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### An Argument For an End to The Analytical/Critical Divide

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## Why we must end the 'Critical' / 'Analytical' Divide

Opposition between 'analytical' and 'critical' traditions in philosophy is misguided and counterproductive. Not before time, this distinction is disappearing from mainstream philosophy. Disappointingly, it persists in legal philosophy. For deeply outmoded reasons the reading lists for legal theory courses at analytically minded law schools bear little similarity to those provided at critical law schools. Legal philosophers attach importance to the work of Raz and Finnis or that of writers like FitzPatrick and Douzinas. It is rare for academic writing to acknowledge that all four are engaged in worthwhile, interesting and significant theoretical enterprise.

There could be any number of reasons why this schism persists in legal theory. It may be that legal theorists on both sides have a vested professional interest in preserving the myth that critical engagement is radically and irreconcilably 'Other' to analytical jurisprudence. This essay will concentrate on a specific error made by both sides; each one misunderstands the significance of 'the Heideggerian turn' in philosophy and its relevance to theories about what judges ought to do when they decide cases.

The twentieth century split between these theoretical approaches begins with Heidegger. Where legal theorists have engaged with Heidegger's work they have operated on the incorrect assumption that acceptance of his position would render normative theories of adjudication redundant. This mistake can be seen across the analytical/critical divide when Heidegger is explicitly mentioned. It is made by analytical theorists who oppose Heidegger, like Michael S. Moore, critical theorists who cite Heidegger's work with approval, like Pierre Schlag, and writers that are 'sceptical' of both traditions, like Stanley Fish. As I will show, Heidegger's philosophy is actually an endorsement of the sorts of normative legal theories that Moore, Posner, Dworkin and other analytical writers provide.

Throughout this essay I focus on direct references to Heidegger and his work yet my point is not merely interpretative. While only certain theorists mention Heidegger by name or engage in any analysis of his work, the entire critical tradition in legal philosophy takes the Heideggerian turn in one form or another and makes the same error about the consequences of that turn. I shall refer to writers like Moore, Schlag, Fish, Rorty, Douzinas, Warrington, Schank, Morgan and Hamula. Yet my point applies equally to anyone who takes philosophical figures inspired by Heidegger as the platform for a position that assumes normative legal theory has no merit. Derrida is commonly used in this way.<sup>1</sup>

My argument is also aimed at anyone that assumes the continental or critical tradition is to be ignored because it is inimical to analytical approaches. This assumption is also wrong, for precisely the same reasons. A number of readers will automatically cease reading at this point at the mere mention of Heidegger's name. This is symptomatic of the outdated and parochial attitude that I attack. There is nothing that I can write at this point to dissuade anyone so incurious and close-minded.

I begin by showing how Heidegger's early work is the basis for all twentieth century critical or continental philosophy. Borrowing from work done by Brian Leiter, I then show how scepticism

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<sup>1</sup> See DOUZINAS AND RONNIE WARRINGTON, *POSTMODERN JURISPRUDENCE* (Routledge, 1991)

about the value of normative theories of adjudication might seem like a logical consequence of the Heideggerian turn. I go on to demonstrate that a more complete Heideggerian account of adjudication leads directly to a justification of the normative theories of adjudication that we find in contemporary analytical jurisprudence. If we properly explore the role of *theoria* in Heidegger's philosophy, if we give an accurate account of normative legal theory, such approaches are inherently impactful on the practice of judging. Normative legal theory is, in fact, necessary to that practice. Finnis and Dworkin are just as true to Heidegger's philosophy as Douzinas and Schlag. I conclude with some remarks about the broader implications of this sort of lazy assumption about key figures in the history of ideas and some of the dangers that it presents in all of our theoretical engagements.

## 1. *Being and Time* and the Critical Tradition

The ground zero for a distinctly 'critical' or 'continental' philosophy in twentieth century thought is Heidegger's *Being and Time*. Heidegger's lifetime project was to return the neglected question of Being to the centre of philosophical discourse. He did so by critiquing certain assumptions in western philosophy up until that point. Metaphysics and epistemology start from a faulty premise according to this argument. 'Man' and 'world' do not exist in different realms, in the way that realism, idealism and nominalism suggest. The Cartesian project of trying to explain knowledge as though it were some lofty ideal we aspire towards is wrongheaded. Knowledge, or 'Understanding' is something that we display all of the time in our daily lives. We are always 'worlded'; we cannot fail to engage with the world around us. If we wish to comprehend Understanding we should look to our practical activities. Capturing 'external' reality is something that we do all of the time as part of our existence. For example, our Understanding of a hammer comes from picking it up and using it as a 'piece of equipment' to achieve various practical ends in our lives; we get no greater insight by "staring at the hammer-thing" and trying to figure out its essential nature. Understanding 'Understanding' is about investigating how we live and what we do instead of trying to gain access to some higher plane beyond our daily lives.

