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Law and Heidegger's Question Concerning Technology: A Prolegomenon to Future Law Librarianship

Paul D. Callister, *University of Missouri-Kansas City*



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Law and Heidegger's Question Concerning Technology: Prolegomenon to Future Law Librarianship*

Paul D. Callister**

Professor Callister explains the criticisms of technology and modern life proffered by German philosopher Martin Heidegger. He applies the criticisms to the current legal information environment and contrasts developing technologies and current attitudes and practices with earlier Anglo-American traditions. Finally, he considers the implications for law librarianship in the current information environment.

POOR librarians. Soon, no doubt, to go the way of blacksmiths and town criers, their chosen field made obsolete by Internet search engines and self-perpetuating electronic databases.¹

¶1 Following World War II, the German philosopher Martin Heidegger offered one of the most potent criticisms of technology and modern life. His nightmare is a world whose essence has been reduced to the functional equivalent of “a giant gasoline station, an energy source for modern technology and industry. This relation of man to the world [is] in principle a technical one. . . . [It is] altogether alien to former ages and histories.”² For Heidegger, the problem is not technology itself, but the technical mode of thinking that has accompanied it. Such a viewpoint of the world is a useful paradigm to consider humanity’s relationship to law in the current information environment, which is increasingly *technical* in Heidegger’s sense of the term.

¶2 Heidegger’s warning that a technical approach to thinking about the world obscures its true essence is directly applicable to the effects of the current (as well as former) information technologies that provide access to law. The thesis of this

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** Associate Professor of Law and Director of the Leon E. Bloch Law Library, University of Missouri-Kansas City School of Law. The author thanks Elizabeth Bach-Van Horn, Richard Danner, James E. Faulconer, Erin Lavelle, Nancy Levit, Travis McDade, and Yelena Shmidova for their excellent assistance and encouragement.

1. Neil Genzlinger, *The Fog of Facts*, N.Y. TIMES, Oct. 17, 2004, § 7, at 12, available at LEXIS, News Library, NYT File.

2. MARTIN HEIDEGGER, *Memorial Address*, in DISCOURSE ON THINKING 43, 50 (John M. Anderson & E. Hans Freund trans., Harper & Row 1966) (1959).

article is that Heidegger provides an escape, not only for libraries threatened by obsolescence by emerging technologies, but for the law itself, which is under the same risk of subjugation. This article explains the nature of Heidegger's criticisms of technology and modern life, and explores the threat specifically identified by such criticism, including an illustration based upon systematic revision of law in Nazi Germany. It applies Heidegger's criticisms to the current legal information environment and contrasts developing technologies and current attitudes and practices with earlier Anglo-American traditions. Finally, the article considers the implications for law librarianship in the current information environment.

Heidegger's Nightmare: Understanding the Beast

Calculative Thinking and the Danger of Subjugation to a Single Will

¶3 The threat is not technology itself; it is rather a danger based in the essence of thinking, which Heidegger describes as "enframing"³ or "calculative thinking."⁴ For Heidegger, the problem is that mankind misconstrues the nature of technology as simply "a means to an end."⁵

¶4 Heidegger's articulation of the common conception of technology as a "means" applies equally well to information technologies, including legal databases. True, it is hard to think of technology in any other way, but what Heidegger argues is that this failure to consider the essence of technology is a threat to humanity.⁶

¶5 He defines the threat in two ways. First, humans become incapable of seeing anything around them as but things to be brought into readiness to serve some end (a concept he refers to as "standing reserve").⁷ They are thereby cut off from understanding the essence of things and, consequently, their surrounding world.⁸ Second, man is reduced to the role of "order-er" of things, specifically to some purpose or end, and, as a result, risks becoming something to be ordered as well.⁹

3. See William Lovitt, *Introduction* to MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS*, at xxix (William Lovitt trans., 1977).

4. HEIDEGGER, *supra* note 2, at 46.

5. See MARTIN HEIDEGGER, *The Question Concerning Technology*, in *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS*, *supra* note 3, at 4-5 ("Technology is a means to an end.").

6. See *infra* ¶¶ 11-17 for an example of how Nazism reduced humanity to a thing to be ordered.

7. See Lovitt, *supra* note 3, at xxix ("Today all things are being swept together into a vast network in which their only meaning lies in their being available to serve some end that will itself also be directed toward getting everything under control. Heidegger calls this fundamentally undifferentiated supply of the available the 'standing reserve.'").

8. See HEIDEGGER, *supra* note 3, at 28 ("The rule of Enframing threatens man with the possibility that it could be denied to him to enter into a more original revealing and hence to experience the call of a more primal truth.").

9. *Id.* at 26-27 ("As soon as . . . man . . . 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.").

Heidegger illustrates these concerns as follows:

The forester who, in the wood, measures the felled timber and to all appearances walks the same forest path in the same way as did his grandfather is today commanded by profit-making in the lumber industry, whether he knows it or not. He is made subordinate to the orderability of cellulose, which for its part is challenged forth by the need for paper, which is then delivered to newspapers and illustrated magazines. The latter, in their turn, set public opinion to swallowing what is printed, so that a set configuration of opinion becomes available on demand.¹⁰

In other words, the trees, the wood, the paper, and even the forester (whose ancestors once understood the sanctity of the woods) are ultimately subordinated to the will to establish orderly public opinion. The forester, in proverbial fashion, “cannot see the forest for the trees.” Instead of appreciating the majesty and mystery of the living forest, he sees only fodder for the paper mill, which will pay for his next meal.

¶6 The same cynicism might be applied to legal publishing. Whole forests have given their lives to the publication of legal information in order to provide a stable basis for society—after all, the “law must be stable and yet it cannot stand still,”¹¹ or as our comrades from Critical Legal Studies might put it, law is simply a tool “to perpetuate the existing socioeconomic status quo.”¹² Cadres of West editors (commonly referred to in generic fashion as *human resources*, ironically making them all the less *human*)¹³ work feverishly to digest points of law and assign 55,000 cases into a taxonomy with more than 100,000 class distinctions,¹⁴ all for the sake of a predictable legal system and stable society.

¶7 For Heidegger, the threat is revealed in mankind's perpetual quest to gain mastery over technology. “Everything depends on our manipulating technology in the proper manner as a means. We will, as we say, ‘get’ technology ‘spiritually in

10. *Id.* at 18. Heidegger finds that man “never is transformed into mere standing-reserve” because of his unique position as the “order-er” of everything else. *Id.*

11. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

12. BLACK'S LAW DICTIONARY 382 (Bryan A. Garner ed., 7th ed., 1999). For a more thorough definition of *Critical Legal Studies*, see John Henry Schlegel, *Critical Legal Studies*, in *OXFORD COMPANION TO AMERICAN LAW* 202 (Kermit L. Hall ed., 2002).

13. See HEIDEGGER, *supra* note 3, at 18 (“If man is challenged, ordered, to do this, then does not man himself belong even more originally than nature within the standing-reserve? The current talk about human resources, about the supply of patients for a clinic, gives evidence of this.”).

