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Articles

Heidegger and the Theory of Adjudication

Brian Leiter[†]

Recent years have witnessed a growing interest in the possible points of intersection between post-Kantian Continental philosophy and Anglo-American jurisprudence.¹ Unfortunately, much of this work has been based on misunderstandings of Continental thinkers² or of Anglo-American legal philosophy.³ This Article sets itself the modest task of investigating just one

† Assistant Professor of Law and Philosophy, The University of Texas at Austin. An earlier version of this paper was presented as an invited address to the Law & Interpretation Section of the Association of American Law Schools in New Orleans, January 8, 1995. I am grateful to Dennis Patterson, Chair of the Section, for the invitation to present this paper, and to Larry Solum for his comments on that occasion. I also benefited from questions posed by Larry Alexander, Randy Barnett, and Stephen Perry at the AALS session. Thanks also to Sheila Sokolowski for comments on an early version of the manuscript, Joshua Brysk and Saul Laureles for research assistance, Jules Coleman and Thomas Morawetz for valuable discussion of the entire manuscript, Jody Kraus for written criticisms, and Cathy Kemp, Doug Laycock, and Sandy Levinson for extremely useful comments on the penultimate draft.

This Article is an attempt to make good on the promissory note in my *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 203 n.60 (1993).

1. Similar developments have occurred in other areas of philosophy as well. See, e.g., JOHN MCDOWELL, *MIND AND WORLD* (1994) (drawing on Hegel and Gadamer in discussing basic issues in Anglo-American metaphysics and epistemology); Brian Leiter, *Nietzsche and the Morality Critics*, 107 ETHICS (forthcoming Jan. 1997) (discussing use of Nietzsche in recent Anglo-American moral philosophy).

2. See, e.g., Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1205-07 (1989). Both of these essays misinterpret Nietzsche's thought. On Frug's misunderstanding of Nietzsche, see Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 81-90 (1992) [hereinafter *Leiter, Intellectual Voyeurism*]; contrast Schlag's misguided comments on Nietzsche with Brian Leiter, *The Paradox of Fatalism and Self-Creation in Nietzsche*, in WILLING AND NOTHINGNESS: SCHOPENHAUER AS NIETZSCHE'S EDUCATOR (C. Janaway ed., forthcoming 1997). For other discussions of the problems with the way lawyers have used philosophy, see Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991); Leiter, *Intellectual Voyeurism*, *supra*, at 91-101; Alan R. Madry, *Analytic Deconstructionism? The Intellectual Voyeurism of Anthony D'Amato*, 63 FORDHAM L. REV. 1033 (1995); Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627 (1993).

3. See, e.g., J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993). Balkin writes:

Since H.L.A. Hart, jurisprudence has been grounded on the so-called "internal point of view"—the perspective of a participant in the legal system who regards its laws as norms for her behavior. In contrast, I believe that we must ground jurisprudence in a critical perspective, one that employs ideological critique to reflect on our internal experience of law. A critical perspective takes seriously the contributions of subjectivity to the nature of law; it treats the

possible point of intersection between the Continental and Anglo-American traditions: between Heidegger's account of human "being-in-the-world" as based on the exercise of noncognitive coping skills and one traditional project of Anglo-American jurisprudence, namely to provide a descriptively adequate and normatively attractive theory of adjudication. If Heidegger is right in his account of "being-in-the-world," what bearing does this have on the attempt to construct a theory of adjudication?⁴ This Article sets out my answer—one that, I hope, does justice to the integrity of both Anglo-American jurisprudence and Heidegger's thought.

Part I sets out the traditional understanding of the theory of adjudication within the Anglo-American tradition, calling particular attention to the relation between the descriptive and normative ambitions of such a theory. Part II explains Heidegger's view that all human understanding depends upon the possession of mindless coping skills that resist theoretical articulation. Part III

sociology of knowledge as a full partner in the jurisprudential enterprise. Instead of taking for granted the primacy of the internal viewpoint of participants in the legal system, a critical perspective asks how this internal experience comes about.

Id. at 110–11 (footnote omitted); *cf. id.* at 128 (criticizing Joseph Raz's use of "internal point of view").

In this passage—and, indeed, in the rest of the article—Balkin seems not to appreciate the philosophical reasons for taking "the internal point of view," which grow out of the hermeneutic tradition in the philosophy of social science. According to this tradition, the only way to understand human practices is by understanding their meaning to participants in those practices. Hart wants to understand the human institution known as "law," and because he accepts the hermeneutic point, he thinks he must understand "law" from an "internal point of view." Hart is not "taking for granted the primacy of the internal viewpoint"; he takes the internal viewpoint as primary for quite substantial reasons arising from the philosophy of social science. For a rich discussion of these issues, see Stephen R. Perry, *Interpretation and Methodology in Legal Theory, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97 (Andrei Marmor ed., 1995). It may be interesting to ask also about the factors that caused the practice to have the "meaning" it does to its participants—the question Balkin calls on us to answer—but this question is simply a non sequitur on Hart's project: To understand the meaning of a human practice is one thing, to understand its causes another. What is missing in Balkin's analysis is an *argument* either that: (a) we ought simply to change the subject; or (b) the questions of jurisprudence really collapse into questions in the "sociology of knowledge." I, myself, am not unsympathetic to such arguments, and try to say more about this in a forthcoming work on American legal realism. See BRIAN LEITER, *AMERICAN LEGAL REALISM AND NATURALIZED JURISPRUDENCE* (forthcoming); see also discussion *infra* Part IV.

Balkin does argue that the "internal" perspectives of participants in the practice may vary. See Balkin, *supra*, at 128. But he does not actually show that they *do* vary with respect to those aspects of "law" that Hart thinks need accounting for in a suitable jurisprudential theory: most importantly, the "normative" aspect of law, the sense in which a norm's being a "legal" norm affects practical reasoning. The point is a relatively simple one: If I say, "Don't go faster than 65 m.p.h. on the highway" that may give you reasons for acting (depending, for instance, on whether you think I am a good driver, knowledgeable about the roads, sensitive to your schedule, etc.). But when the Texas legislature issues the same prescription—"Don't go faster than 65 m.p.h. on the highway"—that adds certain reasons for action that were not present when I articulated the same norm. The jurisprudential question concerns what this "normativity" actually consists in; whether, for instance, this is the normativity of mere prudence, or whether the normativity of law is simply redundant on the normativity of morality. Again, for a useful discussion, see Perry, *supra*.

Balkin's article, then, is a case of some interesting ideas, derived (loosely speaking) from the Continental tradition in philosophy, which fail to make contact with the Anglo-American tradition in legal philosophy because of a fundamental misunderstanding of that tradition.

4. Note that I do *not* address the question at any length of whether Heidegger really is right. Such an undertaking is plainly beyond the scope of this Article. While I am skeptical about some of the strong forms of Heidegger's claim, I think that his ideas are interesting enough, and poorly enough understood, that they warrant a sympathetic hearing of the sort I try to give here.

suggests how Heidegger's thesis may threaten the descriptive ambitions of the theory of adjudication. Finally, Part IV concludes by considering some jurisprudential rejoinders to Heidegger, as well as both some of the limitations and possible uses of Heidegger's critique. In particular, I try to show that the Heideggerian critique does lend support to theories of judicial decisionmaking that many lawyers have found attractive in recent years: the so-called "practical reasoning" or "practical wisdom" theories.⁵ The Heideggerian critique, I will argue, provides a fruitful way of reconceiving these theories; one that vindicates their basic insight about the practical competence requisite for judging, while deflecting the most damning criticism of such theories, namely that they fail to provide concrete guidance to judges. The Heideggerian critique will illuminate both the limitations of the traditional project for a theory of adjudication, as well as what is correct in those recent "practical reasoning" theories of adjudication that are often ignored by analytic jurisprudence.

I. THEORY OF ADJUDICATION

On one prevalent understanding, a theory of adjudication aims to discharge *descriptive* and *normative* functions: It both provides an accurate description of how judges really do decide cases and, at the same time, strives to tell judges how they *ought* to decide them.⁶ Even a theory like Ronald Dworkin's honors the *descriptive* ambitions of the theory of adjudication. For though real judges are less methodical than Dworkin's ideal judge Hercules, Dworkin contends that "Hercules shows us the hidden structure of their judgments and so lays these open to study and criticism."⁷ Thus, Herculean decisionmaking purportedly *describes* actual judicial decisionmaking—if not on its surface, then with respect to its underlying logic and structure.

5. See *infra* text accompanying notes 85–106.

6. See, e.g., Michael S. Moore, *The Need for a Theory of Legal Theories Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988, 989 (1984) (reviewing ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982)) (stating that theory of adjudication tells us "how judges decide and ought to decide cases"); Steven Walt, *Some Problems of Pragmatic Jurisprudence*, 70 TEX. L. REV. 317, 324 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)) (noting that "theory of adjudication . . . accounts for how judges reach results based on a wealth of facts and how they ought to do so").

7. RONALD DWORGIN, *LAW'S EMPIRE* 265 (1986). Dworkin is, of course, a bit vague about what degree of descriptive "fit" is required before we can turn to normative considerations. It might even be thought that normative considerations are implicit at the level of fit. For example, a theory, to be descriptively adequate, need not account for those cases where judges decide based on which side offers the largest bribe. While this is plainly true for Dworkin, it may not be true for all writers interested in theories of adjudication. See, e.g., Jerome Frank, *Are Judges Human? Part Two As Through a Glass Darkly*, 80 U. PA. L. REV. 233, 240 (1931). In general, the question is this: Must the theory be descriptively adequate to the sorts of reasons judges give in their opinions for their decisions, or must it be descriptively adequate to the real grounds of decision, where those may diverge from the reasons given in opinions? One difference between Legal Realism and the mainstream of the Anglo-American tradition of jurisprudence is the answer it gives to this question.

Conceived as both a descriptive and normative account, the theory of adjudication is a strange hybrid, standing almost alone in the philosophical world. For most philosophical theories do *not* aim to discharge both descriptive and normative functions in this way—that is, they do not try to first describe a practice, and then use the description as a basis for normative guidance.⁸ For example, the theory of knowledge (at least as conceived by everyone but W.V. Quine) has no descriptive component; it aims to promulgate norms for belief formation, not to describe how we actually form beliefs.⁹ Some contemporary naturalists do contend that descriptive claims from cognitive science concerning how the human brain really processes information are at least *relevant* to the normative program of epistemology. Norms for what we ought to believe, these philosophers argue, must take into account our actual cognitive *capacities* if the normative advice offered by epistemologists is to be useful.¹⁰ But even for these philosophers, what we actually do in epistemological matters (with respect to the justification of belief) does not matter: Our current epistemological practices could be thoroughly

8. Let me be clear about what I am saying here: Philosophical theories *do* try to be descriptively adequate to our *intuition* about normative matters (for instance, how ought one to act and what ought one to believe). But to be descriptively adequate to one's intuitions about normative matters is plainly not the same as being descriptively adequate to our actual practices (for instance, how we actually act, what we actually believe, etc.).

