fact that the word *logos* shares a root with the verb *legein* meaning 'to say'.⁶⁴ Within the 'reason' or 'word' of Law, there is the 'saying' of Being. To Think the Being of Law is to listen in silence to this saying.

⁶⁰ Heidegger, above n 9, 193.

⁶¹ Ben-Dor, above n 15, 141.

⁶² See Ben-Dor, above n 15, 140-67, Heidegger above n 55, 79-172, and Martin Heidegger, *Early Greek Thinking*, ed by and translated by David Farrell Krell & Frank A. Capuzzi (New York: Harper & Row, 1975) 13-58.

⁶³ Ibid. See also Ljungström, above n 8, 79.

⁶⁴ Ibid 72-78 and Nonet, 'Judgment', above n 8, 1002-07.

Those unfamiliar with Heidegger's work may wonder why these various Thinkers about Law stop at ancient Greek concepts. If the point is to get at our 'most primordial signification' of Law, the logical place to start is the earliest examples of codified law that we have available.

The Code of Hammurabi substantially predates any Greek codified law; it is among the most complete of the early codes available. *Kittum u mēšarum* (eternal truth and right) are referred to in the introductory part. The code explains how the king is charged with dispensation of both *kittum* (eternal laws) and *mēšarum* (justice). *Mēšarum* mitigates the harshness of eternal laws and custom, a role similar to that historically performed by equity in our jurisdiction. Law in early Babylonian cultures was seen as a combination of these two concepts. As Speiser and others have noted, these early Cuneiform laws substantially influenced the content and form of regulation in later Mediterranean civilizations, including Greece.⁶⁵ If the purpose of word analysis and association with deities in Thinking is to get to the primordial 'saying of Law', this use in ancient Mesopotamian cultures is more 'primordial' than Greek usage. The term *kittu(m)* has multiple meanings in Akkadian. In addition to 'universal truth', 'reality' or 'cosmic order' it can also mean 'steadiness', 'reliability', 'loyalty' and 'righteousness'. The singular *kittu* is also the word for a 'stand' or 'support'. The custodian of universal law in Mesopotamian mythology is the god Shamash, who is also the sun-god, the god of light, justice and healing. If we were to take early Babylonian languages and deities as the 'primordial signification of essences' instead of Greek language and mythology the claims that we would make about the Being of Law might look quite different to those made by Thinkers about Law.

To understand why Thinkers about Law ignore pre-Greek terms one must appreciate the reasons behind Heidegger's focus on ancient Greece. Heidegger felt that the Greeks represented the emergence of the 'spirit' of the west, the first step towards an identifiable occidental culture whose remnants are apparent in modern Being⁶⁶. The definition of 'The West' for these purposes is non-technological, that is to say non-scientific. The West is not to be thought of regionally,⁶⁷ 'anthropologically'⁶⁸ or 'biologically'.⁶⁹

⁶⁵ See Ephraim A Speiser, 'Cuneiform Law and the History of Civilization' (1963) 107 *Proceedings of the American Philosophical Society* 536, see also Raymond Westbrook *Law From the Tigris to the Tiber, The Writings of Raymond Westbrook: Vol. 1, The Shared Tradition*, Bruce Wells & Rachel F Magdalene, eds (Indiana: Eisenbrauns 2009).

⁶⁶ Heidegger, above n 55, 46-47.

⁶⁷ Ibid.

⁶⁸ Heidegger, above n 9, 212, 221, see also Heidegger, *Question Concerning Technology*, above n 32, 140, 153.

⁶⁹ Heidegger's most disdainful comments on "liberal biologism" remain untranslated see Faye, above n 23, 96-99. Nevertheless his "anti-biologism" is evident elsewhere. During denazification he claimed that this position represented resistance to Nazism, above n 24, 64-65. See also Heidegger's analysis of Nietzsche, Martin Heidegger, *Nietzsche: Volumes Three and Four*, ed by and translated by David Farrell Krell (New York: Harper Collins, 1991) 39-47 and 103-22.

Heidegger dismisses each of these approaches as damaging to fundamental ontology.⁷⁰ Instead ‘the West’ is defined by ‘the context of belongingness to a destiny’ and a common ‘spirit’.⁷¹ According to Heidegger, the split between technological philosophy and pure Thinking emerges in ancient Athens. As the Greeks compartmentalized academia into philosophy, arts and sciences, so the dominance of technology began. The Pre-Platonic Greeks ‘Thought’ generally, instead of having different areas of expertise.⁷² From then on, according to Heidegger, we turned away from the question of Being (which included all elements of academic life) and turned towards specialist approaches where different disciplines each sought their own ‘correctness’ rather than the *Aletheia* or ‘uncovering’ of Being itself. Thinking is an effort to return to an attitude towards Being that was lost post-Socrates and continually eroded in the history of Western philosophy.