The important questions in philosophy thus relate to existence itself. All of Heidegger's later work moves towards a 'fundamental ontology' that will get us back to this question. This is the starting point for all critical philosophy from that point onwards. Sartre specifically uses Heidegger as the starting point for his own thought and the existentialist movement that followed. Arendt and Levinas were both disciples of the early Heidegger. Gadamer's hermeneutic philosophy has its origins in *Being and Time*. Derrida's biggest philosophical influence was Heidegger to the extent that he was occasionally referred to as "the French Heidegger"; the term 'deconstruction' itself comes from the French translation of a term in Heidegger's work. This is a diffuse array of positions and these prominent thinkers disagree with each other (and Heidegger) on many points. It is also the case that earlier philosophers were rediscovered as part of the emergence of this movement, most notably Nietzsche and Kierkegaard. The key point is this; it all begins with agreement that Heidegger had dissolved the metaphysical and epistemological questions that had pre-occupied philosophy up until that point and would continue to provide the focus for the analytical tradition. Any approach to legal theory that is based on these writers, or anyone else within this tradition, also accepts the Heideggerian turn as a starting point. This is expressly acknowledged by those that have taken the time to trace the philosophical background to various critical movements in legal theory; Peter

Schanck traces the roots of postmodernist theories of statutory interpretation to this particular aspect of Heidegger's thought.<sup>2</sup>

In both critical and analytical jurisprudence, two important assumptions are made about this Heideggerian tradition when it is related to legal theory. The first is that 'foundational' disputes – metaphysics, epistemology and the essential nature of man - are dead and not to be resurrected. The second is that normative theories of adjudication are redundant; that is, any grand theory of what judges ought to do when they decide cases is a waste of time.

This second assumption is the initial focus of my argument. It is incorrect. There is nothing in the Heideggerian turn (and hence nothing in the foundations of critical legal theory) that leads to, or can even sustain, this conclusion. On the contrary; the normative theories of analytical writers like Dworkin, Posner and Moore are justified under the Heidegger's foundational claims. The Heideggerian turn has had an impact on normative theories of adjudication, but these writers already reflect that turn in their positions. The only type of normative theory that Heidegger's account of *theoria* rules out is an approach that no theorist, analytical or otherwise, would ever take anyway. It is philosophically defensible to be sceptical about the value or impact of normative theories of adjudication, but such a position would require one to depart from Heidegger, re-open foundational disputes and hence depart from the very bedrock of the supposed split between analytical and critical philosophy.

The two prevailing assumptions behind the wall that separates critical legal scholarship and analytical approaches are thus incompatible and irreconcilable. The division is philosophically indefensible. Analytical and critical scholars are equally to blame for perpetuating it. Since this assumption is so pervasive and unchallenged, in legal theory we only get glimpses of the manner in which it has stemmed from a misreading of Heidegger's work. Scholars operate on the assumption without addressing its roots. We do, however, get hints as to where and how the error is made. Brian Leiter's work is a useful starting point in explaining how the Heideggerian turn operates in the context of adjudication.

## **2. The Heideggerian Turn and Adjudication**

The Heideggerian turn in describing adjudication can be briefly summarized. Judicial comprehension is practical "know-how". It comes from *being* a judge, together with other judges. It does not come from some universal, timeless code that we can hope to crack. This know-how defies full and complete articulation. One can only fully know it, by living it.

From this brief account we can see why so many have assumed that the Heideggerian turn (and therefore critical jurisprudence generally) requires scepticism about any theory that would tell judges what they ought to do. There is no notional textbook inside the minds of judges that they apply over concepts in the manner that one might follow a set of instructions. Trying to provide a

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<sup>2</sup> Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation* 65 SOUTHERN CALIFORNIA LAW REVIEW 2505 (1991-1992) 2519-2520.

set of rules for adjudication in this way would be a waste of time. This assumption misses two vital points, one on the nature of adjudication and one on the nature of normative legal theory.