There are, of course, branches of philosophy that are not essentially *normative* (i.e., they do not aim to describe what *ought* to be done or what *ought* to be believed). Thus, in metaethics the philosopher aims "to make sense of a practice having [certain] features," namely those that are "manifest in ordinary moral practice as it is engaged in by ordinary folk." MICHAEL SMITH, *THE MORAL PROBLEM* 5 (1994). Philosophy of science is arguably similar (though some philosophers of science, I suspect, would contest this characterization). The philosopher of science *does* try to be descriptively adequate to the actual practices of the natural sciences (indeed, it was precisely on this score that writers like Kuhn and Feyerabend got a foothold for their now famous critiques of positivist philosophy of science). Philosophers of science do *not* try to tell scientists how they *ought* to proceed; rather, they try to reconstruct (i.e., describe) the logic of scientific methodology. Philosophy of science aims only for *descriptive* adequacy, but it has no normative ambitions vis-à-vis natural science. (Historically, of course, philosophies of science constructed on the model of the natural sciences were employed *normatively* to criticize the practice of the social or "human" sciences: Such disciplines were charged with not being scientific at all if they did not conform to the logic of scientific methodology as manifest in the natural sciences.) Thus, the theory of adjudication is anomalous in its *conjoining* of descriptive and normative ambitions in one theory, and in assigning lexical priority to the descriptive claims.

9. On the Quinean conception of a naturalized epistemology, by contrast, there is no (significant) normative component: Epistemology falls into place as a chapter of psychology precisely because the primary ambition of the theory is to describe the causal connections between sensory input and cognitive output. See W.V. QUINE, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 69, 75–84 (1969). For Quine's wavering on the issue of normativity, see W.V. QUINE, *PURSUIT OF TRUTH* 19–20 (1990). Quine's purely descriptive conception of epistemology is widely (though perhaps not rightly) thought to be deficient. See, e.g., Jaegwon Kim, *What Is Naturalized Epistemology?*, reprinted in *NATURALIZING EPISTEMOLOGY* 33 (Hilary Kornblith ed., 1994); Stephen Stich, *Naturalizing Epistemology: Quine, Simon and the Prospects for Pragmatism*, in *PHILOSOPHY AND COGNITIVE SCIENCE* 1, 3–5 (Christopher Hookway & Donald Peterson eds., 1993). An analogous difficulty arises in the "naturalized" jurisprudence that I associate with Legal Realism. I take up the general problem at length in a book I am currently writing. See LEITER, *supra* note 3.

10. See, e.g., ALVIN I. GOLDMAN, *EPISTEMOLOGY AND COGNITION* (1986); Philip Kitcher, *The Naturalists Return*, 101 *PHIL. REV.* 53 (1992); Larry Laudan, *Normative Naturalism*, 57 *PHIL. SCI.* 44 (1990).

wrongheaded, and thus no theory of knowledge needs to accurately describe them.

Theories of knowledge, to repeat, are not alone in this respect. Theories of morality, for example, tell us how we ought to act, not how we do act. Indeed, such theories sometimes allow for the possibility that no one acts morally at all!¹¹ But theories of adjudication never claim that, even though no real judge in fact decides this way, this is how judges *ought* to decide.

Notice that a lexical conjoining of descriptive and normative elements in a theory necessarily constrains the normative reach of the theory. For if it is not possible for the theory to declare existing practice wholly depraved, corrupt, and misguided—precisely because the theory must *first* be descriptively adequate to existing practice—then the normative demands of the theory are, accordingly, circumscribed.

Why then would legal philosophers think theories of adjudication must be not only normatively attractive but also descriptively accurate? One likely explanation for why one might conceive these theories differently from theories of knowledge and morality is surely this: There is a *presumption* that current adjudicative practice is *roughly right*.¹² Call this view that current adjudicative practice is roughly right the “Presumption.” The Presumption explains why a theory of adjudication must have both a descriptive and prescriptive component: because a good description (of a roughly right normative practice) necessarily constrains prescription. For since the practice itself is presumed to be normatively attractive, a description of that practice must then coincide, to some degree, with whatever normative guidance the theory proffers.¹³

The Presumption tells us why a theory of adjudication must have both descriptive and normative elements. But what precise relation do the descriptive and normative ambitions of the theory bear to each other? John Mackie, commenting on Dworkin’s theory, has given apt expression to what is surely the most common understanding:

[Dworkin’s] theory of [adjudication] combines descriptive with prescriptive elements. On the one hand, Professor Dworkin is claiming that it gives the best theoretical understanding of legal procedures and legal reasoning actually at work in such systems as those of England and the United States. But on the other, he wants it to be more

11. See, e.g., IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 74–75 (H.J. Paton trans., Harper & Row 1964); H.J. Paton, *Analysis of the Argument*, in KANT, *supra*, at 25–26

12. An alternative explanation, suggested to me by Doug Laycock, is the tendency for Anglo-American lawyers to keep their normative proposals not too far removed from existing practice so that they stand a greater chance of changing that practice.

13. It is the Presumption, then, that contributes to the essentially conservative character of most work in analytic jurisprudence.

explicitly accepted and more consciously followed. He wants it to become a truer description than it yet is¹⁴

I shall call Mackie's gloss on the relation between descriptive and normative elements the "Standard Relation." According to the Standard Relation, the normative ambition of a theory of adjudication is that judges ought to do "more explicitly and more consciously" what it is the theory claims (as a descriptive matter) they largely do already. We can recognize the very same conception of the Standard Relation in the theory of adjudication in someone as "unDworkinian" as Oliver Wendell Holmes, who complains that "judges . . . have failed adequately to recognize their duty of [explicitly] weighing considerations of social advantage."¹⁵ But what judges "ought" to do—that is, explicitly weigh considerations of social advantage—is, on Holmes's view, precisely what it is they are really doing anyway, albeit "inarticulate[ly], and often unconscious[ly]."¹⁶ Thus, Holmes, like Mackie's Dworkin, demands only that judges "ought" to do what it is they already do, albeit more explicitly and consciously.

There is a final feature of the theory of adjudication to which we need to attend before we turn to Heidegger. This has to do with the meaning of "theory" in the theory of adjudication. What makes an understanding of adjudication "theoretical"? Roughly, the idea is this: A theoretical understanding of any domain of human activity is one that provides an explicit articulation or reconstruction of the rules that govern and explain activity in the domain. Thus, a theory of adjudication makes explicit the rules that govern and explain judicial decisions. Such rules, then, are both descriptive of, and normative for, proper decisionmaking in the sense captured in Mackie's articulation of the Standard Relation. These rules describe the explicit decision procedure judges generally follow, and they define the explicit decision procedure that judges ought to follow more consciously and regularly. Theory, then, presupposes that such activity, even if partly or wholly unreflective, can be reconstructed in terms of the rules that govern and regulate activity in the domain.

So, for example, a theory of adjudication is typically thought to include, among other elements, an account of the proper standards of decision.¹⁷ Are moral considerations grounds for decision? Or are only rules with the right sort of social pedigree proper standards for decision? Quite crudely, Dworkin

14. John Mackie, *The Third Theory of Law*, reprinted in RONALD DWORBIN AND CONTEMPORARY JURISPRUDENCE 161, 163 (Marshall Cohen ed., 1983).

15. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

16. *Id.* This placing of Holmes differs, in emphasis, from what I say in the section on "Normative Theory of Adjudication" in Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 276–77 (D.M. Patterson ed., 1996). The ambiguity of Holmes's normative position was impressed on me in conversation with Stephen Perry.

17. See, e.g., Moore, *supra* note 6, at 1003; Walt, *supra* note 6, at 324.

answers the former question in the affirmative,¹⁸ while positivists like Joseph Raz answer the latter question in the affirmative.¹⁹ Some, like Jules Coleman, H.L.A. Hart, and David Lyons, insist that the proper standards for decision are given by some hybrid answer to these questions.²⁰ The details do not matter for our purposes here. What is important to note is that these writers suppose that a theory of adjudication that identifies the standards for decision must set out rules that both describe the standards judges, by and large, actually do use and that are, at the same time, the standards they ought to use.

Suppose we were to agree that among the standards for decision are the rules or, perhaps, moral principles articulated in certain authoritative sources. We would still need to know, as part of a satisfactory theory of adjudication, how judges do and should construe these authoritative sources to determine what rules they stand for, and also which authoritative sources (and their concomitant rules) are controlling in any particular case. Let us take this latter component of a theory of adjudication in particular, since it is central to the process of reasoning by analogy and to the doctrine of precedent. How do we know that the “rule” of one case applies to some later case? Recall Karl Llewellyn’s famous gloss on what he calls the “strict” doctrine of precedent, according to which the rule is confined to the particular facts, resulting in doctrines like, “This rule holds only of redheaded Walpoles in pale magenta Buick cars.”²¹ Or consider, similarly, Holmes’s

story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes [and reporters] and could find nothing about churns, and gave judgment for the defendant.²²

Both of these fanciful examples illustrate that central to any adequate account of the doctrine of precedent (as part of the theory of adjudication) must be some theory of what we may call “relevance” judgments—the judgments by

18. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (explaining that those norms that provide both best explanation and best justification—as matter of political morality—of prior institutional history are legally binding).

19. See JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* (1979) (claiming that only norms that have social source—e.g., being enacted by legislature—are legally binding).

20. See, e.g., H.L.A. HART, *Postscript to THE CONCEPT OF LAW* (Joseph Raz & Penelope Bulloch eds., 2d ed. 1994) (1961); Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. LEGAL STUD.* 139 (1982), reprinted in RONALD DWORKIN AND *CONTEMPORARY JURISPRUDENCE*, *supra* note 14, at 28; David Lyons, *Principles, Positivism and Legal Theory*, 87 *YALE L.J.* 415, 425 (1977) (reviewing DWORKIN, *supra* note 18) (arguing that moral considerations are legally binding insofar as they have social source, including, e.g., convention among relevant officials to employ moral considerations to resolve disputes). On the issues here, see generally W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994) and Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY*, *supra* note 16, at 241, 243–59.