Heidegger thus identifies a spirit in the pre-Socratic Greeks that can be used to help us Think. Thinkers about Law are not looking for factual evidence of the earliest law available and what this might tell us about the relationship between ‘man’ and ‘law’; they are looking for a culture that Thought about Being. As Heidegger bluntly and arbitrarily states ‘along with German the Greek language is (in regard to its possibilities for Thought) the most powerful and most spiritual of all languages’.⁷³ Evidence of influences on western law in earlier cultures is, presumably, too technological to be considered. The historical, factual parallels that Speiser and others draw between western legal systems and ancient Mesopotamian law are ignored because the quest is for similarities in Being or spirit. Demonstrable, factual similarity in day-to-day practical affairs is thus divorced from the question of ontological essence. This allows Heidegger to make the claim that the Anaximander fragment is ‘the oldest fragment of Western Thinking’ and for his fellow Thinkers to make similarly sweeping statements about the Being of Law based on this claim.⁷⁴ They do so in spite of evidence that Speiser, Westbrook and others can introduce relating to codes that predate this fragment by over one thousand years and had a direct influence on the substantive content of later Western law.

This sort of argument, based on ‘spirit’ but disregarding or contradicting biological, geographical, anthropological or historical fact was lampooned by the comedian Stephen Colbert in his address to the Washington Press Correspondents Dinner in 2006.

⁷⁰ See Heidegger, above n 9, 71-75; Heidegger, above n 11, 7-18; Heidegger, above n 32, 21-28, 115-54, 176-82.

⁷¹ Heidegger, above n 9, 217-37; Heidegger above n 55, 1-42.

⁷² Heidegger, above n 9, 232-33.

⁷³ Heidegger, above n 55, 47

⁷⁴ Heidegger, *Early Greek Thinking*, above n 62, 13; Ljungstöm, above n 8, 79; Nonet, ‘Antigone’s Law’, *ibid*, 314-55; Ben-Dor, above n 15, 141-67.

Guys like us, we're not some brainiacs on the nerd patrol. We're not members of the factinista. We go straight from the gut... That's where the truth lies, right down here in the gut. Do you know you have more nerve endings in your gut than you have in your head? You can look it up. Now, I know some of you are going to say, 'I did look it up, and that's not true'. That's 'cause you looked it up in a book. Next time, look it up in your gut. I did. My gut tells me that's how our nervous system works. Every night on my show, *The Colbert Report*, I speak straight from the gut... I give people the truth, unfiltered by rational argument. I call it the 'No Fact Zone'.⁷⁵

Colbert is joking. Heidegger and Thinkers about Law are serious. Yet the underlying rationale is the same, to Think we must follow spirit rather than fact. Unless our reflections on the human condition grant some sort of weight to practical human knowledge they have no basis and no criteria other than gut instinct or the sort of 'blind' faith that one might associate with the brainwashed members of a cult. Thinkers about Law demonstrate this blind faith in Heidegger himself. Nonet, Ljungström and Ben-Dor treat Heidegger's texts as sacred documents that lead us on a 'way' that is never held to account on its own terms or reconciled with fact.⁷⁶ They thus return to the various sources for Thinking about Law that appealed to Heidegger's spirit, pre-Socratic Greek philosophy and the poetry of Hölderlin and Celan.⁷⁷ To do this is to elevate Heidegger above the rank of a philosopher, whom we can engage with and argue against. It is to treat him as a prophet who had privileged access to Being. Ben-Dor strays slightly from Heidegger's path by supplementing discussion of Greek terms with Hebrew ones. This never becomes a critique of Heidegger. Nevertheless it seems certain that Heidegger would have disapproved. Heidegger never used Hebrew as a path to Thinking and did not regard it as a 'spiritual language'.⁷⁸ Ben-Dor does not contradict Heidegger's claims, preferring to draw parallels in Hebrew to Greek-based analysis. Yet it is impossible to imagine how debate between Heidegger and Ben-Dor could even get started. For

⁷⁵ Full transcript available online:<http://politicalhumor.about.com/od/stephencolbert/a/colbertbush.htm>

⁷⁶ This "cult" of the later Heidegger is clearly distinct from theology which *reconciles* faith and practical reason. For an overview within Christian theology see Paul Helm, *Faith and Reason* (Oxford: Oxford University Press, 1999).