Any account of adjudication *must* explain disagreement and dispute in addition to explaining widespread agreement among practitioners. Heidegger not only explained what happens when we understand things easily, he also offers an account of what we have difficulty understanding. As soon as Heidegger's philosophy is used to explain this *essential* element in adjudication, normative theories of adjudication take on a central, unavoidable role. In this respect Heidegger is similar to Dworkin; every judge is something of a theorist. In this section, I concentrate on this issue.

Normative legal theory does not produce sets of instructions for judges, of the sort that is ruled out by the Heideggerian turn. In Heidegger's later writing he justifies the use of *theoria* as a form of contemplation that operates in service to practical activity. His conception of *theoria* is similar to John Finnis' account of jurisprudence as an effort to distinguish the practically useful from the practically unhelpful from within the same sphere or paradigm as the practitioner. Normative theories such as that of Dworkin, Moore and Posner fit within the justification for traditional theory that Heidegger and Finnis share. I turn to this issue in later sections.

## 2.A Agreement

No legal system could work without a shared conception among its practitioners as to the source and substantive content of law. This phenomenon might be explained any number of ways, from objective meaning in language to convergence in diverse opinions as to the meaning of legal texts. Brian Leiter describes this as "massive and pervasive agreement about the law"<sup>3</sup>. Under the Heideggerian turn it is explained through "immersion in a shared culture". Leiter borrows from Heidegger's work to explain this feature of adjudication.<sup>4</sup>

Leiter makes use of the judgment in *New York v. United States*<sup>5</sup>. In this case the petitioners argued that the constitutional boundaries of Federal Authority had been overstepped by a series of incentives contained in the Low-Level Radioactive Waste Policy Amendments Act 1985<sup>6</sup>. These incentives encouraged individual states to take responsibility for low-level radioactive waste produced within their own state.

Leiter relates Heidegger's account of what "we must know in order to know" to the understanding of previous authorities demonstrated in Justice O'Connor's leading judgment:

What then constitutes the horizon of intelligibility in which "regulation", "autonomy", "state", and "private entity" become visible [in *New York v. United States*]? The Heideggerian thesis is that competence with and immersion in a network of practical concerns is necessary in order for these particular concepts to be intelligible... the intelligibility of "regulation" and "autonomy" is arguably parasitic upon...practical competence: being able to distinguish "external" and "internal" limitations.<sup>7</sup>

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<sup>3</sup> Brian Leiter *Explaining Theoretical Disagreement* 76 UNIVERSITY OF CHICAGO LAW REVIEW 1215 (2009), at 1227

<sup>4</sup> Brian Leiter *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253 (1996) 253.

<sup>5</sup> 505 U.S. 144 (1992)

<sup>6</sup> Pub.L. No. 99-240, 99 Stat. 1842, (1986), (codified at 42 U.S.C., 1994), hereinafter to be referred to as "the Act".

<sup>7</sup> *Supra*, note 4, 274-275.

A number of concepts are mentioned here as part of the “horizon of intelligibility” in *New York v. United States*. Among these is the concept ‘private’. Counsel for the United States argued that the Constitution permits federal directives to state governments on certain occasions, citing a number of authorities. The majority dismissed this line of argument on the basis that “this [was] not a case in which Congress has subjected a State to the same legislation applicable to private parties.”<sup>8</sup> A distinction between public and private entities thus became an important part of the decision. Nevertheless there was no discussion of the meaning of the term ‘private’ in the majority decision, the dissenting opinion of Justice White or the arguments of counsel. In order for Justice O’Connor to successfully draw this distinction everyone involved must broadly agree on the meaning of ‘private’ in this context.<sup>9</sup>

On Leiter’s, Heidegger inspired, reading, ‘private’ is *part* of our existence; understanding ‘it’ is about understanding ‘us’ and our practical engagements instead of trying to grasp some independent object.<sup>10</sup> Justices O’Connor and White came to their common understanding through shared experience of a practical world, in the manner that you and I have the same understanding of how to use a hammer. They did not do so by looking the term up in a book, in the manner that you or I might consult a dictionary to explain a word in a foreign language. The legal conception of ‘private’ is a tool used for practical, day-to-day ends. As such it does not exist, or make sense, in isolation. A crucial part of how we understand is to see these tools as part of a totality; each piece only makes sense because it fits neatly alongside other pieces, in this case ‘state’, ‘autonomy’ and ‘regulation’, that exist in order to help a judge do his or her job.