21. KARL LLEWELLYN, *THE BRAMBLE BUSH* 72 (1930)

22. Holmes, *supra* note 15, at 474–75.

which we say “this case is relevantly similar to that one” and “that case is different in a relevant respect and thus not controlling.”²³ The color of Buicks will rarely be a relevant fact, and so the “strict” construction of the rule of the prior case that Llewellyn imagines is patently silly. So, too, one suspects the Vermont reporters contained instances of one person breaking the personal property of another, cases which should have been controlling even in the absence of a prior litigation over churns. A complete theory of adjudication would tell us how we know that the color of Buicks is not relevant in Llewellyn’s example, and how we know that other cases in which one person broke the property of another *are* relevant in the churn case.

Do real judges fare so badly in making “relevance” judgments? In teaching constitutional law, I am always struck by Justice O’Connor’s opinion in *New York v. United States*.²⁴ The case presented the question of whether federal regulation of radioactive waste disposal by the states infringed upon state sovereignty in violation of the Tenth Amendment.²⁵ At first sight, the Court’s decision only seven years earlier in *Garcia v. San Antonio Metropolitan Transit Authority*²⁶ would seem to be controlling. There, the Court held that the primary protection for the federalism values embodied in the Tenth Amendment comes from the political process itself; only where the political process has broken down must the Court step in to enforce the Tenth Amendment.²⁷ As Justice O’Connor noted in dissent in *Garcia*, on this new process-based approach to federalism, “all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint.”²⁸

Fair as that observation might be, *Garcia* would seem controlling on the facts of *New York*. Indeed, as the federal regulation at issue had relied heavily upon proposals generated by the states themselves through the National Governors’ Association,²⁹ this would seem a clear case of the political process operating in a way respectful of state autonomy.³⁰ Yet Justice O’Connor, in a splendid exercise in applying Llewellyn’s “strict” doctrine of precedent, claims that the new case is factually unique: While prior cases concerned the power of Congress to subject the states to generally applicable

23. Although I shall concentrate in what follows on the Background of intelligibility required for the making of *relevancy* judgments, it bears noting that there are many other features of legal judgment that present related difficulties: for example, judgments about “reasonableness” (as in the omnipresent “reasonableness” standards in the law) or judgments about what does or does not constitute an “exception” to a rule. I concentrate on judgments of “relevancy” because these are central to analogical reasoning, which, in turn, is central to judging. But judgments of “relevance” are only one of many subtle judgments made by lawyers and judges that may not admit of theoretical reconstruction.

24. 505 U.S. 144 (1992).

25. *See id.* at 149.

26. 469 U.S. 528 (1985).

27. *See id.* at 555–56.

28. *Id.* at 588 (O’Connor, J., dissenting).

29. *See New York*, 505 U.S. at 150.

30. *See id.* at 194–98 (White, J., dissenting).

laws, *New York* involved a federal law applicable *only* to the states. Thus, according to Justice O'Connor, *New York* really concerns the power of Congress to "use the States as implements of regulation."³¹ In short, the issue is "whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way,"³² and so *Garcia* is inapposite.

In dissent, Justice White essentially asks whether this factual difference between the cases is a *relevant* difference in the federalism context. "The alleged diminution in state authority over its own affairs," Justice White pointedly observes, "is not any less because the federal mandate restricts the activities of private parties."³³ In other words, the relevant fact in both cases is that we are dealing with a federal regulation that usurps state autonomy; where that is the significant element, *Garcia* controls. The fact that, in the course of usurping state sovereignty, Congress also regulates private parties is irrelevant with respect to federalism values. On the *relevant* facts, *Garcia* and *New York* are the same case. Justice White's complaint, in short, is that Justice O'Connor has distinguished *Garcia* on the grounds that the rule there only applies to "pale magenta Buicks," while the present case concerns a bright red Cadillac. But Justice White's point is precisely that the make or color of the cars are not relevant facts, and so the difference should have no effect on the outcome.

Whether Justice White is correct is not, ultimately, the question that interests me here. The important question here is: How do we know what the "relevant" facts are in comparing *Garcia* and *New York*? What criteria apply to the making of such a judgment about relevance? And do these criteria admit of the sort of explicit articulation and reconstruction required for a complete theory of adjudication?

This is the point at which Heidegger becomes relevant. Heidegger can be read as arguing that such criteria can never be made fully explicit, and thus it follows that a theory of adjudication can never discharge its descriptive ambitions. To the extent that the theory of adjudication is in the business of *description*, the theory of adjudication is out of business. In any event, this, I shall argue, is what some themes from Heidegger suggest.

31. *Id.* at 161.

32. *Id.*

33. *Id.* at 202 (White, J., concurring in part and dissenting in part) My version of the majority opinion follows Justice White's reading of it more closely than partisans of federalism values may like. Arguably, we could reconstruct Justice O'Connor's point as follows: Federalism values are more seriously implicated where the federal regulation reaches a distinctive state function, like regulation, than when it reaches activities that states have in common with private actors, like economic activities. In that event, the fact that the regulation in *New York* only reaches the state is indicative of the fact that it encroaches more profoundly on the autonomy of the state. This is certainly a more chantable understanding of Justice O'Connor's argument, though it is not clear that this is the argument she actually makes. Moreover, such an argument seems like a roundabout attempt to revive the "traditional government functions" approach explicitly repudiated in *Garcia*. In that case, Justice O'Connor's opinion is still an end run around the earlier decision. For my purposes in the text, however, none of these points matter. If anything, they serve to underline Llewellyn's point about the plasticity of precedent.

II. HEIDEGGER

I want to say, first, some words by way of introduction to Heidegger, since his notorious obscurantism,³⁴ together with his seeming remoteness from the concerns of legal scholarship, make him an off-putting figure.³⁵ Heidegger was a pupil of the German phenomenologist Edmund Husserl and Heidegger's most famous work, *Being and Time*,³⁶ is a phenomenological study of the way human beings "are" in the world. For Husserl, phenomenology was to have been the methodology that finally yielded the Cartesian aspiration of a presuppositionless philosophy. Phenomenology was to have done this by concerning itself only with the phenomena that comprise our conscious experience, bracketing all questions about what connection the phenomena that comprise consciousness have with a world "out there."³⁷ Phenomenologists objected that previous philosophies had relied on all sorts of unchallenged conceptual baggage in describing the world without actually undertaking a careful examination of the content of our conscious experience itself.³⁸ Husserl's illusion was that we could free ourselves of all prejudices—linguistic, grammatical, conceptual—if we only turned away from traditional metaphysics and tried simply to describe the detailed nature of our conscious experience.

Heidegger adopts the phenomenological methodology, but rejects both Husserl's idea of "bracketing" the world, as well as the idea that the study of

34. Heidegger's often obscure prose is defended—not convincingly to my mind—in HUBERT L. DREYFUS, *BEING-IN-THE-WORLD* 7–8 (1991); indeed, it would seem that Dreyfus's splendid clarity on the same themes undercuts his defense of Heidegger's often absurd prose style.

35. The fact that he was a Nazi, who later lied about his involvement with Nazism, as well as a bastard—personally and politically—are also aspects of Heidegger that make him an unattractive figure. For discussion of the relevant biographical facts, see VICTOR FARIAS, *HEIDEGGER AND NAZISM* (Joseph Margolis & Tom Rockmore eds. & Paul Burrell trans., Temple Univ. Press 1989) (1987). One attraction of Hubert Dreyfus's influential interpretation of Heidegger is that it extracts from Heidegger arguments and themes that are of independent philosophical interest, and that do *not* seem to be linked to his Nazism. But I have little doubt that other aspects of Heidegger's thought (not considered here) and his Nazism are deeply linked, the protestations of Jacques Derrida and Richard Rorty, among others, notwithstanding. See, e.g., Jacques Derrida, *Philosopher's Hell: An Interview*, in *THE HEIDEGGER CONTROVERSY*, 264, 266–67 (Richard Wolin ed., 1991); Richard Rorty, *Taking Philosophy Seriously*, *NEW REPUBLIC*, Apr. 11, 1988, at 31, 32–33 (reviewing VICTOR FARIAS, *HEIDEGGER ET LA NAZISME* (1987)). As Nietzsche has observed: "[O]ur ideas, our values, our yeas and nays, our ifs and buts, grow out of us with the necessity with which a tree bears fruit—related and each with an affinity to each, and evidence of *one* will, *one* health, *one* soil, *one* sun." FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 16 (Walter Kaufman ed. & Walter Kaufman & R.J. Hollingdale trans., 1969). Heidegger's Nazism and his philosophy were "fruit" of the same tree, and it would be astounding if there were not some affinities, at some level, between the disgusting political and personal record of the man and the philosophy he propounded. For a reading of Heidegger that vindicates this Nietzschean perspective, see GEORGE STEINER, *HEIDEGGER* (1978). However, it still seems to me that the Heideggerian themes that Dreyfus develops can be parsed from Heidegger's Nazism, even if other aspects of his thought cannot.

36. MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962).

37. See EDMUND HUSSERL, *CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY* (Dorion Cairns trans., 1970).

38. Cf. HEIDEGGER, *supra* note 36, at 50 (noting that phenomenology "is opposed to taking over any conceptions which only seem to have been demonstrated").

conscious experience could be presuppositionless. Indeed—and this is central for Heidegger—the phenomenological investigation of human experience reveals a rich and essential structure of “presuppositions” that resist explicit articulation. As Hubert Dreyfus and Paul Rabinow helpfully explain:

Heidegger’s phenomenology stresses the idea that human subjects are formed by the historical cultural practices in which they develop. These practices form a background which can never be made completely explicit, and so cannot be understood in terms of the beliefs of a meaning-giving subject. The background practices do, however, contain a meaning. They embody a way of understanding and coping with things, people, and institutions. Heidegger calls this meaning in the practices an interpretation, and proposes to make manifest certain general features of this interpretation. In *Being and Time* he calls his method, which amounts to giving an interpretation of the interpretation embodied in everyday practices, hermeneutics.³⁹

The key notion here is that of the “Background.” The phenomenological study of human experience, of the human way of “being” or existing in the world, reveals the existence of a Background which renders the world meaningful and intelligible, yet which itself resists explicit articulation in cognitive terms. What constitutes this Background? Different writers in the modern hermeneutic and phenomenological traditions emphasize different factors. Heidegger’s student Hans-Georg Gadamer, for example, places the emphasis on what we might call the “cultural authorities” from whom we acquire those enabling “prejudices” as to what is relevant, important, meaningful: the teachers, novelists, poets, “canonical” works, and the like, that mark every academic discipline and every global *Weltanschauung*.⁴⁰ By contrast, the French phenomenologist Maurice Merleau-Ponty locates the core of the Background in the orientation towards the world we have in virtue of our embodiment as certain sorts of physical bodies, with their characteristic height, weight, shape, rhythm of movement, the whole cumbersomeness or easiness or awkwardness that marks our physical presence in the classroom, the dining hall, the bedroom, etc. The intelligibility of the world, according to Merleau-Ponty, is determined, at the most fundamental level, by what it is like to be a certain sort of physical body in that world.⁴¹

39. HUBERT L. DREYFUS & PAUL RABINOW, MICHAEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS xxi (2d ed. 1983).

40. See, e.g., HANS-GEORG GADAMER, TRUTH AND METHOD 248–49 (Garrett Barden & John Cumming eds. & trans., Crossroad Publ’g Co. 1975) (1960). For a more substantial discussion with particular reference to law, see David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 136 (1985).

