Disclosive breakdown at common law

> "when something ready-to-hand is found missing, though its everyday presence has been so obvious that we have never taken any notice of it, this makes a *break* in those referential contexts which circumspection discovers. Our circumspection comes up against emptiness . . ."[1]

> "Without errancy there would be no connection from destiny to destiny: there would be no history."[2]

Lonergan maintained that for the phenomenon of system "no less than stability, the possibility of development must be considered. Unfortunately, these two can conflict. Schemes with high probabilities of survival tend to imprison materials in their own routines. They provide a highly stable basis for later schemes, but they also tend to prevent later schemes from emerging."[3]

We can see this systemic tension also in Heidegger's "fabulous reading of Anaximander." Caputo glosses that reading in these words:

> "As something granted and given, as a partial sending of presence, no epoch has more than transient authority, no epoch sets the rule for another. The only rule the epochs recognize is the rule of justice, of *dikē*, according to Heidegger's fabulous reading of Anaximander, where *dikē* means precisely to let moments of presence while away. Injustice, *adikia*, results from the stiff-necked persistence of presence which refuses to go under, to give way to another, to give its place to another. *A-dikia* is the refusal to make space for another. And that is what happens when the authority of an epoch asserts itself."[4]

Down to cases then for an example from the history of the common law. "How much law can there be," Milsom wondered, "when a law-suit is settled by testing a comprehensive oath affirming the justice of the one cause or the other, however rational or irrational the test?"[5] His own response was a blunt 'None.' "A blank result settles the dispute but can make no law."[6] At

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[1] Martin Heidegger, *Being and Time* (tr. John Macquarrie and Edward Robinson 1962) 105; *Sein und Zeit* (Niemeyer Verlag) 75: *Imgleichen ist das Fehlen eines Zuhandenen, dessen alltägliches Zugegensein so selbstverständlich war, daß wir von ihm gar nicht erst Notiz nahmen, ein* ***Bruch*** *der in der Umsicht entdeckten Verweisungszusammenhänge. Die Umsicht stößt ins Leere . . .*

[2] Martin Heidegger, "The Anaximander Fragment," in *Early Greek Thinking* (tr. David Farrell Krell 1975) 26; *Gesamtausgabe Band* 5: 337: *Ohne die Irre wäre kein Verhältnis von Geschick zu Geschick, wäre nicht Geschichte*. https://www.beyng.com/gaselis/?vol=5&pg=337 .

[3] *Insight: A Study of Human Understanding (1957), Collected Works of Bernard Lonergan, Volume 3* (ed. F. E. Crowe and R. M. Doran 1992) 146.

[4] John D. Caputo, "Demythologizing Heidegger: 'Alētheia' and the History of Being," 41 *The Review of Metaphysics* 519, 539 (1988).

[5] S. F. C. Milsom, "Law and Fact in Legal Development," 17 *U. Toronto L. J.* 1, 2 (1967).

[6] S. F. C. Milsom, *Historical Foundations of the Common Law* (2d ed. 1981) 4.

early common law the robust institution of trials imprisoned materials – the facts of the controversy – within its routines of proof. The institution thereby stultified its own development. Only after these materials were freed up for use could the old way develop into a different system. Before 1215 the proto-common law could get no further in developing principles and rules for deciding suits because the mode of proof blocked its advance.[7] "[E]arly lawsuits settle disputes without raising questions of substantive law and . . . progress depends upon procedural changes which allow such questions to emerge."[8]

How can a mode of proof imprison facts? "Now when in our own day," says Maitland, "we speak of proof we think of an attempt made by each litigant to convince the judge, or the jurors, of the truth of the facts that he has alleged; he who is successful in this competition has proved his case." Of course. How could it be otherwise? Well, "in old times proof was not an attempt to convince the judges; it was an appeal to the supernatural." A litigant's compurgators, 'oath-helpers,' "have not come there to convince the court, they have not come to be examined and cross-examined like modern witnesses, they have come to bring upon themselves the wrath of God if what they say be not true. . . . An ordeal is still more obviously an appeal to the supernatural; the judgment of God is given; the burning iron spares the innocent, the water rejects the guilty." Plaintiff claims that defendant did *X*, defendant denies it; "the wit of man is at fault in the presence of a flat contradiction; God will show the truth."[9]