We can see the anti-Cartesianism in this vision. To describe what counts as understanding in adjudication we should look to how judges use concepts like ‘private’ when they put them to practical use; it is not about trying to identify ‘justified true belief’ about the nature of ‘private’. The majority in *New York v. United States* used the concept to distinguish past authorities.

The account of judicial understanding presented here is practical, but it is also interpretative. Judges know how to do use ‘private’ as a tool by bringing practical experience with them. They do so in a uniform way because of their shared background. This goes beyond a simple claim that our life experiences may impact upon our general outlook and opinions. How we exist becomes central to how we make sense of the world as soon as we look to daily activities for our account of understanding. Our day-to-day existence is how we reason. This practical, contextual background is inescapable.<sup>11</sup>

If there were always consensus among legal practitioners in this way one might be tempted to agree with the conclusion that the Heideggerian explanation for such consensus leads to scepticism as to the value of normative legal theory. Judges understand things through immersion in a judicial culture that cannot be fully explained so a theory of what judges ought to do that is based on some grander notion like justice seems redundant. When judges engage with various concepts, like ‘private’, what they see are useful tools that can achieve practice specific ends. A theory by some academic about the ‘real’ meaning of ‘private’ or how judges ought to interpret such concepts seems to have no potential impact upon the practice. Within critical scholarship, Pierre Schlag has made a similar argument for decades in a variety of ways. According to Schlag, “normative theory thinks it produces its effects” when in fact “we can [only] usefully read these

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<sup>8</sup> *Supra*, note 5 at 161.

<sup>9</sup> This reasoning is criticized in the dissenting judgment of Justice White *Ibid.*, 201-204, but there was no disagreement as to the meaning of ‘private’.

<sup>10</sup> See MARTIN HEIDEGGER, *BEING AND TIME*, (John MacQuarrie & Edward Robinson trans., Basil Blackwell, 1962), at 98-104

<sup>11</sup> *Id.* 171-192.

theories for what they reveal about the enterprise of normative legal thought”<sup>12</sup>. He selectively quotes from Heidegger multiple times in the course of this argument<sup>13</sup>, alongside secondary sources based on Heidegger such as Kronman<sup>14</sup> and avowedly Heidegger-influenced positions such as those of Derrida. Schlag is far from the only critical jurisprudent to expressly associate Heidegger with this position.<sup>15</sup> One can see analytical theorists make the same assumption about consequences for normative legal theory if one takes ‘the Heideggerian turn’. Moore’s brief treatment of Heidegger claims that his “philosophical hermeneutics cannot be a brand of interpretivism that any theoretician should want for her discipline – on pain of losing any discipline at all”.<sup>16</sup> In this respect he distinguishes Heidegger from Dworkin and other normative theorists who more “modestly interpretative”. So for Moore, taking the Heideggerian turn means giving up on normative theories of adjudication. Even theorists that oppose most critical and analytical forms of legal theory, make the same assumption, for the same reasons about Heidegger’s departure from Descartes and the consequences for normative legal theory. We shall see this in detail when we look at Stanley Fish’s critiques of Dworkin and others; Fish acknowledges Heidegger as his greatest influence.<sup>17</sup>

Adjudication does *not* only involve agreement, consensus or overlapping opinion. No issue could ever get to court, and hence be adjudicated upon, unless there is some sort of dispute. This ‘useful tool’ analogy for how we understand the world around us needs to explain what happens when these tools are not working if it is to apply to adjudication. Heidegger provides such an account. This side of the Heideggerian turn leads directly to a justification of normative theories of adjudication; in legal philosophy it has been entirely missed or ignored by ‘Heideggerians’ and ‘anti-Heideggerians’ alike.

## 2.B Disagreement

Once a case reaches court there must be *some* disagreement. If our lived in, legal culture resulted in utter convergence on every matter of interpretation there would be little space left for

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<sup>12</sup> See Pierre Schlag *Normativity and the Politics of Form* 139(4) UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1991) 801, 844. 829 note 80, 833 note 90

<sup>13</sup> Id. 829 note 80, 833 note 90, 851 note 135, 924 note 317

<sup>14</sup> Id. 907 note 281. The piece cited is Anthony T. Kronman “Precedent and Tradition” *The Yale Law Journal* 99, (Mar., 1990), pp.1029-1068.