41. See MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 98–206 (Colin Smith trans., 1962).

But by far the most influential account—one that resonates in, even as it is modified by, writers like Gadamer and Merleau-Ponty—is Heidegger's, which has, in turn, been adopted in more recent years by writers like the French anthropologist Pierre Bourdieu.⁴² In these writers, the emphasis is roughly on a type of "socialization," an acquisition of practical know-how that is basic to becoming part of a human community.⁴³ It is this "average everydayness," as Heidegger calls it,⁴⁴ in which human beings live that the philosophical tradition has ignored but that at the same time forms the Background of intelligibility against which all of our philosophical and other cognitive judgments are made.

This notion is clearest in Heidegger's famous distinction between that which is present-at-hand and that which is ready-to-hand.⁴⁵ Let me start with an example that will help make Heidegger's point. I might make a catalogue of the items in my study: chair, desk, desk lamp, computer, papers, articles, notebooks, bookshelves, books, filing cabinet, pencil sharpener, stapler, pencils, pens, scissor, magnifying glass. Just in the act of making this catalogue I have changed my relationship to these items; I find myself looking about the study, individuating the items, adding them to the list. Let us take the *cognitive*⁴⁶

42. Arguably similar notions are at work in the later Wittgenstein, as well as in Harold Garfinkel's ethnomethodology, Charles Taylor's work on the philosophy of the human sciences, and some recent work in analytic philosophy. See ROBERT B. BRANDOM, *MAKING IT EXPLICIT* (1994); HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967); CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* (1985); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (R. Rhees ed. & G.E.M. Anscombe ed. & trans., 1953).

In the legal literature, the themes in the text are most often associated with the work of Wittgenstein. See, e.g., Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 (1990). One advantage of considering Heidegger's arguments for similar conclusions is that Heidegger, unlike Wittgenstein and his various followers, offers a more detailed philosophical story both about what practices consist in and why it is they resist theoretical articulation. For Wittgenstein, practice too often functions as an inquiry-stopper: When the philosophical going gets complex, the Wittgensteinian cries, "It's all a matter of *knowing how* to go on with the practice"—end of story. (I am reminded, in this regard, of the philosopher Larry Sklar's emendation of the famous Wittgenstein dictum on the task of philosophy: "Philosophy leaves everything as it is—in a fog.") The philosophical burden on the proponent of such a move should be heavy; Heidegger has the virtue of carrying more of this burden than Wittgenstein. (I am indebted here to Sandy Levinson for raising these issues with me.)

43. As Cathy Kemp has correctly reminded me, practical know-how does not exhaust our account of the Background in the phenomenological tradition. There are, for example, aspects of our experience of things and persons—a certain "ambiance," or "orientation," or "affect"—that are, like the Background of practical skills, not reducible to cognitive propositions, but at the same time are also not reducible to practical skills. Needless to say, I do not aim to be comprehensive in my characterization of the phenomenological tradition; I call attention to one important theme, one that we may fruitfully try to understand in its application to theories of adjudication. Other aspects of the Background might pose related difficulties for theories of adjudication.

44. HEIDEGGER, *supra* note 36, at 69.

45. The Macquarrie and Robinson translation of HEIDEGGER, *supra* note 36, popularized these terms in the English speaking world. The German words—*Zuhandenheit* (i.e., "readiness-to-hand") and *Vorhandenheit* (i.e., "presence-at-hand")—do not have neat English equivalents. Three analytic Heidegger scholars (William Blattner, John Haugeland, and Dreyfus) have suggested instead the terms "availability" and "occurrentness," though I confess I find these unattractive substitutes. See, e.g., DREYFUS, *supra* note 34, at xi.

46. The "cognitive" aspect of an activity is that aspect (e.g., judging, "This is a pen.") that can be evaluated in terms of its truth and falsity. Noncognitive activity—like screeching, cooing, or moaning—is.

aspect of this activity: *individuating* things and writing down their names on a list. In doing this I view the things as “present-at-hand,” for they are presented in “a bare perceptual cognition.”⁴⁷ They are mere things available to detached looking. But this, says Heidegger, is to change their more basic way of being, the more basic way they exist for us. For these things—Heidegger calls them “equipment”⁴⁸—exist most basically as things that are “ready-to-hand.”⁴⁹ That is, these items exist for me most basically as things with which I do various things; they exist, Heidegger says, as “‘something in-order-to . . .’”⁵⁰ The chair exists for me in-order-to-sit; the table in-order-to-work; the pencil sharpener in-order-to-sharpen; the pen in-order-to-write-on-paper; the pencil in-order-to-write-in-a-book; and so forth. When we deal with what is ready-to-hand, what exists first and foremost as things that are useful for various purposes, “this readiness-to-hand is itself understood,” says Heidegger, “though not thematically,” that is, not as a matter of theoretical knowledge.⁵¹ We know these things through what Heidegger calls “circumspection”—the “kind of sight” we have “when we deal with [things] by using them and manipulating them.”⁵² And it is through circumspection—this way of practical seeing or knowing—that any piece of equipment “acquires its specific Thingly character.”⁵³

This last claim is particularly important. Using his favorite example of the hammer, Heidegger often says things like, “the less we just stare at the hammer-Thing, and the more we seize hold of it and use it, the more primordial does our relationship to it become.”⁵⁴ But why, exactly, is the practical relationship more “primordial,” more basic?

Now, plainly, the relationship to things as ready-to-hand is almost always temporally prior to the detached looking at them as things present-at-hand. “The presence-at-hand of entities is thrust to the fore,” says Heidegger, only when there are breaks “in that referential totality in which circumspection ‘operates.’”⁵⁵ While reading a book with pencil in hand, I reach to my left (where the pencil sharpener sits) to sharpen the pencil; I stick the pencil in and nothing happens. What had been ready-to-hand, the pencil sharpener which exists for me as equipment-for-sharpening is suddenly present-at-hand: I now

by contrast, not apt for evaluation in terms of truth and falsity because it asserts nothing about the world that might be true or false.

47. HEIDEGGER, *supra* note 36, at 95.

48. “Equipment” are the entities we encounter in the mode of “Being-in” that Heidegger calls “concern,” i.e., “having to do with something, producing something, attending to something and looking after it, making use of something, giving something up and letting it go, undertaking, accomplishing, evincing, interrogating, considering, discussing, determining . . .” *Id.* at 83.

49. The “Being” of equipment, says Heidegger, is readiness-to-hand. *See, e.g., id.* at 98.

50. *Id.* at 97.

51. *Id.* at 104.

52. *Id.* at 98.

53. *Id.*

54. *Id.*

55. *Id.* at 107.

look at it, rather than simply deal with it automatically as something with a use. It does not function; it shatters the circumspective absorption one has with equipment when that equipment functions in its practical capacity. The pencil sharpener now becomes an object of theoretical knowledge, its presence falling into sharp relief against the background of all the ready-to-hand equipment that comprises my study (the computer, the table, the books, the pencil, etc.). It is a thing to be inspected, stared at, in an effort to make it resume the ordinary mode of being of equipment, that is, as ready-to-hand. It was ready-to-hand first, present-at-hand second.

But Heidegger has more than this in mind by asserting the “primordial” status of the relationship to things as ready-to-hand. Heidegger also means that the status of things as ready-to-hand is *epistemologically* basic in the sense that *theoretical* knowledge is *parasitic* upon the practical know-how we have in circumspection, that is, when relating to things as ready-to-hand. This is what I believe he means when he says that the circumspective dealing with a piece of equipment is that “from which it acquires its specific Thingly character.”⁵⁶ Recall the list of items in my study. Making a list was a *cognitive* activity that required *cognitive* judgment individuating the items in the study, i.e., identifying their separate “Thingly characters.” Why individuate pens from pencils, for example—why not have simply listed writing utensils? Indeed, why individuate writing utensils from scissors, or a magnifying lens, or anything? To start with, one reaches for pens and pencils, not scissors, in-order-to-write. Pens and pencils are ready-to-hand for different purposes than scissors, and so when it comes time to individuate the items in the study, this practical relationship to the items makes it seem natural to individuate them differently. But why individuate pens and pencils? For me, at least, they are ready-to-hand for different purposes: pens in-order-to-write-on-paper, pencils in-order-to-write-in-books. I do not like pen marks in books, so pencils, in my repertoire of everyday equipment, are reserved for that purpose. When I then look “thematically,” like a theoretical knower, at the contents of my study, it again seems natural to individuate pencils and pens. Circumspection, then, is primordial in the sense that theoretical knowing depends on—takes its direction from, is shaped by—the practical know-how we have when relating to things as ready-to-hand.

Heidegger makes the same point later in *Being and Time* when he writes:

In interpreting, we do not, so to speak, throw a “signification” over some naked thing which is present-at-hand . . . but [rather] when something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our

56. *Id.* at 98.

understanding of the world, and this involvement is one which gets laid out by the interpretation.⁵⁷

In other words, a theoretical description of the world actually individuates and describes things the way it does because of the practical relationship we already bear to those things as ready-to-hand.

This general theme of the primordially or basicness of the circumspective relation to things as ready-to-hand is central in Heidegger, particularly to his famous attack upon the problem of skepticism in the Cartesian tradition of epistemology.⁵⁸ Here, however, I want to concentrate on two other issues.