14. See Paul Douglas Callister, *Beyond Training: Law Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J. 7, 21, 2003 LAW LIBR. J. 1, ¶ 33 (estimating number of cases published annually by West in print); Dan Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 LAW LIBR. J. 229, 236, 2007 LAW LIBR. J. 14, ¶ 33 (estimating number of lines in West classification system). Interestingly, Dabney has recently expressed concern that large systems such as the West Topic and Key Number System are limited in effectiveness to their current 100,000 classes. See Dan Dabney, *A Brief Practical Introduction to Taxonomies 7* (Thompson Legal Knowledge and Trends White Paper, n.d.). Apparently, humanity's role as the order-er of things is “at capacity,” and is, presumably, in need of technological replacement. See HEIDEGGER, *supra* note 3, at 18.

hand.' We will master it. The will to mastery becomes all the more urgent the more technology threatens to slip from human control."¹⁵ When Heidegger published these words (first in 1962, but based on lectures from 1949 and 1950),¹⁶ the implications of nuclear energy and atomic warfare occupied much academic discussion. Heidegger points out that the popular question of this period did not concern how to find sufficient energy resources, but "[i]n what way can we tame and direct the unimaginably vast amounts of atomic energies, and so secure mankind against the danger that these gigantic energies suddenly—even without military actions—break out somewhere, 'run away' and destroy everything?"¹⁷ The modern question is about our mastery over technology, not about sufficiency of resources.

¶8 Similar concerns are apparent with respect to information technologies, where the primary problem is not lack of access, but too much access: for example, illegal music file swapping,¹⁸ the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA),¹⁹ and trends to use licensing to control and preserve the economic value of information (and to prohibit otherwise lawfully competitive practices, such as reverse engineering).²⁰ With respect to law and government, we see such examples as retraction of government documents,²¹ the Patriot Act,²² the furor over unpublished electronic precedent,²³ and the recent

15. HEIDEGGER, *supra* note 3, at 5.

16. Lovitt, *supra* note 3, at ix.

17. HEIDEGGER, *supra* note 2, at 51.

18. See, e.g., David Shepardson, *Sony, Others Sue 9 U-M Downloaders; Record Companies Accuse Students of Taking Music Illegally*, DETROIT NEWS, Apr. 2, 2004, at 1D, available at LEXIS, News Library, Detroit News File.

19. 17 U.S.C. §§ 1201(a)–(b) (2000).

20. Compare Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005) (end-user license agreement validly prohibited reverse-engineering even when copyright law may have permitted it) with Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) (reverse-engineering permitted under fair use when no end-user license agreement restrictions banning the practice were an issue in the case).

21. See, e.g., News Release, U.S. Gov't Printing Office, Statement on Request to Withdraw USGS Source-Water CD-Rom from Depository Libraries (Jan. 16, 2002), available at <http://www.access.gpo.gov/public-affairs/news/02news04.html>.

22. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 18, 50, and other titles of U.S.C.); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified in scattered sections of 18, 50, and other titles of U.S.C.).

23. See Molly McDonough, *Door Slowly Opens for Unpublished Opinions*, A.B.A. J. E-REPORT, Apr. 21, 2006 ("Judges and lawyers opposed to the [Supreme Court rule permitting citation of unpublished opinions] have referred to unpublished opinions as 'junk law.' They flooded the advisory committee with some 500 letters opposing the citation rule."); Stephanie Francis Ward, *Giving Their Opinions: Committee Backs Rule Allowing Lawyers to Cite Unpublished Decisions*, A.B.A. J. E-REPORT, Apr. 23, 2004 (quoting federal Ninth Circuit Judge Alex Kozinski: "Given the press of our cases, especially screening cases, we simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent."); Paul Marcotte, *Unpublished but Influential: With Technology, Opinions Not in the Law Books Can Be Misused, Critics Charge*, A.B.A. J., Jan. 1991, at 26, 26 ("[Lauren] Robel fears, for example, that bar groups and scholars will be unable to discern trends in case law covering federal agency decision-making because of the growing numbers of unpublished opinions.").

frenzy of e-discovery.²⁴ Some stakeholders seem to have liked things better when information resources were scarce.²⁵ Universal access is destabilizing—hence, the considerable interest in getting a “handle” on technology through legal sanction and yet additional technological innovation (the so-called “access control” technologies).²⁶

¶9 Heidegger's genius is in recognizing that all the fuss about mastering technologies, although close to the mark, concerns the wrong issue. The more insidious threat is not nuclear fallout or economic devaluation of intellectual property, but the worldview of “calculative” thinking that accompanies rapid technological change: “The world now appears as an object open to attacks of calculative thought, attacks that nothing is believed able any longer to resist.”²⁷ For Heidegger, calculative thought is not limited to the manipulation of machine code or numbers.

24. See, e.g., Carolyn Southerland, *Ignorance of IT Minutiae No Excuse for Litigators*, 28 NAT'L L.J., July 17, 2006, at S3; Kristin M. Nimsger & Michele C. S. Lange, *E is for Evidence: Examining Recent E-Discovery Developments*, GPSOLO, Mar. 2006, at 40, available at <http://www.abanet.org/genpractice/magazine/2006/mar/scitech.html>; James M. (Duke) Johnston Jr. & Philip A. Whistler, *E-Discovery: A Critical Litigation Issue for Franchisors and Franchisees*, 26 FRANCHISE L.J. 20 (2006); Marianne Tolomeo & Brett Kuller, *Litigation Strategies In Light of Document Retention Requirements for Electronic Records*, TRIAL PRAC., Fall 2005, at 6; David K. Isom, *Electronic Discovery: New Power, New Risks*, UTAH B.J., Nov. 2003, at 8.

25. The issue is perhaps discomfort with the pace of technological change (specifically the speed and accuracy of the Internet) and its impact on entertainment industries. See, e.g., *Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of the Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 108th Cong. 18 (2003), available at http://hsgac.senate.gov/_files/shrg108275privacy_piracy.pdf (testimony of Jack Valenti, President & CEO, Motion Picture Association of America) (“If we just stopped [development of broadband Internet] right now, if the world just stopped, we would be doing fine because we [the motion picture industry] could survive it.”). Valenti was particularly concerned about the future speed of the Internet:

Scientists at CalTech have announced “FAST,” an experimental program that can download a DVD quality movie in five seconds! . . . Can anyone deny that these huge download speeds brood over our future? Can anyone deny that when one can upload and download movies in seconds or minutes the rush to illegally obtain films will reach “pandemic stage?”

Id. at 91–92 (prepared statement of Jack Valenti) (emphasis added).

Perhaps, the real problem is a lack of scarcity or “friction” in the new technologies—they are simply too accurate and fast. See SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM*, at xi (2004) (discussing “how we could install ‘friction’ into an otherwise unregulated medium; about how closely we should try to make cyberspace conform to and resemble the analog world”); see also *id.* at xiii (“The collapse of inconvenience has sparked a series of efforts that could reestablish the distance, or friction, that our information systems have featured since the rise of moveable type and bound books.”); *id.* at 13 (explaining the theory postulated in ROBERT KAPLAN, *THE COMING ANARCHY* (2000), “that the stable comfort of the modern nation-state is doomed because too many dangerous goods, services, and ideas can flow too easily without traditional regard for authority and tradition”); *id.* at 87 (“The fundamental purpose of intellectual property law is to create artificial scarcity.”).

26. “Despite the obvious futility of anti-piracy efforts, governments throughout the world are shifting to the technological regulation of distribution from the human to the technological, and expanding the jurisdiction from the national to global.” VAIDHYANATHAN, *supra* note 25, at 101. See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

27. HEIDEGGER, *supra* note 2, at 50.

Rather, the concept is grounded in “Machiavellian scheming” and the pursuit of power. “Calculative thinking computes. It computes ever new, ever more promising and at the same time more economical possibilities. Calculative thinking races from one prospect to the next.”²⁸ The threat Heidegger envisions to human thought is even more dangerous than nuclear warfare.²⁹

¶10 Heidegger’s threat is based on the separation of man from his or her nature. By pursuing economic calculation, man is cut off from the transformative powers of his or her environment. In such a world, law does not have the capacity to educate or to provide the basis for social harmony;³⁰ rather, like any resource, law must be employed to more economic ends. The implication is that calculative thinking mandates that everything (including law) be subjected to a single will. While Heidegger recognized the danger of subjecting everything to a single will, the issue of whether, and when, he equated the danger with Nazi totalitarianism, which he had originally supported, would require a line of historical inquiry far beyond the scope of this article.³¹ Regardless of Heidegger’s own political and moral journey, Nazism effectively illustrates Heidegger’s philosophical fear—that technological thinking risks the “ordering” of all the world, including humanity, as resources subject to a singular will.