<sup>15</sup> See also Schanck, *supra* note 1, Edward L. Rubin *The Practice and Discourse of Legal Scholarship* 86 MICHIGAN LAW REVIEW 1835 (1987-1988), Costas Douzinas and Ronnie Warrington *POSTMODERN JURISPRUDENCE* (Routledge, 1991) 29-54. and James J. Hamula *Philosophical Hermeneutics: Toward and Alternative View of Adjudication* BRIGHAM YOUNG UNIVERSITY LAW REVIEW (1984) 323.

<sup>16</sup> See Michael S. Moore *The Interpretive Turn In Modern Theory: A Turn For The Worse?* 41 STANFORD LAW REVIEW 871, (1989) 927. Moore also assumes that Dworkin’s brief but approving references to Heidegger and Gadamer would require him to give up the ‘right answer thesis’ *id.*, note 308. In a footnote he describes Heidegger as “a very ambitious interpretivist” and as such aligns him with Rorty and Fish, two noted sceptics on the value of normative theory, *id.* 923 note 226. Rorty too assumes that Heidegger’s early work renders normative theory redundant and he draws this conclusion through some very selective quotation of his own. Rorty, however, explicitly parts ways with Heidegger in order to do so. He disagrees with Heidegger’s later work. [add rorty]

<sup>17</sup> Gary A. Olson, *Fish Tales: A Conversation with ‘The Contemporary Sophist’* in Stanley Fish, *THERE’S NO SUCH THING AS FREEDOM OF SPEECH AND IT’S A GOOD THING TOO* (Oxford University Press, 1994) 299-300, 281, he also name-drops Heidegger at least once as support for his general “anti-foundationalist” position, see STANLEY FISH *Anti-Foundationalism, Theory Hope and the Teaching of Composition* in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (Clarendon Press, 1989), 342-355 at 345.

dispute. In private law one side would be advised that they have no chance of winning, they thus would not pursue an action.<sup>18</sup> Even in the most speculative test case imaginable there needs to be *something* to test.

Even a basic Heidegger-style sketch of adjudication must explain both how judges understand functioning pieces of judicial equipment, like 'private' in our example, but also what happens when judges encounter problematic or 'broken' pieces of "equipment".<sup>19</sup> For a piece of equipment to count as "broken" there must be some degree of uncertainty about it, however slight. It does not take major disagreement on the meaning and purpose of law in order for this to happen<sup>20</sup>. Something as prosaic as the appropriate amount of compensation in a straightforward action would count. My earlier account of agreement in law, where we see everything in terms of contextually meaningful tools, involves an attitude towards the world that Heidegger calls *ready-to-hand* – the same attitude that we have towards our shared understanding of a hammer. Any time a question of law comes before a court there are elements of what Heidegger calls the "*unready-to-hand*" or "present-at-hand". *This* type of engagement leads directly to a justification of theories about what judges ought to do. It is distinctly non-Heideggerian to claim that such theories are divorced from practice. On the contrary, Heidegger's position is that what we have been calling 'theory' is *too much* a part of practical engagement to deal with the question of Being. The delusion in western philosophy was its belief that it stood apart from practice; in fact standard western *theoria* inherently serves practice.

In *New York v. United States*, Justice O'Connor assesses whether an Act is consistent with the Constitution. Several concepts are involved that Justice O'Connor has this present-at-hand attitude towards. These include 'Federal Authority'. Unlike the concept 'private', which was usable without any reflection on its meaning, Justice O'Connor has found it necessary to test the parameters of 'Federal Authority'.

Heidegger concedes that we may feel that we encounter independent 'objects' when a particular 'tool' appears troublesome, not useful, or difficult to comprehend. In such circumstances it feels like this object has *constantly* existed at another level to the practically useful one that we are used to.<sup>21</sup> We may feel at such a moment that these things have a mind-independent existence that we need to capture, in the manner of Descartes with his ball of wax. The folly of western philosophy is to believe that this 'present-at-hand' feeling is anything more than temporary and anything more than a blip in practical engagement. Albeit that "pure presence-at-hand announces itself in such equipment" it does so "only to withdraw to the readiness-to-hand...of the sort of thing we find when we put it back into repair"<sup>22</sup>. In short, theoretical questions arise because of practical problems. We do not just dream up questions such as 'what are the limits of Federal Authority?'. These problems are created on the basis of practical need.