We have seen that Heidegger claims that theoretical knowing, or cognition, is parasitic upon circumspection, or practical know-how. But to have an argument against the foundational status of "theory" *per se*, Heidegger also needs the claim that practical know-how is never itself amenable to pure theoretical articulation.⁵⁹ This presents some difficult issues in the interpretation of Heidegger. In their stead, let me propose two considerations that are Heideggerian in spirit. First, consider the sheer magnitude of what is contemplated by asserting the primacy of theory: One must be able to produce a lexical ordering of rules describing the whole network of semiautomatic ways we have of coping with everyday events and things—getting dressed, tending to personal hygiene, feeding oneself, leaving the house, commuting, working at the office, doing errands, and the like. For each of these events, the array of equipment with which we deal—circumspectively—is enormous. What would such a theory of the everyday look like? Just consider "getting dressed." Could we do much better than *The New Yorker* cartoon showing a man sitting on his bed looking at the sign he has posted on the wall that reads, "Pants first, *then* shoes"? As a rule, though, that will hardly help any of us get dressed. Think, for instance, of the issue of *which* pants, a decision made against the background of a whole field of practical know-how about degrees of

57. *Id.* at 190–91.

58. See *id.* at 86–90. This issue is discussed helpfully (if somewhat repetitively) in CHARLES B. GUIGNON, *HEIDEGGER AND THE PROBLEM OF KNOWLEDGE* (1983). For a rich, systematic treatment of the topic, see also JOHN RICHARDSON, *EXISTENTIAL EPISTEMOLOGY* (1986). These accounts, by students of Dreyfus, follow in large part the account now set out in DREYFUS, *supra* note 34, at 248–51. I am inclined to think that the attack on the Cartesian tradition of epistemology is not successful, and indeed, is deeply confused. The confusion is brought out nicely by Dreyfus: "It is only when we reflect philosophically on the structure of deliberative, representational intentionality that we get skepticism, coping practices, on the contrary, do not represent and so cannot misrepresent." *Id.* at 249. The reader should be forgiven if this strikes him or her as an argument for the *irrelevance* of the Heideggerian point to skepticism. The issue, of course, is more complex than this, but is tangential to my concerns here. For a more substantial, and representative, critique of the Heideggerian line, see Leslie Stevenson, *Heidegger on Cartesian Skepticism*, 1 *BRIT. J. HIST. PHIL.* 81 (1993).

59. That is, Heidegger needs an argument against the position well represented in the mainstream of the philosophical tradition by Leibniz's claim that "the most important observations and turns of skill in all sorts of trades and professions are as yet unwritten. . . . Of course we can also write up this practice, since it is at bottom just another theory . . ." LEIBNIZ, *SELECTIONS* 48 (Philip P. Wiener ed., 1951) (I am grateful to Larry Solum for this reference.)

appropriate formality and informality, comfort, practicality, and the like. The complexity is staggering; but what is worse is that it is not apparent that we could ever fully capture in theoretical form what we do with practical ease. Earlier in this century, Carnap's project in the *Aufbau*⁶⁰ and then logical behaviorism in the philosophy of mind⁶¹ foundered on a similar difficulty: Neither could deliver the proposed reduction of, respectively, physical objects to sense-impressions, or of mental states to hypothetical patterns of behavior. At some point, however, "in-principle" reductions become suspect when they have no successful instantiations. Show us a theoretical reduction of practical know-how to explicit rules, the Heideggerian might say, and then we will take the challenge seriously.

It bears emphasis here that Heidegger's point in all of this is *not* simply that in our everyday activities we possess "tacit knowledge" that makes these activities possible.⁶² Heidegger's point goes further than that. Heidegger's unusual claim is precisely that there is a type of noncognitive foundation to intelligibility, a type of intentionality that is neither conscious nor propositional in form. Heidegger's claim is, in Hubert Dreyfus's happy phrasing, that "'mindless' everyday coping skills [are] the basis of all intelligibility."⁶³ The Background for Heidegger is not a tacit belief system, an implicit theory, but a learned way of acting—or "coping" with things and situations—that renders the world meaningful.

This last observation suggests a possible second argument against the primacy of theory. Our mindless coping skills invest things and circumstances with a meaning, but they do so without that meaning being a matter of tacit beliefs, of implicit propositional attitudes. I believe that my wife is the most wonderful person in the world and I wish to spend the rest of my life with her. These are propositional attitudes: the *belief that* a particular proposition is true (namely, that "my wife is the most wonderful person in the world") and the *desire that* a particular proposition be true (namely, that "I spend the rest of my life with her"). I have made these propositional attitudes explicit, but it is fair to say that I hold them tacitly all the time as well. Yet one would surely have a very thin picture of intimacy in its "everydayness" if one thought that

60. See RUDOLF CARNAP, *THE LOGICAL STRUCTURE OF THE WORLD* (Rolf A. George trans., 2d ed. 1967).

61. See, e.g., Carl G. Hempel, *The Logical Analysis of Psychology*, in *READINGS IN PHILOSOPHY OF PSYCHOLOGY* 14, 17–22 (Ned Block ed., 1980).

62. Heidegger is often wrongly construed that way in the legal literature. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 801 (1989) ("Heidegger held that all beliefs presuppose prejudices—judgments already made, implicit in practice, prior to reflection, largely historical and collective in origin, tacitly accepted, and for the moment unquestioned."); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 *CAL. L. REV.* 889, 898 n.20 (1992) (discussing "the Heideggerian notion that our pre-existing, historically developed beliefs structure the way we perceive the world"). What these authors describe sounds more like what Heidegger calls "fore-sight" rather than "fore-having" (the Background). HEIDEGGER, *supra* note 36, at 191. On these issues, see DREYFUS, *supra* note 34, at 198–201; Hubert Dreyfus, *Holism and Hermeneutics*, 34 *REV. METAPHYSICS* 3, 10–12 (1980).

63. DREYFUS, *supra* note 34, at 3.

a “theory” based on these implicit or explicit beliefs and desires was descriptive and explanatory of a loving relationship. Anyone who has been part of an intimate relationship knows that its meaning is defined most immediately by the whole way of being and acting that one shares with the loved one. With a person with whom one is intimate, one has a wholly different and special sense of personal space, of the boundaries of privacy, of the propriety of physical contact, of what can be talked about, of how it can be expressed. Think just for a moment about each of these things—personal space, privacy, physical contact, conversation—and how they differ as between your spouse or lover on the one hand, and then your colleagues, your students, your barber, your adversary in court, on the other. The “skills” we deploy in intimacy—the frequent overstepping of personal space, the physical touching, the unselfconscious opening to view of relatively private activities (hygiene, dressing, the whole ritual of the toilet), the special ways of speaking (intonation, choice of words, what is left unsaid, etc.)—it is precisely these noncognitive skills that mark a person as one with whom we are intimate. As Heidegger notes, “we do not, so to speak, throw a ‘signification’ over some naked thing which is present-at-hand”;⁶⁴ rather, our preexisting “involvement” with that thing or person, the “mindless coping skills” we deploy unconsciously, invest the thing or person with a signification already. But if these skills, these ways of acting, are not themselves tacit propositions, then the meaning they embody (for example, that this is a person with whom I am intimate) will not be amenable to theoretical articulation, which is essentially propositional in form.⁶⁵

But, one might object, why should these skills not admit of “translation” (as it were) into propositions expressing patterns of rule governed behavior? At this point, it seems to me the Heideggerian must have recourse once again to the breathtaking difficulty of the task. For example, after I wrote the preceding paragraph, my wife came into the study, started reading over my shoulder, and then rested her bare foot on my knee. Without thinking about it, she knew that it was okay to do so. Similarly without thinking, she knows it

64. HEIDEGGER, *supra* note 36, at 190.

65. Hubert Dreyfus suggests another nice illustration of the point. In commenting on Heidegger, he quotes approvingly the following illustrative observation by Bourdieu

[I]n all societies, children are particularly attentive to the gestures and postures which, in their eyes, express everything that goes to make an accomplished adult—a way of walking, a tilt of the head, facial expressions, ways of sitting and of using implements, always associated with a tone of voice, a style of speech, and (how could it be otherwise?) a certain subjective experience.

PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 87 (1977), *quoted in* DREYFUS, *supra* note 34, at 17. According to Dreyfus, all of these characteristics—the way of walking, the tilt of the head, the facial expressions, etc.—in Bourdieu’s view “add up to an interpretation of what it is to be a person” *Id* Class differences are often made manifest in this way: custodial staff and sanitation workers, for example, tend to avert their eyes, and to proceed through their tasks as though they were invisible—often expressing surprise when they are greeted or acknowledged by members of the bourgeois classes. The latter, by contrast, often carry themselves with a constant expectation of recognition and a sense of weighty presence

would not be okay to do the same thing at work with her boss. On the other hand, in some circumstances, she could touch the shoulder or arm of her boss; and presumably in even more circumstances, she could touch my shoulder or arm. We all possess, to varying degrees, the practical know-how regarding personal space and physical contact with respect to our professional colleagues and our intimate companions, the practical know-how that, through its very exercise, gives a meaning to these relationships (establishing this one as “professional,” that one as “intimate”). But does anyone think they could produce the comprehensive rule book describing the “do’s” and “don’t’s” of personal space and physical contact?⁶⁶ Heidegger denies, with some plausibility, that we could, and he does so precisely because he denies that these practical skills admit of theoretical articulation.

We are now finally in a position to explicate Heidegger’s famous notion of “being-in-the-world.” “Being-in-the-world,” says Heidegger, “amounts to a nonthematic circumspective absorption in references or assignments constitutive for the readiness-to-hand of a totality of equipment.”⁶⁷ Stated a bit differently, and I hope more clearly, the way human beings exist or “dwell” in the world is fundamentally in a state of practical absorption in tasks and skills, in which theoretical knowledge of things (as present-at-hand) is only a secondary and parasitic phenomenon.

Like Heidegger, the anthropologist Pierre Bourdieu also contrasts the “theoretical mode[] of knowledge” with “the practical mode of knowledge which is the basis of ordinary experience of the social world.”⁶⁸ According to Bourdieu, human practices “have as their principle not a set of conscious, constant rules, but practical schemes, opaque to their possessors.”⁶⁹ “Real mastery” of the “logic” of these practices is possible only through “practical learning of the schemes of perception, appreciation and action which are the precondition of all ‘sensible’ thought and practice, and which, being continually reinforced by actions and discourses produced according to the same schemes, are excluded from the universe of objects of thought”⁷⁰ (i.e.,

66. As Doug Laycock points out to me, a central problem in the law of sexual harassment is precisely the impossibility of codifying rules of conduct for those who either (a) lack any understanding of them at all, or (b) have inconsistent understandings of them.