28. *Id.* at 46.

29. *Id.* at 52 (“[A]n attack with technological means is being prepared upon the life and nature of man compared with which the explosion of the hydrogen bomb means little.”).

30. *See infra* ¶ 28.

31. One of the best treatments of the issue is Safranski’s critique of Heidegger’s responses to his famous interview with *Der Spiegel*, which took place on September 23, 1964, in Freidenburg, but which was not published until his death. *See* RÜDIGER SAFRANSKI, MARTIN HEIDEGGER: BETWEEN GOOD AND EVIL 418–21 (Ewald Osers trans., 1998). Safranski believes Heidegger recognized that Nazism had ultimately been guilty of technological reductionism, as used in this article (or reducing the world, including men, to a resource for exploitation). *See id.* at 420 (footnote omitted) (“When the interview turned to the problem that ‘technology tears men loose from the earth and uproots them,’ Heidegger pointed out that National Socialism had originally intended to oppose such a development [technological reductionism] but had subsequently become its motor.”). In a review of *The Heidegger Controversy: A Critical Reader*, Thomas Sheehan is much more skeptical of how far (and how soon) Heidegger distanced himself from his initial embrace of Nazism. *See* Thomas Sheehan, *A Normal Nazi*, N.Y. REV. BOOKS, Jan. 14, 1993, at 31.

Heidegger’s disillusionment had to do with the [Nazi] party’s failure to carry out Heidegger’s own philosophical program of renewing the promise of the ancient Greek polis, overcoming European nihilism, and returning Germany to a less hectic and more simple life. Thus his so called “break” with official Nazism in the mid-Thirties consisted in his decision to be *more* true to the “inner truth and greatness” of the movement than the party ever could be.

Id. at 35 (citing ERNST NOLTE, MARTIN HEIDEGGER, POLITIK UND GESCHICHTE IM LEBEN UND DENKEN (POLITICS AND HISTORY IN HIS LIFE AND THOUGHT) 164–65 (1992)). For general discussion of Heidegger and his affiliation with Nazism, *see* SAFRANSKI, *supra*; Sheehan, *supra*; NOLTE, *supra*; JOHANNES FRITSCHKE, HISTORICAL DESTINY AND NATIONAL SOCIALISM IN HEIDEGGER’S *BEING AND TIME* (1999); HUGO OTT, MARTIN HEIDEGGER: A POLITICAL LIFE (Allan Blunden trans., 1993); HANS SLUGA, HEIDEGGER’S CRISIS: PHILOSOPHY AND POLITICS IN NAZI GERMANY (1993); HEIDEGGER CONTROVERSY: A CRITICAL READER (Richard Wolin ed., 1991).

Subjection of Law to Will—The Nazi Experience

¶11 While serving as a law librarian at the University of Illinois at Urbana-Champaign, I learned that a special mission of the Library of Congress had seized contents of Nazi libraries following World War II. As part of a library lecture series, Tom Kilton and Gail Hueting, university librarians from the Modern Languages and Linguistics Library, discussed items seized by the Library of Congress and distributed to various American libraries. Some of the items were held in various University of Illinois campus libraries, but at the time of Kilton and Hueting's presentation, no one had looked seriously at the law school library. Motivated by the lecture and with some effort, I was able to identify more than seventy such items at the law library and many other legal titles that traced their origin to Nazi Germany.³²

¶12 As I made my way through some of the legal materials, I was struck by the fact that the Nazis did not simply ignore law; rather, they systematically rewrote it to their own purposes. For example, consider the following translation of a Nazi business organizations statute:

The industrial concern of a legal person is considered as Jewish,

- (a) if one or several of the persons appointed as legal representation or one or several of the members of the supervisory board are Jews;
- (b) if Jews are crucially involved as to capital or right to vote. Crucial participation in capital occurs if more than one quarter of the capital belongs to Jews; crucial participation as to right to vote occurs if the Jewish voices (voters) reach half of the total number of voices (voters).³³

The section then goes on to address issues of subsidiaries and mining enterprises.³⁴ Having been a tax attorney in a former life, I am struck by the technical precision and lengths to which Nazi draftsmen went to define "Jewish" business entities. Technical definitions of "controlled groups" and "closely held" corporations illustrate similar precision in draftsmanship with respect to U.S. tax law, but without the anti-Semitism.³⁵ The Nazis, at least in 1934, did not simply ignore the law; they reworked it with great care and precision to their own ends.

¶13 This was a Nazi legal academy, complete with law professors, some of whom sported Nazi pins or armbands, who systematically set about to rewrite

32. See *Library Lines: A Reminder to Never Forget the Past*, ILL. JURIST, Spring 2002, at 25–26; GAIL P. HUETING, SPECIAL COLLECTIONS IN GERMAN STUDIES IN NORTH AMERICAN LIBRARIES (rev. Feb. 1, 2005), <http://www.dartmouth.edu/~wessweb/gdgspeccoll.html> (Item no. 16, *National Socialist Literature*, briefly describes the 17,000 volumes held by the University of Illinois as part of the Cooperative Acquisitions Project for Wartime Publications.).

33. HEINRICH SCHÖNFELDER, DEUTSCHE REICHSGESETZE SAMMLUNG DES VERFASSUNGS, GEMEIN, STRAF UND VERFAHRENSRECHTS FÜR DEN TÄGLICHEN GEBRAUCH § 10a, art. 1, para. 1, subpara. III (13th ed., 1943) (passage translated by author).

34. *Id.* at subpara. IV.

35. See, e.g., 26 U.S.C. §§ 447(h), 1563 (2000).

the law according to Nazi ideals.³⁶ In a translated foreword to the *Academy for German Law Yearbook 1933/34*, Dr. Hans Frank, director of the German Academy of Justice, revealed his own “instrumental”³⁷ attitudes about German law and legal academia when he wrote:

Being entrusted with the Führer’s call for the revision of the German empire’s legal system, . . . I have the Academy for German Justice, which shall demand the reorganization of the German legal life in close and lasting conjunction with the proper authorities for the legislation of the National Socialist program. . . .

. . . Germany has at its disposal the greatest jurist’s organization of the world, the Union of National Socialist German Jurists, to set down a method of working, which differs from the lawmaking of fundamental liberalist aims. In hardly any other area of life has the parliamentary methods of the party state had a more fatal effect than in the field of the lawmaking and legislation.³⁸

In other words, the law was too important a tool to be entrusted to politicians.³⁹ Both the law and legal academia were put to the service of the Nazi “machine.”

¶14 As *Führer*, Hitler was exalted to the status of a legal concept. In 1940, J. Walter Jones (fellow of Queen’s College, Oxford) described the *Führer* as one of two principles upon which the Nazi conception of law was based (the other principle being racial homogeneity).⁴⁰ Having reviewed Nazi writings on the subject, Jones observed:

The efficiency of all political and legal machinery is judged by the smoothness and speed which it brings to the functioning of the Nation-State. Action, instant and overwhelming, must be the primary purpose of the State. . . . Therefore, State action is dependent on the existence of a Leader (*Führer*) and on unquestioning faith in the creed of leadership.⁴¹

This nice little syllogism justifies totalitarian rule on the basis of expedient state action.