Such problems are also resolved practically. We do not get anywhere by "just staring at the...thing," but by finding ways of "seiz[ing] hold of... and using..."<sup>23</sup> it. Mending broken equipment is about finding ways to return to our normal, practical attitudes. No one piece of equipment makes

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<sup>18</sup> Leiter points out that lawyers would not be able to advise a majority of potential clients against pursuing litigation unless there is widespread agreement about law *see* Leiter, *supra* note 3. My point here is the corollary of Leiter's; to get as far as adjudication there must be some room for dispute as to the likely outcome.

<sup>19</sup> In an exchange with Alan Madry and Joel Richeimer, Leiter noted that his consensus with Heidegger on adjudication was limited to an explanation for agreement. *See* Brian Leiter, *On the Value of Normative Theory: A Reply to Madry and Richeimer* 4 LEGAL THEORY 241 (1998). Like Rorty, Leiter explicitly parts ways with Heidegger on foundational points in order to remain a sceptic about the value of normative theories of adjudication. Leiter's position is thus not one of those under attack in this essay; in fact, Leiter is one of very few legal theorists to recognize how impoverished the "analytical/critical" divide is, *see* [add].

<sup>20</sup> Leiter notes how rare such 'theoretical agreements' actually are, *supra* note 3.

<sup>21</sup> HEIDEGGER *supra*, note 10, at 102-103

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*



sense by itself. Earlier, we saw how the Heideggerian turn in relation to adjudication means that judicial ‘equipment’ is understood as part of a ‘totality’; ‘private’ only makes sense as part of a seamless ‘horizon of intelligibility’. Getting to grips with a broken piece of equipment, ‘Federal Authority’ here, is also an exercise in making it fit with the *totality* of equipment once more.

Justice O’Connor’s attitude towards Federal Authority is ‘present-at-hand’. The court needed to “determine whether any of the three challenged provisions...oversteps the boundary between federal and state authority”<sup>24</sup>. ‘Federal Authority’ as a piece of equipment appears to be “damaged” or “unusable” for deciding whether the Act was constitutional. This is so because judges perceive the tools around them as a whole – each part is not *an* equipment. ‘Equipment’ is the collection of such tools taken together<sup>25</sup>. ‘Federal Authority’ is sticking out from the rest of the totality because there are competing lines of authority as to its meaning. Precedent generally suggested that ‘Federal Authority’ is transgressed by any requirement for states to legislate in accordance with Federal wishes. On the other hand Counsel for the United States pointed out that some authorities *have* permitted similar directives from Congress to state government in certain circumstances.<sup>26</sup> These dicta do not fit together as a totality that can be used in order to determine the constitutionality of the Act.<sup>27</sup>

When Justice O’Connor resolves this issue, or ‘fixes Federal Authority’ according to the analogy, she uses practically useful tools that she already understands. ‘Private’ is just such a functioning tool.

Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws... This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.<sup>28</sup>

We can see here how the judge uses ‘private’ to distinguish one line of authority from another. In this way, the totality of judicial equipment is restored. ‘Federal Authority’ now fits with *both* lines of authority. Recent cases in which Congress has been permitted to issue such directives are distinguished from the case at hand as ‘Federal Authority’ has only been held to allow such a provision in cases where “Congress has subjected a State to the same legislation applicable to private parties”. The concept of ‘Federal Authority’ coheres with the line of authority that suggests the relevant provision to transgress the Tenth Amendment as this is not such a situation. ‘Private’ is not the only piece of judicial equipment that she uses here. ‘State’, ‘Congress’, and ‘government’ are also pieces of equipment that are in working order and that help Justice O’Connor to mend ‘Federal Authority’.

The manner in which Justice O’Connor makes use of legal concepts, precedent and the Constitution also shows how the ‘presence-at-hand’ of the question “withdraws” into “readiness-to-hand”. All of the skills involved are themselves learned through practical application. Justice O’Connor has learned how to utilize precedent and interpret the Constitution just as a craftsman learns how to use a hammer, by using it as a piece of equipment in-order-to achieve practical ends. According to this vision of how we reason, when Justice O’Connor performs all of the actions involved in this process – recognising sections of the Constitution as significant, reading those

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<sup>24</sup> *Supra* note 5, at 159.

<sup>25</sup> *See* HEIDEGGER *supra* note 10, at 97.