This "most ancient pattern of law-suit: the claim, the blank denial, the test of rightness"[10] is too smooth; it exposes too little texture for lawyers to catch hold of. If the "core business" of the

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[7] **Not** talking here about that other thing in 1215, what Cromwell in a fit of *Trumpismo* called 'Magna Farta.' "George Cony, a London merchant, had once been a friend of Oliver Cromwell. But when the Lord Protector slapped a tax on silk imports without the consent of Parliament, Mr Cony protested that this was the sort of arbitrary behaviour for which Cromwell had lambasted the late king, and demanded that the unjust tax be repaid to him. Cromwell first tried to browbeat Cony into submission, then threw him in prison. Cony's lawyer, the eminent Sir John Maynard, demanded that he be set free, and the judges in the case were minded to release him, invoking the provisions of Magna Carta against imprisonment without trial. The Great Oliver then committed Maynard to the Tower, summoned the judges and told them that 'their Magna Farta should not control his actions which he knew were for the safety of the Commonwealth. He asked them who made them judges; whether they had any authority to sit there but what he gave them?' Nor did Cromwell think any better of the Petition of Right, the reprise of Magna Carta designed by Sir Edward Coke to recall Charles I to his constitutional duty: according to Coke's grandson Roger, he called it 'the Petition of Shite'." Ferdinand Mount, "Back to Runnymede," 37 *London Review of Books* No. 8, 15-18 at 15 (23 April 2015).

[8] S. F. C. Milsom*, A Natural History of the Common Law* (2003) 2.

[9] F. W. Maitland, *The Forms of Action at Common Law* (1909) 12-13; http://legacy.fordham.edu/halsall/basis/maitland-formsofaction.asp . There is considerable evidence that in practice many mortal thumbs pressed, to the proband's relief, on the divine scales. "[T]he majority of people who underwent the ordeal passed it and, by doing so, saved their lives . . . It can be shown that the ordeals themselves were engineered to ensure a high rate of success." Margaret H. Kerr, Richard D. Forsyth, Michael J. Plyley, "Cold Water and Hot Iron: Trial by Ordeal in England," 22 *The Journal of Interdisciplinary History* 573, 580 (1992).

[10] "Law and Fact in Legal Development" 17-18.

lawyer is "the analysis of situations . . . the consideration of many facts at the same time,"[11] then lawyers need fact-situations to analyze. But as yet procedure gave no access to facts, hence no questions of law:

> "You must not beat your neighbour, must pay your debts and so on, because there are claims for such things. But there is nothing beyond the claims except customs about procedure and, most important, about proof. Proof was not a matter of establishing the facts so that rules could be applied. The claim is made and denied in equally formal terms, and the unanalyzed dispute is put to supernatural decision by ordeal or the like. A blank result settles the dispute but can make no law. What if the beating was accidental or the debt forgiven? The questions cannot be asked as legal questions until the supernatural is replaced by a rational deciding mechanism."[12]

And so it went until 1215 when the Fourth Lateran Council decreed by its eighteenth canon that "Neither shall [any cleric] in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing."[13] This decree ended the use of the unilateral ordeal in England. "The upset caused by the Church's decision can be seen as reenactment in the legal arena of the Fall of Man."[14]

"In the field of what we should call serious crime [the Council's decree] brought the legal process to an abrupt stop, and the lay power had to think of something else to do with the accused persons piling up in its prisons."[15] The royal justiciars set out on their next eyre in the winter of 1218. The loss of the ordeal – "the ancient comfortable reliance on God to test an oath sworn by the defendant"[16]– triggered deep anxiety about how to do justice without it; anxiety which shows through in the King's message to his judges en route: "When you started on your eyre it was as yet undetermined what should be done with persons accused of crime, the Church having forbidden the ordeal. For the present we must rely very much on your discretion to act wisely according to the special circumstances of each case."[17]

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[11] *A Natural History* xxi.