67. HEIDEGGER, *supra* note 36, at 107.

68. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 25 (Richard Nice trans., Polity Press 1990) (1980). Bourdieu’s interests differ from Heidegger’s in at least the following respect: Bourdieu wants to examine the theoretical knower, “the epistemological and social conditions” of his activity, to illuminate the conditions of possibility of theoretical knowledge. *Id.* But like Heidegger, he is motivated to undertake this inquiry precisely because he sees theoretical knowledge as missing out on the more primary mode of “practical” engagement with the social world. *See id.* at 26. Bourdieu’s question is: What is it about theoretical knowledge and the theoretical knower that makes him miss the practical? *See id.* at 25–29. This question is suggested in Heidegger as well, *see* HEIDEGGER, *supra* note 36, at 76, but is worked out in more detail in BOURDIEU, *supra*.

69. BOURDIEU, *supra* note 68, at 12.

70. *Id.* at 14. Bourdieu specifically distinguishes the “two relations to the world, one theoretical, the other practical.” *Id.*

from the realm of theory). This type of practical know-how Bourdieu describes as the “immediate but unselfconscious understanding which defines the practical relationship to the world.”⁷¹

What we may call the Heidegger-Bourdieu line has actually been nicely articulated in Gerald Postema’s important discussion of Dworkin’s *Law’s Empire*.⁷² In criticizing Dworkin’s account of what it is to interpret a social practice, Postema observes that to become part of a communal practice “involves a good deal more than merely learning a set of routine responses to routinized situations” but rather requires “practical mastery of a discipline.”⁷³ Practical discipline, says Postema, “always outstrips the resources of the theory to meet novel situations.”⁷⁴ Such discipline, Postema continues, involves

a trained social sense. Not only is it socially acquired, learned through interaction and participation, but what is handed down and learned is itself a shared capacity. A social capacity is the capacity to move around with familiarity in the world of the practice common to its participants. To learn a social practice is to become acquainted through participation with a new common world; it is to enter and take up a place in a world already constituted.⁷⁵

What Postema calls the “common world” that the learner of a practice finds “already constituted” is essentially what Heidegger means by describing human existence in terms of “being-in-the-world”: We exist practically absorbed in a world “already constituted,” constituted precisely by the practical involvements we have with the things and people in it. We have, in turn, a social practice when a group of people share the same type of practical absorption in things, tasks, persons, and the like. Like Heidegger, Postema emphasizes that practical competence “outstrips” the resources of a theory, presumably because practical competence and skill resist explicit theoretical articulation.

III. HEIDEGGER AND THE THEORY OF ADJUDICATION

Let me summarize what has been said so far. A theory of adjudication aims both to *describe* how judges really do decide cases and to tell judges how they *ought* to decide them. To be descriptively adequate, a theory of adjudication should include, in part, a theory of “relevance” judgments, the sort of judgments judges make in deciding that one case is or is not relevant to a

71. *Id.* at 19.

72. See Gerald J. Postema, “Protestant” *Interpretation and Social Practices*, 6 *LAW & PHIL.* 283 (1987).

73. *Id.* at 302–03.

74. *Id.* at 313.

75. *Id.*

case presently before the court.⁷⁶ Heidegger has argued that at the foundation of all intelligibility is a Background of mindless coping skills, and that this Background of practical know-how does not admit of theoretical articulation in terms of explicit rules. To conjoin the two parts of this paper so far—the theory of adjudication and Heidegger—we need only to see that the capacity for making relevance judgments depends on the Background of mindless coping skills, and thus, as a result, no theory of such judgments will be possible.⁷⁷

76. See, e.g., Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933, 951–52 (1996) (criticizing certain other theories of adjudication for failing to provide conceptual explication of judgments of “relevant similarity”). In Brewer’s somewhat loaded terminology, see *id.* at 951–53, the position defended in this Article is both “mystical” and “skeptical”: It both denies that we can give a theoretically explicit account of judgments of “relevance,” though, at the same time, it does not suppose that arguments by analogy necessarily have much “rational force.” Even Brewer, it bears noting, concedes to the “mystics” that “there is inevitably an uncodifiable imaginative moment in exemplary, analogical reasoning” (though he thinks, perhaps rightly, that this makes legal reasoning no worse off than “other areas of reasoning in whose rational force our intellectual culture has placed great confidence—namely, both the empirical and the demonstrative sciences”). *Id.* at 954. Later he speaks of the need for a “rule” that would provide a “patterned direction of attention” to the relevant features of a particular set of examples, but then never actually provides one. See *id.* at 973; cf. *id.* at 978 (argument by analogy requires, among other things, “making sense of patterns of characteristics”). Though he sheds much light on the logical form of analogical arguments, he never, as far as I can see, rebuts the mystic who thinks that we cannot have a “rational explication,” *id.* at 1026, of judgments of relevance. Instead, he conflates the question of whether we can have an explicit theory of relevance judgments with the question of whether or not there are “significant rational constraints” on the process of analogizing or disanalogizing particular cases. See *id.* But because judgments of relevance are only part of the reasoning process that Brewer claims is rationally constrained (the process, as he puts it, of constructing analogy-warranting rules and analogy-warranting rationales), nothing he says shows that we can expect to have a theory of relevance judgments, even if analogical reasoning is not without all rational constraints. “[A] knowledge of the logical form of argument by analogy (a ‘knowledge that’) will not,” he finally admits, “provide all the skills one needs to make or criticize such arguments effectively (a ‘knowledge-how’).” *Id.* at 1027. But this is to concede the point of the Heideggerian critique developed here.

77. Notice that the Heideggerian challenge is actually quite different from the superficially similar one posed by Stanley Fish in, e.g., *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987). While Heidegger’s claim is that the mindless coping skills that are the foundation of intelligibility cannot be made explicit in the way “theory” contemplates, Fish’s claim is that a theoretical reconstruction of the “tacit knowledge” (or coping skills) at the foundation of practice is neither necessary for participation in the practice, nor does it make a difference in the practice. See *id.* at 1774–90. In short, for Fish, “theory” is not useful (hence the title of his piece), while for Heidegger “theory” is not possible (whatever its use is or might be).

This is not to deny that there are Heideggerian moments in Fish, as when he remarks, “Someone who looks with practice-informed eyes sees a field already organized in terms of perspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence.” *Id.* at 1788. The difference is that for Heidegger or Bourdieu the ultimate point is that at the foundation of this field of intelligibility are mindless coping skills that resist explicit articulation in propositional form, while for Fish the ultimate point is only that “practice-informed” eyes are enough, and theory makes no difference. The Fish critique would actually be more plausible if it were conjoined with the Heideggerian point; as it is, it invites easy rejoinders. See, e.g., Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 909–10 (1989) (distinguishing between process of discovery and process of justification, and noting that “theory” is concerned primarily with latter, while Fish’s point speaks only to former); see also RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 25–36 (1961) (providing seminal jurisprudential discussion of distinction between processes of discovery and justification). I discuss at the end of this Article the consequences of the Heideggerian point for theories of justification (i.e., normative theories). See also Leiter, *supra* note 16.

Let us return to Holmes's Vermont judge considering the case of the broken churn. Whatever the precise issue—e.g., standard of care or, more likely, consequential damages—the judge must know something about churns and their place in farm life in order to assess what other cases involving broken property have precedential value. A churn is ready-to-hand for turning milk into butter. Butter is ready-to-hand for consumption or for bartering or for sale. A churn may be simple to use or require great skill. It may be customary or unusual for farmers to lend them out. A churn may be easy to fix, or difficult to replace. The loss of a churn may be utterly disruptive to the business of the farm or a minor inconvenience. The churn, in short, exists at the nexus of a range of practical skills—churning, farming, consuming, selling—all of which inform our sense of which other cases are relevant to this one, and also of which outcome would be appropriate. Your neighbor borrows your hammer and breaks it; that case may or may not be relevant to thinking about the churn case. If you are a carpenter, and your broken hammer is a specialized item, central to your daily trade, then the cases may be relevantly similar. If, instead, you are a professor of law and philosophy unable to fix anything, but the owner, nonetheless, of a hammer bestowed by thoughtful in-laws, the course of decision in that case may be less useful. One reason, no doubt, that Llewellyn thought that the ideal judge was one who had been thoroughly immersed in the mercantile culture on which he now sits in judgment is precisely because only by knowing, say, the “meaning” of the churn in its practical contexts can one possibly decide what precedent is or is not relevant.⁷⁸ If, of course, one could have a complete theory of churns and their place in farming culture, and a complete theory of every other item of equipment and its place in its particular economic culture, then one could presumably generate the needed theory of relevance. But do we have such a theory? Plainly not. Rather, we seem to depend on the practical sensitivity of judges to the similarities and differences appropriate to each cause.

What about *Garcia v. San Antonio Metropolitan Transit Authority*⁷⁹ and *New York v. United States*?⁸⁰ I noted earlier Justice White's view that *Garcia* should have been controlling in *New York*.⁸¹ But how does one know that *Garcia* is relevant? Consider the most superficial difficulty: Why should a case concerning wage and hour regulations applying to employees of a municipal transit authority in Texas (*Garcia*) be relevant to a case concerning the regulation of radioactive waste disposal by the State of New York? Notice that in posing this question I have not even mentioned the variable that Justice O'Connor finds decisive: namely, that one case involves a regulation of the

78. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 121–57 (1960).

79. 469 U.S. 528 (1985).

80. 505 U.S. 144 (1992).

81. *Id.* at 202 (White, J., dissenting).

state *and* private entities, while the other involves a regulation directed only at the states.⁸²

Relevance is, of course, relative! Facts are relevant only with respect to some set of issues. The issue in *Garcia* and *New York* is state autonomy as protected by the Tenth Amendment. Why, then, are the Texas versus New York or the wage and hour requirements versus radioactive waste disposal differences not relevant? What must one “know” to know that they are irrelevant?

At least for the O’Connor-White debate, there are really only four operative concepts: regulation, autonomy, state, and private entity. Justice O’Connor claims that where state autonomy is usurped by a regulation affecting only states, *Garcia* is inapposite. Justice White replies that the usurpation of state autonomy is no more or less where the regulation also reaches private entities, and so the difference is irrelevant. To know who is right, it seems we must know whether or not a regulation that reaches *only* states, and not private entities, is more damaging to state autonomy. What constitutes the Background against which these issues can even become intelligible?