⁷⁷ Ljungström name-drops Wallace Stevens and Samuel Beckett as other literary figures that demonstrate "poetic Thinking", again without argument or demonstration, above n 8, 90.

⁷⁸ Evidence of Heidegger's anti-Semitism also suggests likely disapproval. Jaspers testified that Heidegger *became* anti-Semitic in the 1930s, Jaspers, above n 31, 147-48. According to Jaspers, Heidegger expressed belief in "a dangerous international network of Jews" during private conversation in May 1933, Karl Jaspers, *Philosophische Autobiographie* (Munich: Piper Verlag, 1933) 101. For further accounts of anti-Semitic remarks by Heidegger, see Faye, above n 23, 32-38 and George Leaman, 'Strategies of Deception: The Composition of Heidegger's Silence' in *Martin Heidegger and the Holocaust*, above n 16, 57. Heidegger remained married to confirmed anti-Semite, Elfride Heidegger (nee Petri), from 1917 until his death in 1976 and at no point appeared to have considered ending the relationship, even during his multiple extra-marital affairs.

Heidegger, 'German and Greek [just] are the most spiritual of languages' and thus hold the key to Thinking. For Ben-Dor Hebrew, presumably, just *is* as spiritual. There is nothing that one side could say to the other in order to advance their position. Nothing counts as evidence for either claim. Even looking for evidence, or 'correctness', is seen as missing the point.

VII RESCUING 'BEING' IN LEGAL THEORY: A MODEST PROPOSAL

No effort to contemplate the human condition within Law is worthwhile if such contemplation is hostile to efforts by the legal to protect and preserve basic human necessities. This reality provides certain guidelines for a tenable ontology of Law.

We should not be required to sacrifice important practical gains, such as those of Roxin, in order to address what is said to us about Being in Law.

Food, clothing, shelter and the preservation of life simply *are* more important than the opportunity to question Being in Law. Fundamental ontological reflection is a luxury many cannot afford. No human being would, or should, prioritize detached reflection about our existence over the practical goals of survival for themselves *and* for others. To require such prioritizing is inhuman and destructive of Being.

Any fundamental ontology of Law needs to be informed by input from our purposive practices. Fundamental ontology that hovers above practical engagement instead of being led by it runs the risk of being too arbitrary and personal to have any meaning for others.

Thinking about Law falls short of these guidelines. Ben-Dor notes that the major figures in philosophy who have been influenced by Heidegger have not 'Thought' in Heidegger's terms. Ben-Dor and others see this as a failure. It is not. *Each* of the major figures that departed from Heidegger's later philosophy did so by deliberately re-establishing the priority of practical human interaction in claims about the human condition. Sartre does this by claiming (contrary to Heidegger) that '[practical day-to-day] existence comes before essence'.⁷⁹ Levinas does this by holding that ethics is more primordial than ontology.⁸⁰ Arendt does it by placing the *vita activa* at the centre of her vision of reflective political community.⁸¹ The fundamental flaw that I have identified in

⁷⁹ The Heidegger/Sartre debate arose because Sartre claimed that Heidegger shared Sartre's view in this regard, and was thus 'existentialist', see Jean-Paul Sartre, *Existentialism and Humanism*, 3rd ed, translated by Philip Mairet (London: Methuen, 1989) 26. Heidegger distanced himself immediately, Heidegger, above n 9.

⁸⁰ Emmanuel Levinas, *Otherwise than Being or Beyond Essence* (Pittsburgh: Duquesne University Press, 1981) 1-11, and Emmanuel Levinas, 'Is Ontology Fundamental?' in *Entre Nous: On Thinking-of-the-Other*, ed by and translated by M B Smith & B Harshav, (London: The Athlone Press, 1998).

⁸¹ Hannah Arendt, *The Human Condition*, 2nd ed, (Chicago and London: University of Chicago Press, 1998) 7-21.

Thinking about Law is broadly the same point of departure that we see in Sartre, Levinas and Arendt. We are not failing to live up to Heidegger's later project; we disagree with it.

Heidegger's later work contains insights that might be applied fruitfully to legal theory. These become apparent when we look at Heidegger's position critically, instead of blindly following him. In what follows, I make a modest proposal for an approach towards legal scholarship based on the concern that theory has ignored or turned away from the question of Being. My suggestion will re-unite existing scholarship with the question of Being in Law.