[12] *Historical Foundations* 4-5. What if the beating was therapy? By 1348, when Chaucer was a boy, a defendant could, instead of a blank 'Not guilty,' enter a plea of confession and avoidance. "An epileptic fit was understood to be possession by devils, which could be driven out by beating the sufferer. The sufferer sues, and the defendant fears what a jury will do if he pleads the usual Not Guilty. It was after all he who had got all that blood on the floor. So he confesses the fact of the battery and seeks to avoid liability by expressly making his justification of (in our terms) proper medical treatment." *A Natural History* 11. The scant report is at YB 22 *Liber Assisarum* plea 56 folio 98 (1348); translation here: http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11805 .

[13] Canons of the Fourth Lateran Council here: http://www.fordham.edu/halsall/basis/lateran4.asp .

[14] *A Natural History* 7.

[15] *Ibid*.

[16] *Ibid.*

[17] J. B. Thayer, "The Jury and its Development I," 5 *Harv. L. Rev.* 249, 265 fn. 3 (1892).

The loss of the ordeal "must have been an upset beyond modern imagination," says Milsom. "Telling good from evil, deciding between Guilty and Not Guilty, brought questions even more painful than 'Was this the man that did it?' Was he guilty if yes he did it, but by accident or mistake or under duress or out of necessity or when sleepwalking or drunk or mad? A developed system of law is one in which the answers to such questions are written out in books from which the judge can, as it were, read extracts to the jury. But there was no book of answers in 1215 or for centuries to come: the questions had yet to be asked."[18]

Opening up the possibility of considering the circumstances of each case, of taking account of situations, of finding and analyzing facts, of formulating rules to make systematic sense of the facts, was how this Fall proved fortunately disclosive for the development of the common law. "Substantive law is the product of thinking about facts. What takes a legal system beyond the mere classification of claims is the adoption of a mode of trial which allows the facts to come out. . . . So long as there was only wager of law, there was nobody but God to whom a bailee could explain about the accidental loss."[19] Before 1215 "There was only one justice." "Justice was as single as truth, and conscience was man's knowledge of it." "How could divine justice manifest itself? There was no difficulty so long as all law-suits were settled by making a party swear to the justice of his cause, and submitting that oath to divine test. The true start of equity as well as of the common law was the replacement of the divine test by a fallible human result."[20] "We can see the introduction of rational trial as the opening of a door which led out into a modern world"– "the transfer of decisions from God to man."[21]

It can be seen now – via Milsom's interpretation – that the loss of the ordeal marks the Inflection point as one epoch of the common law wends into another. The relaxation of the supernatural's mortmain grip and the consequent transfer of decisions from God to man resulted in a – Wolin's phrase – "displacement of the notational principle": "When a unifying assumption is displaced, the system of ideas is thrown out of balance; subordinate ideas become prominent [Heidegger's *Vor-treten*, *Her-kunft*]; primary ideas recede into secondary importance [H.'s *Schwund*; *aus dem Erscheinen sich zurückziehen*]. This is because a political theory consists of a set of concepts – such as order, peace, justice, law, etc. – bound together, as we have said, by a kind of notational principle that assigns accents and modulations. Any displacement or significant alteration of the notational principle or any exaggerated emphasis on one or a few concepts results in a different kind of theory."[22] The common law's unifying

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[18] *A Natural History* 7-8.
[19] S. F. C. Milsom, Introduction to Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* ([2nd ed. 1898] reissue 1968) lxvii.
[20] *Historical Foundations* 86, 89, 90.
[21] Introduction to Pollock and Maitland lxviii; *Historical Foundations* 5.
[22] Sheldon Wolin, *Politics and Vision* (exp. ed. 2005) 24.

assumption of a divine order making itself felt in the institutions of decision-making began to be displaced in 1215.