Let me borrow, again, an example from Dreyfus to sharpen the question. Dreyfus writes:

[T]o be a hammer is to be used to pound in nails for building houses, etc. For a culture that always tied things together, there could be no hammers because there would be nothing that it was to be a hammer. But there could, nonetheless, be pieces of wood with iron blobs on the end, since wood and iron are natural kinds and their being and causal powers make no essential reference to any in-order-tos⁸³

The Background of intelligibility for “hammers,” then, includes the cultural practice of binding things together with nails and the like, for hammers are essentially ready-to-hand in-order-to-bind-with-nails. In the absence of such a practice, the things we call “hammers” are simply pieces of wood with iron blobs on one end.⁸⁴

What then constitutes the horizon of intelligibility in which “regulation,” “autonomy,” “state,” and “private entity” become visible? The Heideggerian thesis is that competence with and immersion in a network of practical

82. *See id.* at 161–62.

83. DREYFUS, *supra* note 34, at 257–58. As Jody Kraus has pointed out to me, the idea that there could be such a thing as “natural kinds”—i.e., things that are what they are independent of anyone’s practical interests—does not seem consistent with the thrust of the interpretation of Heidegger that Dreyfus develops.

84. This should be understood as a point not about semantics *per se*, but rather about the conditions under which signs that have semantic value (strictly speaking) become culturally available and significant.

concerns is necessary in order for these particular concepts to be intelligible. In order to work with the distinction between a state or public entity and a private one, for example, you need to be conversant with at least these other concepts: ownership, control, elected body, profit, fees, and taxation. Public and private entities are often indistinguishable in terms of personnel, functions, and appearance. The city police can be easily confused with private security personnel; but they differ in that the city police do not charge a fee, they do not seek a profit, they are controlled by authorities that are responsive to public sentiment expressed through voting, they are paid out of monies raised through taxation, they have special (for example, constitutional) obligations attached to entities “publicly” owned, and the like. By contrast, private security personnel charge a fee (to someone), they are owned or controlled by individuals or other entities not ultimately under the authority of elected officials, they are not supported (typically) by tax dollars, and the like. Just to get a handle, however, on this elucidation of the difference, one must be conversant with the practices of payment, taxation, voting, and control or ownership, among others. In a cultural order without the practices of payment, taxation, voting (or some surrogate), and property rights (which vest control), the whole problem that animates *Garcia* and *New York* becomes senseless.

So, too, the intelligibility of “regulation” and “autonomy” is arguably parasitic on the following sort of practical competence: being able to distinguish “external” and “internal” limitations. A nonautonomous action is one subject to an external limitation, while an autonomous action is subject to an internal limitation. Since the federal government is “external” to the state, limitations originating there violate the autonomy of the state. At least in the case of the individual (from which, arguably, we generalize in thinking about the autonomy of other entities), understanding of the internal/external divide is parasitic on the practices which institutionalize the difference: for example, the practice of granting authority to the agent’s verdict on her mental states (an internal matter), or the practice of ascribing responsibility for “volitional” conduct, conduct which originates “internally.”

Even this will not do, however, since as the tradition of German Idealism has shown, there can be *internal* limitations on action that undermine autonomy (action based on desire, for Kant) and *external* limitations that are essential for autonomy (the laws of the rational state, for Hegel). What this highlights is that it is essential to the concept of autonomy that limitations on action come from the *right* source, that is, from something that we identify as essential to the agent (whether the agent be a state or an individual). A state does not act autonomously if its policies are dictated by the corporate lobbyists that have the state legislature in their pocket—even though all the lobbyists are residents of the state, and even though all the legislation is enacted by duly elected legislators. Thus, to have a view about the violation of state autonomy one needs to have a handle on the concept of the essence of “statehood” itself.

The concept of statehood not only requires a wealth of propositional knowledge—for example, about the components of government or the legitimate reasons for state action—but a wealth of practical understanding of what it means for a state to act and what functions states perform in the lives of their citizens. It is immersion in the network of practices constitutive of statehood that makes intelligible the worry about the “autonomy” of the state.⁸⁵

One could, of course, keep tracing this Background of intelligibility for each concept *ad infinitum*. And there may perhaps be something unsatisfyingly sketchy about the picture of the Background that in fact emerges. On the other hand, if Heidegger is right that the Background of practical know-how does not admit of theoretical articulation, then a “sketch” of some of its elements and contours is all that we have any right to expect. The sketch, if successful, should simply throw into relief some of the practical competence we need, but may not have noticed, in order to make cognitive judgments about relevance or about anything else. Good judges, immersed as they are in their adjudicative practices, make these judgments all the time; but if the foregoing sketch is right, there is no reason to think any *theory* could ever do justice to what they are doing.

IV. HEIDEGGER, THEORY OF ADJUDICATION, AND PRACTICAL REASON

Let me conclude with four observations.

First, if this broadly Heideggerian critique is on target, then the theory of adjudication fails not only in its *descriptive* ambitions. We can see this readily if we recall both the Presumption—that current adjudicative practice is “roughly right”—and Mackie’s account of the Standard Relation between normative and descriptive elements in the theory: As a normative matter, the theory wants the descriptive account of judicial decisionmaking to be, as Mackie puts it, “a truer description than it yet is.”⁸⁶ In other words, because normative theory of adjudication is parasitic upon accurate description, the impossibility of complete description necessarily handicaps prescription. If what judges are doing in deciding cases is, in significant part, dependent upon the horizon of intelligibility created by the Background, and if we have no way of articulating the type of understanding constituted by the Background, then, on the normative side, we can do no better than an empty gesture: “Do as you

85. The situation is somewhat complicated by the fact that *Garcia* concerns a regulation of a city, San Antonio, while *New York* concerns a regulation of a state. Assuming we are suitably immersed in the relevant practices, however, we can see that the issue about the autonomy of local government (state or city) is relevantly similar, and that the regulations—though one is concerned with wages, the other with the disposal of radioactive wastes—are also relevantly similarly with respect to local autonomy.

86. Mackie, *supra* note 14, at 163.

do, judges, though we cannot say how that is."⁸⁷ This should prove worrisome on the plausible assumption that we can only better assess what we *ought* to be doing if we actually know what we *are* doing. But if Heidegger is right, then there is a lot that judges are doing in deciding cases, that we, as jurisprudential theorists, cannot articulate or, consequently, cannot subject to critical evaluation.

A second observation warrants comment at this point. For the plausibility of this Heideggerian attack on theory of adjudication turns ultimately on whether Heidegger (and Bourdieu and Dreyfus and all those others who follow Heidegger in this regard) are really right that practical competence resists theoretical articulation. It is not clear in Heidegger, for example, that there is anything that would count as an *a priori* argument for this claim. But without such an argument, it seems that for any domain of human activity it will remain an empirical question whether Heidegger is right about the prospects of "theory" in that domain. I have tried here only to invoke some plausible intuitions about why the prospects for "theory" in adjudication and elsewhere may fall prey to the Heideggerian objection. Even here, though, it might be objected that the cases that I have concentrated on are not representative, and that the prospects for a theory of "relevance" judgments are better than these examples would suggest. More importantly, someone might object that even without a complete theory of "relevance" judgments—one that would require the sort of explicit articulation of the Background that Heidegger denies is possible—a theory of adjudication has accomplished enough if it gives us a theoretical articulation of those aspects of the practice that are not coextensive with the Background. Even if the Background is opaque, much about judicial decision may not be. I concede that it is not obvious that an interesting theory of adjudication *must* be a theory of the Background.⁸⁸ On the other hand, it is striking that, because analogical reasoning is central to judging, so too is the capacity for making judgments of relevance. Yet if the Heideggerian critique is conceded, then it follows that the theory of adjudication can shed no light on a central part of the judicial enterprise: the making of judgments of relevance! I return to this point momentarily.

87. Of course, it remains possible, and indeed likely, that we can still articulate norms for decisionmaking that speak to those aspects of judicial decision that are not coextensive with the Background competence. Such norms are also likely to be quite important

88. If writers like Kent Greenawalt are correct, then there is, in fact, nothing distinctive about *legal* reasoning; that is, legal reasoning simply adopts methods of reasoning (e.g., reasoning by analogy, which is itself dependent upon relevance judgments) that are familiar from nonlegal life. See KENT GREENAWALT, *LAW AND OBJECTIVITY* 199 (1992) ("The major reasons in law are not distinctive to law. I cannot think of a characteristically *legal* reason that does not have a familiar analogue in common experience and judgment."). In that case, if Heidegger is right about the centrality of the Background to understanding in ordinary life, then he would be right *a fortiori* about understanding in law. At this point, the legal philosopher might wonder why this problem should be considered *her* problem? Part of the answer, of course, is that the legal philosopher seeks a *theory* of legal understanding.

There remains a different respect, though, in which the Heideggerian critique resonates with recent work in the theory of adjudication, and, indeed, might offer something to it. I have in mind, of course, the practical reasoning or practical wisdom theories of adjudication that have commanded considerable attention in recent years.⁸⁹ For the practical reasoning theories seem to pursue an insight congenial to Heidegger: namely, that the practice of judicial decision resists a certain sort of theoretical articulation. Consider, for example, Judge John Noonan's complaint about Dworkin's theory of adjudication:

Mr. Dworkin is too abstract, contrary to his choice of the appellate judge as the best example of the law at work. The judge has far less time to imitate Hercules than has the law professor, who can actually be the master of his own corner of the field. If there is any reason to prefer the judge to him as a paradigm, it is that the decision of cases affecting real people demands a sensitivity that handling hypothetical ones does not. Such sensitivity is nurtured by experience. It eventuates in what Aristotle calls prudence. In that small summa of American jurisprudence "The Legal Enterprise," Robert Rodes offered the homely image of a soccer referee. One cannot spell out precisely in any rule book what his calls should be, since sometimes to call a foul will penalize the team that has been fouled. Only discretion makes the good referee; the same holds for judges. I do not think this element of practical wisdom is captured in any of Mr. Dworkin's formulations.⁹⁰

Substitute Heidegger's notion of the Background for the talk of "experience" and "prudence," and Judge Noonan has lodged the same critique as that being discussed here: that one cannot give an explicit, rule-book version of how judges decide cases, because some significant part of what goes into judicial decision depends on a background of practical skills which resist such cognitive articulation.

The problem with some of these practical reasoning theories, it seems to me, is that they cannot rest content with this criticism: They seek to generate a competitor "theory" to traditional theories which are usually dubbed,

89. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER* 209–25 (1993); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 *VAND. L. REV.* 533 (1992); Lawrence B. Solum, Comment, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 *S. CAL. L. REV.* 1735 (1988). A number of these pieces take Llewellyn as representative of this line of thought. For a similar take on Llewellyn, but from a Wittgensteinian perspective, see Dennis M. Patterson, *Law's Practice*, 90 *COLUM. L. REV.* 575 (1990) (reviewing KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (1989)). For a rather different, and more skeptical, view of the later Llewellyn, see Leiter, *supra* note 16, at 274.