¶15 In June 1934, the same Dr. Hans Frank, then the Bavarian justice minister as well as director of the Academy of German Justice, phoned Hitler to inquire

36. See, e.g., AKADEMIE FÜR DEUTSCHES RECHT, JAHRBUCH 1936, at vi–vii, illus. ii (1936) (shows Dr. Hans Frank in Nazi uniform as president of Akademie für Deutsches Recht); *id.* at 144–45, illus. vi (shows Dr. Karl Lasch, director of the Akademie, sporting a Nazi lapel pin). Note that in 1937 Heidegger declined to attend with the German delegation a Descartes conference in France intended as a forum to reconcile Nazi socialism with European philosophy. See SAFRANSKI, *supra* note 31, at 324–25. Many of the German academia wore Nazi uniforms. *Id.* at 325.

37. Throughout this article, I use “instrumental” in the same sense as Heidegger uses “technical” or “calculative” to refer the reduction of law and legal information to “resources” to be ordered to some end. See *supra* ¶¶ 3–5.

38. Hans Frank, *Vorwort*, in AKADEMIE FÜR DEUTSCHES RECHT, JAHRBUCH 1933/34, at 5–6 (1934) (passage translated by author).

39. See *id.* at 5 (“Here, in the past, the former state’s anonymous playground accounted only to extracted economic and political power groups.”) (passage translated by author).

40. See J. WALTER JONES, THE NAZI CONCEPTION OF LAW 4–5 (Oxford Pamphlets on World Affairs No. 21, 1939).

41. *Id.* at 5.

about the “legal grounds” to carry out Hitler’s order to execute nineteen leaders of the Brownshirts (the *Röhm putsch*), then being held in Frank’s care. Hitler’s response: “I’ll tell you that the legal grounds for everything that happens is the very existence of the Reich!”⁴² Being thoroughly converted to Hitler’s cause, Dr. Frank would later declare, “[S]ince the foundation of the National Socialist State is National Socialist law and order, the Supreme Führer is by definition also our supreme judge . . . , that his *will* must now be the foundation of our law and order.”⁴³ The nightmare of the world as gasoline station was realized into the rule of a single will.

¶16 Not surprisingly, Dr. Frank closed his telephone conversation with Hitler by committing to carry out the executions;⁴⁴ the German concept of *order* (in the sense of laying the foundation of the Third Reich) demanded it. Later, as governor of occupied Poland, Dr. Frank would extend the reasoning justifying nineteen executions to seventeen thousand: “We must not be squeamish when we hear of seventeen thousand Poles executed.”⁴⁵ Dr. Frank, who began his career as a defense attorney and then became a legal academic, would ultimately be convicted at Nuremburg and hung for his actions as governor of occupied Poland.⁴⁶

¶17 The point of this painful odyssey through Nazi law is to illustrate the extremes to which law can be reduced to serve a chosen end and subjugated to a single will. In the words of Dr. Hans Frank, “the Academy for German Law in almost all important fields of law has supplied an abundance of valuable suggestions and contributions *for the realization of the National Socialist legal will*.”⁴⁷ It is to the realization of *will* that law ultimately succumbs when it is reduced to the status of a technological tool by *calculative* thinking.

The Modern American Version—Law and the Billable Unit

¶18 In contemporary America, the technological yoking of law to will—its wholesale conversion to “standing reserve”—is infinitely less inimical and perceptible than in Nazi Germany, but the danger is there, nonetheless. It is the subtle shift in attitudes accompanying new legal technologies to which law librarians, and ultimately the legal profession, must direct their attention.

¶19 While describing an experimental system that seamlessly combines brief writing on the word processor with legal research—to facilitate a kind of self-researching brief—Dan Dabney, senior director, Thomson Global Services GmbH, observed: “[W]hat is happening here, at least potentially, is that legal research has

42. NIKLAS FRANK, *IN THE SHADOW OF THE REICH* 85 (Arthur S. Wensinger & Carole Clew-Hoey trans., Knopf 1991) (1987) (Hans Frank’s son recounted the phone conversation in an impassioned biography condemning his father’s life and deeds as a jurist and Nazi officer.).

43. *Id.* at 71 (parenthetical comments of biographer omitted) (emphasis added).

44. *Id.* at 85.

45. *Id.* at 128.

46. *Id.* at 356–71.

47. Frank, *supra* note 38, at 6 (emphasis added).

ceased to be a particularly separate part of the operation. You can just sit down and write a brief and the authorities you need, the law that you are looking for, will find you.”⁴⁸ Dabney’s education as an information scientist is apparent. He quite capably connects technological developments with search behavior.

¶20 More importantly, Dabney connects legal search behaviors with underlying attitudes about legal arguments. In fact, Dabney illustrates that the behavior and attitudes this new self-researching brief facilitates are not new. He quotes a former law partner: “You know when I write a brief, I do the legal research last. I write the brief and when I see something that probably needs authority I just put in ‘(cite)’ and go on and write something else. But you can make the argument because you know what the arguments are going to be.”⁴⁹ West’s new technology is not to blame for this attitude. After all, the technology simply facilitates the calculative thinking and culture already at the root of the legal profession. West and other publishers simply meet the demand for information services and products to supply authority for the arguments legal practitioners have already decided to make.

¶21 Dabney’s most interesting observation explores the philosophical underpinnings of such calculative attitudes:

[T]he reason that my colleague was so proud of this is that it reflected his rather cynical attitude about the law itself. There is no sense in which the law *informs* you at all. You are creating the law that was necessary to your purposes on the fly and you were never going to discover that law wasn’t the way you wanted it to be. This [is], you know, the *legal realist* mentality: There is plenty of law out there for everyone.⁵⁰

The information environment facilitates the triumph of legal realism. Indeed, Grant C. Gilmore made the argument back in 1961 that realism is a reaction of the information environment to the presence of too many cases in the system.⁵¹

¶22 Even in the Anglo-American tradition, in the same society that triumphed over Nazism and Fascism, the prevailing viewpoint is technological and calculative. Heidegger’s fears aptly criticized American capitalism as well as totalitarian ideologies: “‘Calculation’ stands for Americanism, ‘planning’ for communism, and ‘cultivation’ for National Socialism.”⁵² The labels differ, but the methods of Western ideologies all share calculative thinking at their core.

¶23 Modern thinking about law is also calculative in nature. The principle of flexible stability, that the “[l]aw must be stable and yet it cannot stand still,”⁵³ the

48. Dan Dabney, *Envisioning the Future: The Publisher’s Perspective*, Remarks at the Future of Law Libraries Symposium, Florida Coastal School of Law (Mar. 10–11, 2005), mms://broadcast.cali.org/foll05/DanDabney.wmv (quoted passage transcribed by author).

49. *Id.*

50. *Id.* (emphasis added).

51. Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1041 (1961).

52. SAFRANSKI, *supra* note 31, at 296.

53. POUND, *supra* note 11, at 1.

oft-recited declaration with which Roscoe Pound opens *Interpretations of Legal History* and which is engraved above the moot courtroom at Cornell Law School, facilitates predictability, economic growth, and the general welfare. While Pound's statement has been elevated to the status of a legal maxim, its underlying rationale is less known. "The social interest in general security has led men to seek some fixed bases for an absolute *ordering* of human action whereby a firm and stable social *order* might be assured."⁵⁴ Again, the will to order drives modern, instrumental conceptions of law. Law is simply the basis for "ordering human action," although as Pound argues, the resulting construct must be flexible to be successful. Heidegger's description of technical and calculative thinking, based upon willing order, corresponds nicely to this modern conception of law.