Nietzsche's example of a protean system is the institution of punishment, in which he distinguished two aspects, "its relative *permanence*, a traditional usage, a fixed form of action, a 'drama', a certain strict sequence of procedures;" the other "its *fluidity* [***Flüssige***], its meaning [*Sinn*], purpose and expectation." With regard to this second element of punishment, its fluidity,

> "its 'meaning', the concept 'punishment' presents, at a very late stage of culture (for example, in Europe today), not just one meaning but a whole synthesis of 'meanings' [*Sinnen*]: the history of punishment up to now in general, the history of its use for a variety of purposes, finally crystallizes in a kind of unity which is difficult to dissolve back into its elements, difficult to analyse, and, this has to be stressed, is absolutely *undefinable. . . .* At an earlier stage, however, the synthesis of 'meanings' appeared much easier to undo and shift [*verschiebbarer*]; we can still make out how, in every single case, the elements of the synthesis change valence and alter the order in which they occur [*ihre Werthigkeit verändern und sich demgemäss umordnen*] so that now this, then that element stands out [*hervortritt*] and dominates [*dominirt*], to the detriment of the others, indeed, in some circumstances one element (for example, the purpose of deterrence) seems to overcome [*aufzuheben*] all the rest."[23]

In his practice of genealogy Nietzsche saw history as errancy—a wandering ratio of inertial to viscous forces; so that the "whole history [*die ganze Geschichte*] of a 'thing', an organ, a tradition" can be

> "a continuous chain of signs, continually revealing new interpretations and adaptations [*neuen Interpretationen und Zurechtmachungen*], the causes of which need not be connected even amongst themselves, but rather sometimes just follow and replace one another at random. The 'development' [*„Entwicklung"*] of a thing, a tradition, an organ is therefore certainly not its *progressus* towards a goal, taking the shortest route with least expenditure of energy and cost, – instead it is a succession of more or less profound, more or less mutually independent processes of subjugation [*Überwältigungsprozessen*] exacted on the thing [e.g. the U.S. Constitution], added to this the resistances encountered every time, the attempted transformations for the purpose of defence and reaction, and the results, too, of successful countermeasures. The form is fluid [*flüssig*], the 'meaning' [*Sinn*] even more so."[24]

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[23] Friedrich Nietzsche, *On the Genealogy of Morality* (tr. Carol Diethe 1994) Essay II, § 13, pp. 56-57.
[24] *Id.* Essay II, § 12, p 55.

Foucault found this same errancy of *eris* in the seventeenth century's discourse of 'political historicism':

> "No matter how far back it goes, historical knowledge never finds nature, right, order, or peace. However far back it goes historical knowledge discovers only an unending war, or in other words, forces that relate to one another and come into conflict with one another, and the events in which relations of force are decided, but always in a provisional way. . . . Once we begin to talk about power relations, we are not talking about right, and we are not talking about sovereignty; we are talking about domination, about an infinitely dense and multiple domination that never comes to an end."[25]

In light of this conception the common law's transfer of decisions from God to man was a case of, so to speak, disseisin, and the consequent strife of ejectment inevitable. The struggle is often characterized in martial terms. Lieutenant Governor Dan Patrick, for example, has said

> "There is a war going on right now in this country for the heart and soul of who we are and who we will be. It's a battle, but we will be victorious, because with God, who can be against us? We know how it all ends. We [Texans] can be the leader in education, we can be the leader in creating jobs, we can be the leader in all that stuff, but we really need to be the leader for Christ. That's the answer, that's the hope that this state and country must look to. We need you as an army behind us, to stand for life, to stand for marriage, to stand just for the Constitution."[26]

United States Supreme Court Justice Amy Coney Barrett has made explicit her position that there is a divine order which manifests itself in human decision-making. In 2006 then-Professor Barrett urged a class of graduates to "fulfill the promise of being a different kind of lawyer." A legal career, she instructed, is "but a means to an end . . . building the kingdom of God;" for a person's "fundamental purpose in life is to know, love, and serve God." Accordingly she advised the class,