<sup>26</sup> Justice O’Connor discusses these arguments in section IV, A of her judgment, *supra* note 5, 177-181. Cases cited by counsel include *South Carolina v. Baker*, 485 U. S. 505 (1988), *Garcia v. San Antonio Metro. Transit Auth.* 469 U. S. 528 (1985), and *Testa v. Katt*, 330 U.S. 386 (1947).

<sup>27</sup> In a different context, ‘Federal Authority’ might remain “inconspicuous” in the same way that ‘private’ did *see* HEIDEGGER *supra*, note 10, 102-103. Similarly, in other contexts ‘private’ might itself appear broken and in need of repair. Aspects of Justice White’s dissenting judgment reflect this, *see supra* note 5 at 201-205.

<sup>28</sup> *Supra*, note 5, at 160.

sections, taking the relevant claims about Federal Authority and state sovereignty from it and comprehending the terms in those claims – she is adopting a ready-to-hand attitude whereby the Constitution appears as a piece of equipment in-order-to mend another, broken, piece.

For Heidegger, this is all that our theories have amounted to. They are a “process of reflection in service to doing and making”<sup>29</sup>. *Theoria* ultimately involves the same combination of shared background presuppositions and purposeful activity that normal, day-to-day understanding shows. Far from being divorced from practice, it is inherently practical (whether we admit it to ourselves or not). Our mistake is to imagine that we have been doing anything more profound than mending bits of equipment. Of course reflection on the meaning of ‘Federal Authority’ is one thing, a grand normative theory of adjudication generally is quite another. In what follows, I shall show that *these* sorts of theories are inherently impactful if we follow Heidegger’s reasoning.

### 3. Judge as Jurisprudent, Heidegger and Dworkin

For Heidegger’s analogy to work every judge *must* have a sense of an overall purpose behind adjudication. I understand the merits of using a hammer in-order-to put a nail in the living-room wall, in-order-to hang a picture because I understand the overall goal of improving the aesthetic appearance of my home. In a judicial context, judges need to have some overall goal in mind when they mend broken equipment, even if it is not articulated in the written judgment and even if judges are not conscious of using it. Otherwise judges could never put things back together as part of a totality. They would have no sense of what the totality is; it would be like a craftsman trying to build a boat with bits of wood and various tools but no concept of the purpose behind a boat. Just as Finnis sees an evaluative enterprise in any description of law, just as Dworkin sees adjudication as a constructive interpretation making law the ‘best it can be’, Heidegger’s ‘broken equipment’ analogy requires of judges that they have a sense of what law does when it works well in order for the analogy itself to make sense.

Justice O’Connor could not have ‘fixed Federal Authority’ unless she had an overall picture of the purpose(s) of adjudication. Justice White even makes the following claim in his dissenting judgment:

[T]he Court makes no effort to explain why this purported distinction should affect the analysis of Congress’ power under general principles of federalism and the Tenth Amendment. The distinction, facilely thrown out, is not based on any defensible *theory*. [my emphasis]<sup>30</sup>

The fact that judges need a purpose in order to adjudicate does not in itself render academic debate on what judges ought to do worthwhile. Yet such debates form part of the life of any practicing lawyer. According to the Heideggerian turn, this lived in culture is *how* we reason and understand. The relationship between our background ‘being’ and how we act may resist theoretical articulation; but that is not to say that such a relationship does not exist. It simply must exist according to this explanation of understanding. We cannot compel others to follow a set of prescribed rules in practical activities, but we certainly *can* and *do* contribute to the background, shared culture which makes these practices possible and makes any sort of decision-making possible. This aspect of the Heideggerian turn has been lost by those that seek to take it in legal philosophy. Schlag, for example, argues at length against the idea that normative theory has any ‘role’ to play in the real world of legal bureaucracy – he poses the question of “just who or what normative legal thought thinks it is addressing? What messages are being received and what role do

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<sup>29</sup> See MARTIN HEIDEGGER *The Letter on Humanism* in BASIC WRITINGS: MARTIN HEIDEGGER (David Farrell Krell, ed., Routledge, 1996), 218

<sup>30</sup> *Supra*, note 5, at 201.

normative messages serve?"<sup>31</sup> These questions make no sense if we take the Heideggerian turn; the whole point is that we understand based on a background that we share with others and that defies complete articulation. As such the questions that Schlag poses are unanswerable.