¶24 The conception of law is equally calculative and instrumental in nature in the writings of other modern theorists. Ronald Dworkin's paradigm of law as the unending chain story also functions to maximize the values of stability and predictability.⁵⁵ H.L.A. Hart, another luminary of jurisprudence, stresses law's "value as an *instrument* for the realization of human purposes."⁵⁶ Normative theories of law and economics exult in the efficient administration of the general welfare.⁵⁷ Noting law's instrumental character, Richard Posner comes closest to identifying the technological nature of law (in Heidegger's sense), by arguing: "I myself do not think law is a humanity. It is a technique of government."⁵⁸ Oliver Wendell Holmes, Sr., noted poet and father of the eminent United States Supreme Court Justice, also saw law in a technical and instrumental context: "Law is an *implement* of society which is intended for every-day work."⁵⁹ Holmes, Jr., while not using technical language, commented on the historical origins of law in saying that "the earliest appearance of law was as a substitute for the private feuds between families or clans."⁶⁰ In sum, the modern, instrumental conception of law is clear. Law is fundamentally a resource for stability in an unstable world. In Heidegger's terms, law appears as *standing reserve*—as something to be ordered, with the rest of the world to serve some end.⁶¹ Small wonder that, in addition to Heidegger's philosophical definition,

54. *Id.* (emphasis added).

55. See RONALD DWORKIN, *LAW'S EMPIRE* 228–38 (1986).

56. H.L.A. Hart, *Problems of Philosophy of Law*, in 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 264, 273 (Paul Edwards ed., 1967).

57. See Eric Talley, *Theory of Law and Economics*, in *OXFORD COMPANION TO AMERICAN LAW*, *supra* note 12, at 485, 486.

58. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 *VA. L. REV.* 1351, 1392 (1986). Posner admits that as a technique, law is "tied to the creation of and interpretation of texts" which can benefit "from sympathetic engagement with literature," at least on his terms. *Id.*

59. OLIVER WENDELL HOLMES, *PAGES FROM AN OLD VOLUME OF LIFE* 323 (Boston, Houghton Mifflin 1892 (second emphasis added)). Holmes, Sr. continues: "It [law] is a coarse tool and not a mathematical instrument." *Id.*

60. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 248 (Little, Brown & Co. 1923) (1881).

61. See *supra* note 6.

standing reserve is used as an accounting concept for assessing resources in the military and energy industries.⁶²

¶25 Reducing law to standing reserve may seem unnecessarily perfunctory, especially since it is hard to think of it in any other way. Indeed, the profession of law speaks of legal information, like other information, as a resource to be mined, harvested, ordered, quantified (in billable units), packaged, marketed, and, ultimately, consumed to some calculated end or purpose, which in turn will serve some other overarching end or purpose. A quick survey of product literature reinforces the commoditization of legal information and law:

- “Try CQ Legislative Impact and you’ll see how this service can streamline your work by pinpointing the exact places where pending legislation would change existing laws.”⁶³
- Advertisement with photo of attorney in front of circus booth labeled “Estrella’s Prophecies.” He asks, “How will my judge rule on this issue?” The subtitle for the advertisement reads, “There’s a better way to get a real indication of how your judge might rule on a specific issue—strategic court-records research on LexisNexis Courtlink.”⁶⁴
- “Draft high-quality, winning legal briefs, motions and pleadings faster and more accurately with *Shepard’s* BriefCheck for the Web. . . .”⁶⁵
- “When you need an answer to the question, ‘Is my case good law?’ there’s no question which system provides a more comprehensive or more focused answer.”⁶⁶
- “Westlaw Litigator can help you in every aspect of your case and at every stage of the process. It puts all your key litigation resources in one place to save you time.”⁶⁷

62. See, e.g., David Newbery, *Electricity Liberalization in Britain and the Evolution of Market Design*, in *ELECTRICITY MARKET REFORM: AN INTERNATIONAL PERSPECTIVE* 109, 120 (Fereidoon Perry Sioshansi & Wolfgang Pfaffenberger eds., 2006) (illustrating concept of energy reserves); M. Rashidinejad, Y.H. Song, & M.H. Javidi, *Ancillary Services (I): Pricing and Procurement of Reserves*, in *OPERATION OF MARKET-ORIENTED POWER SYSTEMS* 223 (Yong-Hua Song & Xi-Fan Wang eds., 2003) (illustrating concept of energy reserves); Carlos Pascual, Office of the Coordinator for Reconstruction & Stabilization, U.S. Dep’t of State, *Strengthening U.S. Reconstruction and Stabilization Capabilities*, Address Before Joint Event of the Center for Strategic and International Studies and Woodrow Wilson International Center for Scholars (Oct. 20, 2004), available at <http://www.state.gov/s/crs/rls/rm/37430.htm> (discussing role of foreign service supporting military through rotating through “Standing Reserve”).

63. Letter from Congressional Quarterly, Inc. (undated ca. 2006) (copy on file with author).

64. LexisNexis advertisement, A.B.A. J., Feb. 2005, at 7 (“Revealing court-records research is just one way LexisNexis gives litigators a strategic advantage, often before their case ever gets to trial.”).

65. *New Shepard’s BriefCheck for the Web: More Cite-Checking Accuracy Plus Web Flexibility*, 6 LEXISNEXIS INFO. PROF. UPDATE 93 (2006).

66. Lexis Auto-Cite advertisement, A.B.A. J., August 1991, at 45 (“When it comes to building strong cases, there’s strength in numbers [of precedent]”).

67. Westlaw Litigator advertisement, A.B.A. J., Mar. 2004, at 3.

- “Only ALR gives you the assurance you haven’t missed any case law on your point.”⁶⁸
- “In addition to finding the primary law, you can check your firm’s legal arguments against those of the legal profession’s heavy hitters.”⁶⁹
- “Thanks to KeyCite and Table of Authorities, you can relax knowing that nothing affecting the precedential value of a cited authority will escape your notice.”⁷⁰

The common theme from the vendor literature is simple: legal information resources are essential tools which make the practice of law more efficient. They proffer competitive advantage and a sense of security, while putting the law at users’ fingertips so that nothing is missed. In Heidegger’s terms, the resources bring law into the order of standing reserve. As Dabney has pointed out,⁷¹ law appears to have the same characteristics as the information services that provide access to it because through such systems the law always stands ready to supply argument for any occasion or proposition. The question is how to think otherwise. More importantly, has Heidegger’s nightmare of the world as a “gasoline station” been realized?

Daring to Think Otherwise—“In-formative” Reading

¶26 Dabney’s use of *inform* (as in “there is no sense in which the law informs you”) is both interesting and entirely consistent with his behavioral approach, including conceptual linkages to legal realism. *Information* evolved from the Latin *informare* as in “the action of forming matter, such as stone, wood, leather, etc.,” or, with respect to informing humans, “the action of informing; formation or molding of the mind or character, training, instruction, teaching; communication of instructive knowledge.”⁷² To *inform* was transformative of character in respect to material objects or the human mind and character. Following World War II, however, there was a shift to a more technical or calculating meaning of the term *information* (consistent with Heidegger’s sense of the term) to “define anything that was sent over an electric or mechanical channel.”⁷³ In 1949, information science pioneers Claude Shannon and Warren Weaver defined *information* as “that which *reduces* uncertainty.”⁷⁴ With its utility established, information is now a proper “resource.”