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[25] Michel Foucault, *"Society Must be Defended": Lectures at the Collège de France 1975-1976* (tr. David Macey 2003) 172-173, 111. Strife: that ole-time religion. *See* Hesiod, *Works and Days* 11-26 for good Eris and bad Eris. "Strife or war is Heraclitus' metaphor for the dominance of change in the world." G. S. Kirk and J. E. Raven, *The Presocratic Philosophers* (1957) 195; glossing fr. 53: πόλεμος πάντων μὲν πατήρ ἐστι πάντων δὲ βασιλεύς κτλ; and fr. 80: εἰδέναι χρὴ τὸν πόλεμον ἐόντα ξυνόν, καὶ δίκην ἔριν, καὶ γινόμενα πάντα κατ' ἔριν καὶ χρεών. Heraclitus "thinks strife [*Streit*] as the essence of being [*das Wesen des Seins*]." Martin Heidegger, *Heraclitus: The Inception of Occidental Thinking* and *Logic: Heraclitus's Doctrine of the Logos* (tr. Julia Goesser Assaiante and S. Montgomery Ewegen 2018) 15; GA 55: 18: https://www.beyng.com/gaapp/recordband/54 .

[26] Combined from quotations in *Austin American-Statesman* August 1, 2013 and February 25, 2015. After the Uvalde massacre Patrick said, "In these other shootings — Sutherland Springs, El Paso, Odessa, Santa Fe — it's God that brings a community together. It's God that heals a community. If we don't turn back as a nation to understanding what we were founded upon and what we were taught by our parents and what we believe in, then these situations will only get worse." As quoted in *The Texas Tribune* May 29, 2022.

> "First, before you take any job . . . pray about it. . . It's the rare person who consults God before making a choice. It's the rare person who brings his or her options to God and says, 'In which situation can I best serve You?' Be the rare person. Pray about your career choices before you make them. If you do, I think you will be successful at tempering the influence of ambition as the overriding force in your decisionmaking."[27]

If a lawyer ought to consult God for advice in career choices then *a fortiori* in deciding cases of constitutional magnitude a judge should inquire of that same authority (as *dominus curiae*) 'Which result best serves You?' I.e., contributes best to building the kingdom of God. In the limit the return of decision-making to the supernatural will be accomplished; 'how it all ends.'

'Building the kingdom of God' cannot mean **creating** something *ex nihilo*; the work of creation is already done. It must mean the task of reassembling, repurposing, reconfiguring elements already available; to establish the kingdom from materials at hand. This project will entail more or less profound subjugation of some elements of the constitutional system and more or less blue-sky exaltation of others.

Any such politico-juridical project of building the kingdom of God – of transferring decisions from man back to God – will therefore exemplify both Nietzsche's *Haupt-Gesichtspunkt der historischen Methodik* and Heidegger's interpretation of Anaximander. For Heidegger teaches – in the 1932 lecture course – that Anaximander "understands beings not at all primarily as development [*Entwicklung*], as causal generation and degeneration, but as stepping forth and receding [*Her-kunft und Schwund*], as we said: appearance."

> "For the Greeks, what is decisive is not the causal sequence, the coming to be out of and through one another, but purely and simply the *stepping-forth* [*Vor-treten*], the looming up [*Auftreten*]. Our term for it in short will be *appearance* [*Erscheinen*]. . . Appearance can be understood only very broadly and originally and it oscillates [*schwingt*] within the meaning of γένεσις—thus not coming to be, but stepping forth. . . . γένεσις does not mean 'coming to be,' but arrival [*Ankommen*], appearance, and φθορά does not mean 'passing away,' but disappearance [*Verschwinden*], withdrawal from appearance [*aus dem Erscheinen sich zurückziehen*]."[28]

In the 1946 essay Heidegger adds that "γένεσις and φθορά are to be thought from φύσις, and within it, as ways of luminous rising and decline [*als Weisen des sich lichtenden Auf- und*

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[27] "Associate Professor Amy Coney Barrett, Diploma Ceremony Address" (2006); https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1013&context=commencement_programs .