Heidegger distinguishes the 'enframing' quest for correctness in technological approaches from his quest for *Aletheia*, the 'uncovering' of Being itself. Yet Heidegger is clear that goal-oriented reflection achieves some *Aletheia*. The enframed part of essential Being is uncovered, while much is left uncovered, or is covered up by this process.⁸² Heidegger's fundamental ontology has to do with 'the nearness of the near' rather than anything transcendental. For Heidegger, Being is always near to us; it constantly 'murmurs' in the background even though it may be 'distorted' by our enframing. Existing jurisprudence may operate on a technological level but Being is still present and engaged with albeit unknowingly. Something about our Being is 'said' to us, even as we enframe concepts for practical purposes. Roxin's 'mastery of the act' theory has been put to important practical use within 'the legal'. Yet the fact that we think of culpability in this way tells us something significant about the uniquely human feeling of guilt. How and why we feel responsibility for our actions and towards others is no small part of Being itself. This is precisely the sort of input that we need if we are to reflect on the meaning of humanity as it reveals itself to us in law.

For Heidegger, the growth and pervasiveness of technology causes Being to be forgotten and is ultimately harmful to *Aletheia*. Thinkers about Law unquestioningly repeat this claim. Yet Heidegger's concession that *some Aletheia* takes place in every technological practice rests uneasily with this position. There has been massive growth in legal theory since Heidegger first suggested Thinking. Much piece-by-piece *Aletheia* simply *must* have taken place through these different approaches. If at least some of Being in Law was uncovered by legal positivism, another part was captured by natural law and still more uncovered by legal realism in 1947. So much more must have been uncovered by the diversification and enrichment of these approaches. Critical legal theory, feminist jurisprudence and deconstruction are but three supposedly 'technological' approaches that have emerged since. On Heidegger's own terms, each of these enframes another bit of the fundamental ontological truth of Law for a different technological purpose. All of these traditions will have achieved a great deal of incidental, unwitting *Aletheia* when taken together.

⁸² Heidegger, above n 32, 21.

This suggests an alternative to the untenable, radical detachment that Heidegger and Thinkers about Law advocate. Instead of turning away from our existing attitudes, openness towards diverse approaches and questions *within* the ever growing body of legal theory presents a way of coming to grips with the meaning of Law in our Being. We can do this without giving up our purposeful engagements. Each enframed piece tells us something more about Being. We can construct a picture of the ontological truth of law by combining different approaches. Ontology by slow construction in this way would still be an enframing, technological exercise. Yet the 'frame' used would expand as our existing approaches diversify. The more practically useful ways of looking at Law we come up with, the more glimpses of Law in our Being we get.

This alternative allows us to re-establish the importance of Being as a significant philosophical question within jurisprudence. It also re-engages with goal-oriented, practical reflection. Combining the enframed truth from different traditions avoids practical, real world loss. It allows us to act when we have a moral imperative to do so. Roxin's work is useful to this modest ontological project; we do not have to condemn it as harmful to Being. This proposal also avoids the dilemma of requiring an individual to make enormous personal sacrifices. Heidegger's self-defence in the denazification process enframes a bit more of the Being of Law and that bit is part of the project. 'Correctness', fit with our day-to-day practical reason, serves as a means of preventing the arbitrary claims and starting points we can see in Thinking about Law.

By critiquing Heidegger's internal inconsistency, we can thus rescue the central insight; in all of our technical legal disputes we should not forget the question of what this tells us about humanity itself. It also goes to the heart of a more evident danger in the growth of technology for legal theory. Alongside the emergence of different types of legal philosophy, the practice as a whole has become fragmented. Increased diversity has led to increased specialisation, with different branches of legal philosophy operating within their own spheres. There is little dialogue between schools; critical jurisprudence and analytical jurisprudence barely engage with each other. We can see areas of specialization move in ever decreasing circles of debate *within* broad positions such as critical feminist theory or positivism. This specialization and stratification echoes the claims that Heidegger makes about the growth of technology.⁸³ The important debates within our areas of specialization may well cause us to 'forget' the meaning of Law for human existence. The suggestion that I have made for a more tenable *Aletheia* of Law would require us to combine these different existing theoretical approaches. One does not need to accept any part of Heidegger's philosophy to see what is at stake here for legal philosophy or to endorse this more holistic approach. The more specialized we become in our endeavour, the narrower its scope. This makes the potential audience for any legal theory smaller. Our areas of interest are becoming so specific that it is difficult to

⁸³ Heidegger, above n 9, 256.

imagine a 'big idea' in Jurisprudence that all schools of thought and traditions would deem worthy of discussion. If we wish to talk about the general at all in jurisprudence, my modest proposal for a more tenable *Aletheia* of Law must be pursue.