68. Lawyers Cooperative Publishing advertisement for *American Law Reports* (ALR), A.B.A. J., July 1991, at 15.

69. Tim Nixon, *How Online Briefs Save Time*, LAW. LIBRS. NEW MILLENNIUM, May–Jun. 2004, at 7 (commenting on West’s Online Briefs).

70. Jay Shuck, *WestCheck Meets the World Wide Web*, LAW. LIBRS. NEW MILLENNIUM, Mar.–Apr. 2004, at 5.

71. See *supra* note 50 and accompanying text.

72. RICHARD SAUL WURMAN, *INFORMATION ANXIETY* 38 (1989).

73. *Id.*

74. *Id.* at 39 (citing CLAUDE SHANNON & WARREN WEAVER, *MATHEMATICAL THEORY OF COMMUNICATION* (1949)).

Being dedicated to “reducing uncertainty,” *information* bears remarkable relationship to order, or ordering, and fits easily with Heidegger’s concept of “standing reserve.”

¶27 The same is true of law. As discussed earlier, legal information reduces uncertainty by providing access to a stable system of rules for resolving disputes in a predictable way.⁷⁵ In short, law is perhaps the principle tool for ordering our world. It is no surprise that the law is often made up of “ord-inance” (deriving from *order*).⁷⁶ Indeed, the German *gesetz*, translated as *law*, also means “to place” as in “to set down order.”⁷⁷ Returning to legal information, the major legal publishers facilitate this ordering in a remarkable way, with “Exhibit A” being West’s Topic and Key Number system.

¶28 The interpretation of *information* as a tool for reducing order, however, contrasts with the sense that Dabney may have meant for the term *inform*, in its pre-war, non-technological sense, as information *informing* the reader. It is the individual user’s understanding and character that is formed, molded, and educated. It is in this sense that Isocrates and Plato referred to law. “Isocrates claims that proliferation of laws and the search for *akribeia* (precision) [perhaps another reference to order] was to miss the real function of law, which was to be general and morally educative.”⁷⁸ Plato shared a similar vision with respect to law serving an instructional function and promoting social harmony. “Laws are partly framed for the sake of good men, in order to instruct them how they may live on friendly terms with one another, and partly for the sake of those who refuse to be instructed, whose spirit cannot be subdued, or softened, or hindered from plunging into evil.”⁷⁹ Plato’s analogy of philosophy curing the ills of the soul as a doctor applies medicine to a sick patient is particularly apt here.⁸⁰ “[J]ustice is a moral physician and cures men of their excesses and makes them better people.”⁸¹ This is the original sense of legal information, which stresses *in-forming* or educating and molding members of society.

¶29 While browsing a well-known rare book store in Salt Lake City, I happened upon a 1633 third edition of Lord Edward Coke’s *First Part of the Institutes of the Laws of England* (otherwise known as the Coke’s *Commentary on Littleton*),⁸²

75. See *supra* notes 53–71 and accompanying text.

76. See OXFORD ENGLISH DICTIONARY ONLINE (Draft Revision Sept. 2004), <http://dictionary.oed.com> (access etymology link for “ordinance, *n.*”).

77. See *id.* (2d ed. 1989) (access etymology link for “law, *n.*”).

78. S.C. Todd, *The Language of Law in Classical Athens*, in *THE MORAL WORLD OF THE LAW* 17, 27 (Peter Coss ed., 2000) (citing Isocrates §§ 7.33, 7.39–40). See also Paul D. Callister, *Law’s Box: Law, Jurisprudence and the Information Ecosphere*, 74 UMKC L. REV. 263, 277–78 (pointing out the advantages of *Stelae* as a medium for education through law).

79. 5 PLATO, *DIALOGUES OF PLATO* 266 (Benjamin Jowett trans., 3d ed., rev. and corrected, N.Y. and London, MacMillan & Co. 1892).

80. PLATO, *GORGAS* 69–71 (W. Hamilton trans., Penguin Books 1960).

81. *Id.* at 70.

82. EDWARD COKE, *FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (3d ed. corrected, London, M.F.I.H. & R.T. assigns of I. More, esq., 1633).

which I acquired for my law school. The volume is particularly valuable because of the marginalia, evidence of provenance, and other inscriptions, including one from the cover sheet bearing a quote in Latin from Quintilian from the first century A.D. This quotation reveals something about the relationship of the reader to the text. "Those who strive to reach the heights will always rise higher than those who, giving up on their goals because of despair, immediately halt at the lowest levels."⁸³ It is not a testimonial about the ease and usefulness of the book, or its utility as a *resource*; rather, it emphasizes the journey, which the reader must undertake, and the transformation that is the ultimate reward of the book.

¶30 Frederick C. Hicks, whose legacy as a legal bibliographer and teacher is dear to the law library profession, recognized the difficulty readers had with Coke's monumental work, writing that this "'painful volume' has become a symbol for all books which, sparing neither author nor reader in going to the bottom of things, say the last on the subjects of which they treat."⁸⁴ Fundamentally, the prominent legal texts in earlier times bore a different relationship to readers and students than the legal information resources of today. Prior texts emphasized *informing* the student. Modern texts are more easily accessed, perused, and searched in both print and digital (including convenient "cut-and-paste") formats.

¶31 This modern change in the relationship of readers to legal texts is demonstrated in Otto Preminger's film, *Anatomy of a Murder*.⁸⁵ In the film, which explores the insanity defense, or "irresistible impulse," the lawyer for the defense, Paul Biegler, played by Jimmy Stewart, does something incomprehensible in the modern practice of law. Biegler and his alcoholic colleague, Parnell McCarthy, played by Arthur O'Connell, actually choose to spend their leisure time drinking bourbon whiskey and reading case reporters—decisions by Justice Holmes no less.⁸⁶ For a practicing lawyer to find *recreation* in reading case reporters, let alone spend significant time to ponderously read cases under any circumstances (while tippling with a colleague), probably strikes most present-day attorneys as anachronistic, if not an outright Hollywood fabrication.⁸⁷

83. Translation of handwritten inscription from dedication page of UMKC law library's copy of Coke's *Institutes*. See *id.* The inscription comes from Quintilian's *Institutio Oratoria* and reads: "Altius ibunt qui ad summa nitentur quam qui praesumpta desperatione qua velint evadendi protinus circa ima subterint." E-mail from Holly M. Sypniewski, Assistant Professor, Department of Classical Studies, Millsaps College, to Elisabeth Bach-Van Horn, Legal Research Assistant, UMKC School of Law (Aug. 16, 2006). See 1 *INSTITUTIO ORATORIA OF QUINTILIAN* 14–15 (bk. I preface, l. 20) (E. Capps, T.E. Page, & W.H.D. Rouse eds., H.E. Butler trans., London, William Heinemann 1920) (n.d.).

84. FREDERICK C. HICKS, *MEN AND BOOKS FAMOUS IN THE LAW* 97 (1921).

85. *ANATOMY OF A MURDER* (Columbia Pictures 1959).

86. *Id.* (McCarthy queries Biegler: "Well, what shall we read this evening? How about a little Chief Justice Holmes?").

87. The 1959 movie is based on a book of the same title by John D. Voelker (writing under the name of Robert Traver) originally published in 1958, when Voelker was a justice of the Michigan Supreme Court. He served from 1957 to 1959, when he retired to write full time after the success of *ROBERT TRAVER, ANATOMY OF A MURDER* (1958).