[28] Martin Heidegger, *The Beginning of Western Philosophy: Interpretation of Anaximander and Parmenides* (tr. Richard Rojcewicz 2015) 13-14, 6; GA 35: 17, 6-7: https://www.beyng.com/gaapp/recordband/35 .

Untergehens]."[29] 'Γένεσις and φθορά,' in other words, is a merism for φύσις; the whole of 'emergence and submergence.'[30] So Heidegger describes "everything present, everything that presences by lingering awhile" using this same ancient trope, as

> "gods and men, temples and cities, sea and land, eagle and snake, tree and shrub, wind and light, stone and sand, day and night."[31]

Building the kingdom of God with politico-juridical materials exalts one half of a fundamental merism and subjugates the other. And that *Grundmerismus* is not far to seek; in the present context it is 'ontotheology and finitude.' The important question, as Williams put it, "or, at any rate, another important question—is whether or not a given writer or philosophy believes that, beyond some things that human beings have themselves shaped, there is anything at all that is intrinsically shaped to human interests, in particular to human beings' ethical interests."[32]

The first term of the fundamental merism answers 'Yes.' In the words of former Attorney General of the United States William Barr,

> "Traditional Judeo-Christian doctrine maintains that there is a transcendent moral order with objective standards of right and wrong that exists independent of man's will. This transcendent order flows from God's eternal law—the divine will by which the whole of creation is ordered. This eternal law is impressed upon and reflected in nature and all created things. This is the natural law. Man can know God's law, not only through revelation, but also through the natural law, which he can discern by reason and experience."[33]

Abrahamic religion is of course only one of several varieties of ontotheology. Over against all these is the other term, the 'No' of a "growing understanding that the world has no

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[29] "The Anaximander Fragment" 30; GA 5: 341-342.

[30] For the pervasiveness of merisms in Indo-European thought *see* Calvert Watkins, *How to Kill a Dragon: Aspects of Indo-European Poetics* (1995) 9 and M. L. West, *Indo-European Poetry and Myth* (2007) 99-100. For the persistence of merisms into Greek philosophy *see* G. E. R. Lloyd, *Polarity and Analogy: Two types of argumentation in early Greek thought* (1966). *Cf.* Heidegger's "fundamental words for early thinking" Φύσις and Λόγος, Μοῖρα and Ἔρις , Ἀλήθεια and Ἕν. "The Anaximander Fragment" 39; GA 5: 352. Krašovec distinguishes merism from antithesis; *see* Jože Krašovec, "Merism – Polar Expression in Biblical Hebrew," 64 *Biblica* 231, 232 (1983). I use 'merism' broadly to mean any contrastive pair, polar expression, or antithesis ("apparently irreconcilable and oppositional").

[31] "Anaximander Fragment" 40; GA 5: 353. *Cf. Der Baum und das Gras, der Adler und der Stier, die Schlange und die Grille . . . Dieses Herauskommen und Aufgehen selbst und im Ganzen nannten die Griechen frühzeitig die* Φύσις. *Der Ursprung des Kunstwerkes*, GA 5: 28. And: *die* φύσις *nennt das, worinnen zum voraus Erde und Himmel, Meer und Gebirg, Baum und Tier, Mensch und Gott aufgehen und als Aufgehende dergestalt sich zeigen, so daß sie im Hinblick darauf als ›Seiendes‹ nennbar sind. Heraklit: Der Anfang des abendländischen Denkens,* GA 55: 88.

[32] Bernard Williams, *Shame and Necessity* (1993) 163.