90. John T. Noonan, Jr., *Hercules and the Snail Darter*, *N.Y. TIMES*, May 25, 1986, § 7, at 13; cf. KRONMAN, *supra* note 89, at 217 ("The habits that constrain a judge as he goes about his work are not the product of thought but of experience, and no amount of abstract theorizing can ever be a substitute for them, much less bring them into being in the first place.").

somewhat loosely, “formalistic.”⁹¹ Thus, for example, Daniel Farber describes the challenge for practical reasoning theorists as being to “describe the operation of practical reason” so that we can have “confidence in its ability to guide judicial decisions.”⁹² The key is to see that “reason includes a broader range of cognitive activities” than the formalist imagines;⁹³ in short, “there are other cognitive abilities besides deduction on which judges can rely.”⁹⁴ In the case of statutory interpretation, for example, Farber says that we must recognize that this is not a matter of a “mechanical application of rules . . . but instead involves a complex judgment about how to best harmonize text, legislative history, statutory purpose, and contemporary public policy.”⁹⁵ Ultimately, though, the practical reason theorist wants to insist that though the descriptions of practical reason “are much less precise than one might wish,” practical reason is still real enough. “[M]any other cognitive skills,” says Farber, “also are extremely difficult to explain—for example, the ability to determine the correct trajectory for throwing a ball—yet these skills obviously exist.”⁹⁶

Perhaps the mistake, though, is to think that what we are talking about here is cognitive at all, that the sort of “skill” at the foundation of judgment is best viewed as involving a tacit theory. This is precisely what Heidegger denies, which is why he denies that we can expect to have a theory about these skills. If some practical reasoning theorists are reluctant to take this step, it may be because they feel the pressure of the dictum usually attributed to Richard Epstein: “[I]t takes a theory to beat a theory.”⁹⁷ Thus, if practical reasoning proponents are to supplant the formalists, they must, by the Epstein dictum, generate a competitor theory. But as an epistemological principle, the Epstein dictum is nonsense: Significant amounts of recalcitrant data suffice to beat any theory,⁹⁸ and the proponents of practical reasoning have produced

91. Thus, Farber says practical reasoning theorists reject the formalistic view “that rules and precedents *in and of themselves* dictate [via deduction] outcomes.” Farber, *supra* note 89, at 539 (emphasis added). It is doubtful, though, that anyone since Blackstone has held *this* precise view (and perhaps not even Blackstone).

92. *Id.* at 533; see also *id.* at 542 (“If practical reason is only a vague description of how judges should decide cases, it seemingly provides no method to criticize their decisions. Nor does it provide any constraint on outcomes, but leaves judges free to impose their own social values at the expense of the legislatures.”).

93. *Id.* at 540.

94. *Id.* at 554.

95. *Id.* at 541; see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 352 (1990) (arguing that legal interpretation involves utilizing broad range of evidence, none of which is necessarily dispositive).

96. Farber, *supra* note 89, at 554. Notice Farber’s assumption that throwing a ball is a *cognitive skill*.

97. Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983).

98. I do not mean to deny here the Duhem-Quine thesis about the underdetermination of theories by evidence, or Quine’s closely related doctrine that no theoretical statement is immune from revision. Recalcitrant data can always be accommodated if we are willing to make substantial enough adjustments in our background theoretical assumptions. But this subtle point growing out of the epistemology of science is not Epstein’s. Epstein asserts that one cannot displace a theoretical edifice simply by adducing evidence

precisely such data against the formalist theories.⁹⁹ Surely Farber is right in speaking about the “inevitability” of practical reason—or of something that fills the gapping holes left after the formalist is done.

Borrowing a phrase from the philosopher Stephen Schiffer, the proponents of practical reason or practical wisdom should really adopt what we might call the “No-Theory” Theory of Adjudication.¹⁰⁰ According to the No-Theory Theory, judicial decision is not something about which one should expect to have a theory, because one can never produce the needed theoretical reduction of adjudication to explicit rules of decision. Some of the defenders of practical wisdom correctly embrace the No-Theory Theory. Anthony Kronman, for example, in commenting on Llewellyn’s notion of the “horse-sense” that a good judge needs, observes that “horse-sense, like soundness of judgment in other areas of life, is not reducible to a method”¹⁰¹ and adds that “[t]he work of ‘the cold intellect’ . . . can never . . . replace the practical know-how on which the craft of appellate judging rests.”¹⁰² Once acquired, through time and experience, these habits of practical know-how constrain decision,¹⁰³ which is precisely why Kronman aptly observes that “the true judicial craftsman, the judge endowed with horse-sense, knows that his work is constrained even in its most creative aspects and regards the iconoclastic bogey of an utterly free judicial prerogative as a fantasy or myth.”¹⁰⁴

Kronman, of course, looks to Aristotle (and Llewellyn), not Heidegger, in support of these points.¹⁰⁵ But the choice of intellectual authority for the theme hardly matters. Whether it is Aristotle, or Heidegger, or Wittgenstein, or Bourdieu, the core idea remains the same, and it is one with potentially far-reaching implications: There is much in human judgment and action that is

inconsistent with the claims of the theory. It is, of course, easy to understand why free market utopians like Epstein would find such a doctrine attractive: It precludes taking into account the actual reality of, for example, labor relations under capitalism. This is precisely what Julius G. Getman and Thomas C. Kohler point out, see Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1416–17, 1427–33 (1983), to which Epstein responds, see Epstein, *supra* note 97. Epstein claims that, according to economic theory, an essentially nineteenth-century legal regime in labor relations will promote liberty and autonomy. Getman and Kohler point out that historical evidence shows this is not so. Epstein replies, in essence, “Economic theory says it *ought* to be so, and unless you have a better theory, it is so.” See Epstein, *supra* note 97, at 143–51. As an epistemological precept, this is so bizarre as to defy characterization, but it is certainly not a posture that finds any support from Quine or Duhem. For a discussion of the generally poor predictive record of economics, as well as a skilled philosophical exploration of why this might be so, see ALEXANDER ROSENBERG, *ECONOMICS—MATHEMATICAL POLITICS OR SCIENCE OF DIMINISHING RETURNS?* (1992).

99. See, e.g., Farber, *supra* note 89, at 543–49.

100. See STEPHEN SCHIFFER, *REMNANTS OF MEANING* 265 (1987).

101. KRONMAN, *supra* note 89, at 223.

102. *Id.* at 219. Compare Michael Tigar’s related observation, analogizing trial lawyers to cooks: “With a recipe, you can cook something. With theory, techniques, and skill—informed by experience—you can call yourself a cook.” MICHAEL E. TIGAR, *EXAMINING WITNESSES* xi (1993).

103. Recall that for Heidegger, the Background forms the horizon of intelligibility, meaning that it *enables* as well as *delimits* the sphere of understanding.

104. KRONMAN, *supra* note 89, at 224.

105. See, e.g., *id.* at 225.

possible only because of practical skills and competence that remain beyond the reach of theoretical articulation. Heidegger, more than these others, makes a detailed *phenomenological* case—a case based on a careful analysis of our actual experience—for the impossibility of theory. If he is right, this may give us additional reason to rethink the jurisprudential program for a theory of adjudication.

Despite its commitment to a certain level of descriptive adequacy, the heart of the theory of adjudication has always been its normative program, its attempt to tell judges how they *ought* to decide cases. Because of the Standard Relation between the descriptive and normative aspects of the theory, however, a problem at the descriptive level will handicap the theorist's ability to discharge the normative program: If we *cannot* (as Heidegger would give us reason for believing) describe in theoretical terms how judges *do* decide cases, then we will not be able to tell them, with any specificity, how they *ought* to decide them. Of course, as noted earlier,¹⁰⁶ much of Anglo-American theory of adjudication has concerned itself with aspects of adjudication other than the skills that draw on the Background. But to demarcate the theory of adjudication this way may make such a theory fatally uninteresting. If, as I have argued, the Background is essential to judgments of relevance, then it is central to one of *the most distinctive judicial functions: namely, reasoning by analogy*. Moreover, it seems likely that Background understanding is essential for other important parts of the judge's job: for example, deciding what constitutes the "exception" to a rule, or interpreting the omnipresent "reasonableness" standards in the law.¹⁰⁷ In short, to give up the ambition of developing a theory of the Background—as Heidegger would tell us we have to do—entails giving up having a theory that illuminates central aspects of what judges do. We must ask, then: What sort of theory are we left with, and is it one worth having?

Of course, we might still develop a theory of other aspects of the judicial function, perhaps along the lines of Ronald Dworkin's influential account.¹⁰⁸ There are independent reasons for being skeptical about the prospects of this kind of theory—some having to do with broadly metaethical considerations about the objectivity of moral reasoning¹⁰⁹ and some having to do with Legal Realist arguments about the indeterminacy of law.¹¹⁰ Like the Heideggerian arguments against a theory of the Background, these arguments suggest that the prospects for a fruitful *normative* theory of adjudication may be dim. One

106. See *supra* note 83 and accompanying text.

107. See *supra* note 23.

108. See DWORKIN, *supra* note 7; DWORKIN, *supra* note 18.

109. I develop these arguments in a paper I am now writing, *Objectivity, Morality and Adjudication*, in *OBJECTIVITY IN LAW AND MORALS* (Brian Leiter ed., forthcoming 1998). For related considerations, see Mackie, *supra* note 14.

110. I will explore these in LEITER, *supra* note 3; see also Brian Leiter, *Legal Indeterminacy*, 1 *LEGAL THEORY* 481 (1995).

response to this dilemma would be to revisit the Legal Realist idea of aiming *only* for a descriptively adequate theory of what courts actually do, not in terms of what they *say* they are doing, but in terms of what *causes* them to do what they do. Such a theory would abandon the traditional aim of providing a rational reconstruction of judges' reasons. If successful, however, it would yield something much more practical: a guide to what courts will do.

I propose to show elsewhere¹¹¹ that such a "naturalized" approach to jurisprudence (as I call it) warrants more serious consideration than most Anglo-American legal philosophers would think. In this light, we may understand Heidegger's arguments against the possibility of developing a theory of the Background as providing only one type of important reason for abandoning normative theory, and taking the "naturalistic turn"¹¹² in legal philosophy.

111. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence* (Aug. 23, 1996) (unpublished manuscript, on file with the *Yale Law Journal*).

112. This is a play on the title of *THE LINGUISTIC TURN* (Richard Rorty ed., 1967). Heidegger would not advocate "naturalism," though for reasons that are tangential to my concerns here.