¶32 As unusual as the behavior of the fictional attorneys in *Anatomy of a Murder* may seem, there was indeed a time when reading (other than the condensed and heavily edited versions presented in the classroom) was dear to the profession. Robert C. Berring has noted that “Daniel Webster probably read every case that was published by every American appellate court, and probably read English cases as well.”⁸⁸ In 1769, another model American, John Rutledge wrote a telling letter to his brother Edward, then studying law in England. The letter advises:

[W]ith regard to particular law books—Coke’s Institutes seem to be almost the foundation of our law. These you must read over and over, with the greatest attention, and not quit him till you understand him thoroughly, and have made your own everything in him, which is worth taking out. . . . I would read every case reported from that time [the Glorious Revolution of 1688] to the present [1769]. . . . I would have you, also, read the Statute Laws throughout When I say you should read such a book, I do not mean just to run cursorily through it, as you would a newspaper but to read it carefully and deliberately, and transcribe what you find useful in it.⁸⁹

Both John and Edward Rutledge would serve as delegates to the General Congress prior to the American Revolution and later as governors of South Carolina. Edward Rutledge would sign the Declaration of Independence, and John would serve as a Justice on the United States Supreme Court and chief justice of the South Carolina Supreme Court.⁹⁰ Other examples of equally prodigious readers of American law are easy to find.⁹¹

¶33 Reading was at the heart of an English and early American legal education, and not just perusing, but a painstaking, purposefully repetitive and comprehensive study of works (as of 1769, eighty-one years of cases), including extensive personal annotation and transcribed notes. So voracious was the reading of the nineteenth- and early-twentieth-century bar that courts justified selecting decisions for publication (rather than publishing every decision) to help cut down the reading. “The leading lawyers in every State are expected to run over, if they do not read, every case in every new volume of its reports. Every case dropped [from publication] lightens the task.”⁹² Indeed, law was a profession of readers. But why? Was it simply a matter of being the best armed for court or was something deeper and nobler going on?

¶34 The very essence of being a lawyer was to be bookish. In a delightful

88. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 19 (1994).

89. JOHN BELTON O’NEALL, 2 BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 124–26 (Charleston, S.G. Courtenay & Co. 1859).

90. On John Rutledge, see 1 *id.* at 17–37; on Edward Rutledge, see 2 *id.* at 115–29.

91. See, e.g., MOORFIELD STOREY & EDWARD W. EMERSON, EBENEZER ROCKWOOD HOAR 30 (1911) (Hoar served as a supreme court justice for Massachusetts); ADDRESS OF HON. HENRY W. BLODGETT UPON THE EARLY BAR OF CHICAGO 7 (1896) (discussing reading habits of Illinois State Supreme Court Justice John Dean Canton).

92. SIMEON E. BALDWIN, AMERICAN JUDICIARY 274 (1905).

article published in 1937, Max Radin explained the effect on modern legal scholarship of the seventeenth-century work of Sir Edward Coke on the basis of its grounding in books.⁹³ However, the purpose of such reading is best understood from Lord Coke himself. Coke's writings go beyond "making the case" to include something more beneficial, such as *informing* the reader and improving individual self-governance in accordance with law. Coke quotes Parliament about the reason for publishing his magnum opus, the *Laws and Institutes*, in English, rather than in the customary legal French:

That the Lawes and Customes of this Realme the rather should be reasonably perceived and knowne, and better understood by the tongue used in this Realme, and by so much every man might the *better governe himselfe* without offending the Law. . . . [G]ood governance and full right is done to every man, because that the Lawes and Customes be learned and used in the Tongue of the Country: as more at large by the said Act. . . . No man ought to be wiser than the Law.⁹⁴

The highest purpose of publishing law is so that individuals may better govern themselves.

¶35 The moral essence and transformative character of law books are evidenced in several ways. Early English judges and attorneys apparently elected to read Littleton's *Tenures* each Christmas.⁹⁵ Together with the Bible, such books came to represent individual conscience. In 1648, during the Interregnum, Judge David Jenkins was accused before the House of Commons of being a Royalist. In prospect of hanging, the judge found strength in his books: "Multitudes, no doubt, will come to see the old Welsh Judge hanged. I shall go with the venerable Bracton's book hung on my left shoulder, and the Statutes at Large on my right. I will have the Bible, with a ribbon put round my neck, hanging on my breast."⁹⁶ The symbolic moral force that an English judge placed upon the Bible, Bracton, and the Statutes belies a reverence to legal bibliography alien to the modern practice of law.

¶36 The law itself at various times in history has functioned as a transformative agent, not simply as another instrument or resource for ordering the world. While this topic could be sufficiently addressed only in an article exclusively devoted to that purpose, a few examples are in order. The thirteenth-century Charter of Kurukan Fuga (forming the Empire of Mali), as kept by oral tradition, provides for the division of classes, rules for collective escheat, transfer of property, fixing dowry, and similar matters, but also for positive relations among family members, avoidance of vanity, respect for seniority, tolerance for religious beliefs,

93. Max Radin, *On Legal Scholarship*, 46 YALE L. J. 1124, 1127 (1937).

94. COKE, *supra* note 82, at vi.

95. 2 WESTMINSTER HALL OR PROFESSIONAL RELICS AND ANECDOTES OF THE BAR, BENCH, AND WOOLSACK 8 (London, John Knight & Henry Lacey 1825) (describing Roger North as the model law student); *see also* GILBERT J. CLARK, 2 LIFE SKETCHES OF EMINENT LAWYERS: AMERICAN, ENGLISH, AND CANADIAN 101 (Kansas City, Lawyer' International Co. 1895); HICKS, *supra* note 84, at 95.

96. WILLIAM RALPH DOUTHWAITE, GRAY'S INN: ITS HISTORY & ASSOCIATIONS 213 (London, Reeves & Turner 1886).

protection of foreigners, minimization of offenses against women, joking among classes, and description of ideal leadership.⁹⁷ In the charter, there is little of the division between legal and normative standards that modern legal practitioners and theorists would recognize. This ancient African law functioned in a way that transformed individuals by encouraging tolerance, respect, leadership, diversity, virtue, and even humor.

¶37 Also drawing from Africa, the Egyptian Demotic Code of Hermopolis West (dating from about 730 to 15 B.C. in the Twenty-Fourth Dynasty) is in the same tradition as both Egyptian wisdom literature and the narrative classic, the "Tale of the Eloquent Peasant."⁹⁸ In Europe, the ancient Celts lacked a clear separation between legal maxim and aphorism or gnomonic literature,⁹⁹ intimating that a common tradition functioned both to resolve disputes and to instruct character. In classical Greece, Plato's *Laws* suggest that "solemn custom often prevails over that of statute."¹⁰⁰ Indeed, "custom as promulgated orally in the medium of Homer's *Iliad* is an interweaving of both private and public codes of conduct."¹⁰¹ Thus, Homer's classic works may be as apt a source for law as any statute, and probably much more transformative in effect.

¶38 A quick survey of ancient Anglo-Saxon legal traditions suggests that law functioned merely as an efficient mechanism for administering punishments and avoiding violence,¹⁰² much as Holmes, Jr. had noted.¹⁰³ However, the curious title of the fourteenth-century code of customary law, known as the *Sachsenspiegel* (translated "Saxon Mirror"), suggests the need for much deeper understanding.