[33] William P. Barr, "Legal Issues in a New Political Order," 36 *The Catholic Lawyer* 1, 3 (1995); https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=2355&context=tcl .

metaphysical structure whatsoever."[34] As in Sheehan's gloss of Heidegger, "radical human finitude—with no need for a supervenient God or some preternatural 'Being'—is the ultimate source of meaning-at-all and thus of culture in all its historical configurations."[35]

The metaphysical wing sometimes uses 'the autonomous individual' as synecdoche for the opposite wing. So AG Barr also wrote in 1995,

> "It is undeniable that, since the mid-1960s, there has been a steady and mounting assault on traditional values. We have lived through thirty years of permissiveness, the sexual revolution, and the drug culture. Moral tradition has given way to moral relativism. There are no objective standards of right and wrong. Each individual has his or her own tastes and we simply cannot say whether or not those tastes are good or bad. Everyone writes their own rule book. So, we cannot have a moral consensus or moral culture in society. We have only the autonomous individual."[36]

Just this year Professor Vermeule has written, "For liberal constitutional theory, emphatically including both its right wing (originalism) and its left wing (progressivism), rights are central to the project of ever-increasing autonomy." Whereas in Vermeule's view the notion of autonomy expressed in *Planned Parenthood v. Casey* that each individual may 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life' "should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after."[37]

We might take Heidegger's two extreme possibilities of the positive mode of *Fürsorge* as reflecting this ground-merism.[38] The one extreme of solicitude 'takes away one's care' through "the ancient comfortable reliance on God;" in the assurance that "God will show the truth;" in the mantra that "to know, love, and serve God" is one's fundamental purpose; and by the *in terrorem* curse that to define one's own concept of existence, etc. is abominable, 'ab-human.' Whereas the other extreme of *Fürsorge* frees up the individual's care, her radical finitude, that which makes her, in Heidegger's thinking, pre-eminently human.

But the contrast in this characterization ignores ontotheology's claim that its kind of servitude is indeed liberating. As Frankfurt observes, "The suggestion that a person may be in some sense liberated through acceding to a power which is not subject to his immediate voluntary control is among the most ancient and persistent themes of our moral and religious tradition. It must

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[34] Bernard Williams, "Introduction to *The Gay Science*" in *The Sense of the Past: Essays in the History of Philosophy* (ed. Myles Burnyeat 2006) 316.
[35] Thomas Sheehan, *Making Sense of Heidegger: A Paradigm Shift* (2015) 292.
[36] "Legal Issues in a New Political Order" 4.
[37] Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (2022) 164; 41-42.
[38] Extremes first articulated in Martin Heidegger, *Logic: The Question of Truth* (tr. Thomas Sheehan 2010) 187; GA 21: 223; in *Sein und Zeit* at 122.

surely reflect some quite fundamental structural feature of our lives."[39] Perhaps then we can view the two terms as – to borrow from the physicists – 'conjugate' powers. For Heidegger teaches, in keeping with this very tradition, that acceding to our finitude – "front-running death," as he puts it – "allows death to grow powerful" within us, *in sich mächtig werden läßt.* In doing so, human being "as free for death," i.e., acceding to its power, "understands itself in terms of the '*superior power*' [***Übermacht***] of its own finite freedom." Which accession/understanding liberates human existence "to take over [*übernehmen*] the *powerlessness* [***Ohnmacht***] of being abandoned to itself."[40]

All of which leaves us with the classic Heideggerian question: the *Grundmerismus* discloses a fundamental difference—in what dimension is that difference embedded? What subtends the distinction between ontotheology and finitude, that from which the two emerge in their difference? "[W]e wish merely to attain the field or *dimension* in which to make this distinction."[41] In Frankfurt's terms, what is the fundamental structural feature of our lives enabling this difference? Heidegger claims that "every time we bump up against the apparently irreconcilable and oppositional the essential is stirred."[42] And that is his answer: 'the essential' – our appropriatedness to sense-making – enables this difference and our experience of it.[43]

What about the dynamics of the oscillation; whence *Streit, eris*? Conjecture: If individual autonomy as behavioral polypheny may serve as proxy for the broader phenomenon of variation, then the ground-merism can be taken as natural selection's basic conflict of forces manifesting itself in human existence. "There will be a constant selection pressure for increased variation, for it is only by producing variants that organisms can successfully perpetuate themselves [in the onslaught of a changing environment[44]]. But too much variation will be