The mirror genre examines the metaphysical and intellectual dimensions of subjects such as virtue, law, and rulership. Such mirrors, written in Latin, informed and instructed the next generation. Eike's lawbook [*Der Sachsenspiegel*] fits this tradition, but, significantly, it also marks the first such instructional prose text to appear in the vernacular. Eike borrowed

97. See Mangoné Niang, The Kukukan Fuga Charter: An Example of an Endogenous Governance Mechanism for Conflict Prevention 6–8 (2006) (working document prepared for Sahel and West Africa Club/OECD, Inter-generational Forum on Endogenous Governance in West Africa, Workshop No. 2, June 26–28, 2006), available at <http://www.oecd.org/dataoecd/60/55/37341473.pdf> (articles 1–4 (social classes), 7 (tolerance among relations), 14 (offense of women), 22 (vanity), 24 (treatment of foreigners), 29 (dowry), 32 (acquiring property), 33 (escheat), and 43 (joking)); see also Fatou K. Camara, Democracy in a Plural Society: The Charter of Kurukan Fuga (Empire of Mali-1235) (slides of presentation at Salzburg Seminar, Session 435: The Rule of Law: Reconciling Religion and Culture in a Constitutional Framework, Oct. 9, 2006) (copy on file with author) (slides 8 (qualities of leadership) and 9 (religious tolerance)).

98. See Callister, *supra* note 78, at 293–94.

99. *Id.* at 319–20.

100. ERIC A. HAVELOCK, PREFACE TO PLATO 63 (1963).

101. Callister, *supra* note 78, at 279 (citing HAVELOCK, *supra* note 100, at 76).

102. See generally THE LAWS OF THE EARLIEST ENGLISH KINGS (F.L. Attenborough ed. and trans., 1922); LAWS OF THE SALIAN AND RIPUARIAN FRANKS (Theodore John Rivers trans., 1986). Similar comparisons can be made with other tribes of northern Europe. See THE OLD WEST FRISIAN *SKELTANA RIUCHT* (Sydney Fairbanks trans., 1939); LAWS OF EARLY ICELAND: *GRÁGÁS*, THE CODEX REGIUS OF GRÁGÁS, WITH MATERIAL FROM OTHER MANUSCRIPTS (Andrew Dennis et al. trans., 1980).

103. See *supra* note 60 and accompanying text.

the concept from the well-known twelfth-century mirror, Honorius Augustodunensis's *Speculum ecclesiae*, in which the Bride of Christ looks in a mirror to find those faults in herself that might be objectionable to Christ.¹⁰⁴

In other words, the Saxon law, despite the plethora of rules and penalties permitting resolution of disputes is fundamentally meant as text for the *populace*, in the vernacular, so that they might better measure themselves. It is law that is *informative* in nature.

¶39 Thus, it is possible to think about law and legal information as something other than resources for efficient exploitation. Not so long ago, even the modern study of law carried transformative impact. Law books were even worthy of perusal during one's leisure time, to be read out loud while sipping drinks with friends after working hours. Legal texts were the kind of reading one recommended to a friend or a close sibling, with the expectation that the literary adventure, although difficult, would exalt one's thinking and character. Legal education was a lifelong quest—the kind of journey that produced giants worthy of drafting constitutions and governing nations. It is indeed possible to think differently about law and legal institutions.

Prologue to Future Law Librarianship— Dealing with Obsolescence

¶40 As the opening quotation suggests,¹⁰⁵ the emergence of information technologies has threatened modern librarianship with obsolescence, or at least the perception of obsolescence. Because of law's traditional dependence on highly structured repositories of legal information, the threat applies as well to law and legal thinking. Law can be thought of as a resource to be harnessed, exploited, and ultimately rendered obsolete. "[N]ever send to know for whom the bell tolls, it tolls for thee."¹⁰⁶ The fates of libraries and law are intertwined, predicated on a worldview that reduces their status, along with everything else, to being mere resources, suitable for exploitation. This outcome is not foreordained, however. The fundamental aim of every law library ought to be to remind its patrons and constituents to dare to think otherwise—to see the law in its true, transformative essence. If law librarians do not play this important role, the battle may be lost entirely.

¶41 In fall 2004, I participated in the Salzburg Seminar, Libraries in the Twenty-First Century. A product of the conference was a statement titled "Vision of the Communal Role of Libraries." It emphasizes the role of libraries as cultural institutions.

104. *Introduction*, in *THE SAXON MIRROR: A SACHSENSPIEGEL OF THE FOURTEENTH CENTURY* 7–8 (Maria Dobozy trans., 1999).

105. *See supra* note 1 and accompanying text.

106. John Donne, *Devotions XVII*, in *JOHN DONNE: SELECTED POETRY AND PROSE* 165, 166 (T.W. Craik & R.J. Craik eds., 1986).

The library is a place where knowledge and information freely dwell to define, empower, preserve, challenge, connect, entertain, and transform individuals, cultures, and communities. The dwelling place, whether physical or virtual, is the product of collective reflection, aspiration, commitment, expertise and organization. It is both a byproduct of civil communities and a catalyst for cultural progress, inspiration, expression and exchange. Its absence in this new century would not only deprive many individuals of important resources, but also, more significantly, such loss would deny humanity an essential portion of its shared identity and entitled liberties. The library can never be fully replaced by information technologies. For the essence of its communal role is not the technological mastery over knowledge and information, but rather the provision of sanctuary for human thought and expression in any medium.¹⁰⁷

The statement is intended to counter perceptions of libraries as obsolete resources and emphasizes the role of libraries as cultural institutions. Of particular importance is the library's role in defining and enabling communities and in serving as a transformative institution and sanctuary for human thought and character. Despite their unique features, the same statement applies equally well to law libraries.

¶42 In conclusion, let me suggest that the legal academy and librarians can think about law libraries in ways that will avoid reducing the library to a mere set of technologies or resources, in Heidegger's sense, and will facilitate recognition of the library's larger role as a cultural and transformative institution:

¶43 *Library as Portal to the World.* Besides the pragmatic recognition that many libraries serve more virtual visitors than physical patrons, the library must serve as a window to a wider world, allowing patrons access to unfamiliar places and ideas.

¶44 *Library as Social Knowledge Network.* An organization's principle value is not its physical assets, but what the organization "knows"—including both the information it accesses and stores and the collective knowledge, wisdom, and social relationships of the organization's members (in this case the knowledge, skill, and relationships of the librarians).

¶45 *Library as Transforming User Behavior and Character.* The transformative impact of a library on its users and constituents is a prime justification for its continued existence. Not only should improving research skills and information literacy drive much of a library's effort, but it must also emphasize its impact on the overall character and education of its users. Consequently, it will never do for law libraries simply to "train" students in legal research skills.¹⁰⁸

¶46 *Library as Transformative and Communal Place.* As addressed in the Salzburg statement, the law library provides sanctuary for human thought and expression and serves an important role in defining the respective cultures of the

107. Vision of the Communal Role of Libraries (endorsed Mar. 31, 2005, by the Faculty, Fellows, and Observers of the Salzburg Seminar, Libraries in the 21st Century), <http://www1.law.umkc.edu/faculty/callister/Session422/statement.pdf>.

108. For extensive discussion on the theme of training versus education in the context of legal research instruction, see generally Callister, *supra* note 14.

law schools and legal profession. It is a temple to which patrons may withdraw from the world, if only for a brief moment, to reorient their moral compasses, reflect on their ideals, remember who they are, and discover the entirely unexpected (including the intellectual and moral fiber at the heart of the profession).

¶47 In closing, remember the noble character of libraries and the transformative power of law. These twin, glorious institutions represent far more than resources for human consumption, subjugation, and exploitation. It is not simply the futures of libraries and legal professions that are at stake, but the underpinnings of civilization and the continuing tenure of the rule of law.