[39] Harry G. Frankfurt, *The importance of what we care about: Philosophical essays* ([1988] 1998) 89.
[40] Thomas Sheehan and Corinne Painter, "Choosing One's Fate: A Re-Reading of *Sein und Zeit* §74," 29 *Research in Phenomenology* 63, 66 (1999); https://drive.google.com/file/d/0B2zuyt5_UZUqUm9kX0NIM0RyQWM/view?resourcekey=0-0NVN8Bq1B0E-BQFR3JoGfg .
[41] Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (tr. William McNeill and Nicholas Walker) 356; GA 29/30: 518: https://www.beyng.com/gaapp/recordband/30 .
[42] *Heraclitus* 27; GA 55: 33. *wo wir auf das anscheinend ganz Unvereinbare und in sich Gegenwendige stoßen, an das Wesenhafte gerührt ist.*
[43] *Cf.* "[W]hether Being *and* time name a matter at stake from which both being and time first result. . . . Being *and* time, time *and* Being, name the relation of both issues, the matter at stake which *holds* both issues toward each other and endures their relation [?; *und ihr Verhältnis aus hält Diesem Sachverhalt nachzusinnen*]. . . . What lets the two matters belong together, what brings the two into their own and, even more, maintains and holds them in their belonging together—the way the two matters stand, the matter at stake—is Appropriation [*Ereignis*]." Martin Heidegger, *On Time and Being* (tr. Joan Stambaugh 1972) 4, 19; GA 14: 8, 24: https://www.beyng.com/gaapp/recordband/15 .
[44] An environment which organisms themselves change; "a self-perpetuating fluctuation results." *See* Leigh ('Red Queen') Van Valen, "A New Evolutionary Law," 1 *Evolutionary Theory* 1 (1973): https://www.mn.uio.no/cees/english/services/van-valen/evolutionary-theory/volume-1/vol-1-no-1-pages-1-30-l-van-valen-a-new-evolutionary-law.pdf .

selected against because new, successful variants will be lost by excessive change."[45] In other words,

> "A central concern of adaptive intelligence within a path-dependent, meandering history is the relation between the exploration of new possibilities and the exploitation of old certainties. Exploration includes things captured by such terms as search, variation, risk taking, experimentation, play, flexibility, discovery, and innovation. Exploitation includes such things as refinement, choice, production, efficiency, selection, implementation, and execution."[46]

This exploitation/exploration polarity is a congener of Lonergan's 'stability and development' as well as, it seems plausible to say, Anaximander's metabolics of epochs. Heidegger puts it so:

> "winter and summer, tempest and calm, sleep and waking, youth and age, birth and death, fame and disgrace, shine and pallor, curse and blessing . . . The one gives way reciprocally [*wechselweise*] to the other, and this giving way is at once arrival and departure, i.e., appearance. *Appearance oscillates in such giving way before, and against, each other of the stepping-forth and receding.*"[47]

Oscillating appearance with its breaks and discontinuities is the quantum-kinesis of human experience. Disclosive the breaks may be, yet

> "Dignity under these conditions few
> I feel might muster steadily, and you
> Jitterbug more than you pavane, poor dears . ."[48]

DCW 06/24/2022 Compiled with an eye toward today's decision in *Dobbs v. Jackson Women's Health Organization*: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf .

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[45] John Tyler Bonner, *The Evolution of Complexity by Means of Natural Selection* (1988) 231.
[46] James G. March, *A Primer on Decision Making: How Decisions Happen* (1994) 237. But always "Beyond the dynamics of this competition itself, no one is in charge." Richard J. Herrnstein and Dražen Prelec, "Melioration: A Theory of Distributed Choice" in Herrnstein, *The Matching Law: Papers in Psychology and Economics* (ed. Howard Rachlin and David I. Laibson 1997) 292.
[47] *The Beginning of Western Philosophy* 9; GA 35: 11. *Das Erscheinen schwingt in solchem Vor-und-Gegeneinanderweichen der Her-kunft und des Schwindens.*
[48] John Berryman, *Sonnets to Chris* (no. 87).