Anyone who has attended Law School will be familiar with competing theories of what judges ought to do. Anyone who watches the news, reads a newspaper or listens to a political speech is exposed to theories about the ultimate goal of a justice system. Since our day-to-day way of living determines how we understand *everything*, according to this worldview, it must determine how judges understand the purpose behind their profession. Theories about the point or purpose of law are themselves tools that judges use in-order-to mend broken pieces of equipment. Schlag applies this insight to his critique of Dworkin. According to Schlag, Dworkin is wrong to assume that judges can be immunized against non-legal factors in their decision making. In Heidegger fashion, Schlag suggests that historical and sociological factors will inevitably have some impact upon adjudication; judges are human, human beings can only reason through their cultural background. Yet Schlag fails to realize the full consequences of this turn – if judges cannot rid themselves of historical and sociological concerns, the same is true of ‘philosophical’ ones. If judges cannot help but be sociologists or historians, they cannot help but be normative legal theorists. The degree to which a given judge has a keen sense of history or sociology as part of their interpretative make-up is moot. There may be huge differences between members of the judiciary in this respect. Yet every judge has gone to law school, every judge has been exposed to legal theory, however diluted. It is an inevitable part of their background and reasoning processes as a result if we take the Heideggerian turn.<sup>32</sup>

This account of adjudication is similar to that of Dworkin. Like Heidegger, Dworkin sees little merit in foundational debates and the quest for ‘objectivity’ in our evaluative claims. Like Heidegger, Dworkin sees our interactions with the world as fundamentally interpretative. Like Dworkin’s account of adjudication, a more fully articulated Heideggerian ‘sketch’ makes normative theorists out of judges; having a theory of what judges *ought* to do is a part of our description of what judges actually do. A sense of what judging ought to be colours the interpretative attitude that any judge will have to past decisions.

Dworkin’s account has many detractors. The purpose of this essay is not to defend this understanding of adjudication. The purpose is to erode an unhelpful distinction between analytical and critical jurisprudence by exposing fundamental misconceptions about the Heideggerian turn. As such, Dworkin’s position is helpful; some reactions to it expose key misconceptions about Heidegger’s work. Dworkin approvingly refers to Heidegger in a number of footnotes. From the analytical side, Moore finds this approval odd and claims that such an association would require Dworkin to give up his long-standing commitment to the idea of a ‘correct’ interpretation for all judicial decisions. From an expressly pro-Heidegger position, Fish’s best known and most sustained arguments against normative theories of adjudication come in his critique of Dworkin. From an overtly critical position, Schlag criticizes Dworkin and others for assuming that their normative legal claims “somehow controls the way in which normative legal thought is used”, all the while name-dropping Heidegger with approval. These are but three examples of a prevailing assumption that the Heideggerian turn means that a normative theorist like Dworkin is wrong to believe that his theory can have any impact on practice, much less that he can and should put forward his own theory of ‘correct’ judicial interpretation. In what remains of this section I shall show how common ‘critical’ arguments against Dworkin’s normativity do not follow from the Heideggerian turn and cannot follow from Heidegger’s philosophy generally. This is a useful way to demonstrate the larger point. Continental or critical theory is not radically ‘other’ than analytical theory. Dworkin’s account of adjudication is more faithful to Heidegger, the philosopher whose position is assumed to mark a break with Dworkin’s more analytical tradition.

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<sup>31</sup> Schlag, *supra* note 12, 831

<sup>32</sup> *Ibid.*, 921

### 3.A The 'No Ultimate Truth' argument

It might be possible to agree with the Heideggerian sketch above and still claim that normative legal theory is valueless. One could argue that since everything is interpretative as well as practical there is no ultimate arbiter of 'truth'. This would be the case for any claim that we might make about what law ought to achieve and hence what judges ought to do when they decide cases. As a result, 'Justice', 'Fairness', 'Equality', 'Integrity' or anything else that we might care to mention as a guide for judging is nothing more than another interpretative concept. Nothing tells us which interpretation is ultimately correct, because no such ultimate correctness exists. An argument of this sort is frequently made by those that critique normative theory using Heidegger or the 'continental tradition'. This is nicely illustrated by arguments made against Dworkin's normative project by Stanley Fish and Pierre Schlag.

Fish makes the general claim that any guiding concept in interpretation is meaningless once we accept that we are engaged in an interpretative act. With specific reference to Dworkin, Fish applies this thinking:

The distinction between principle and policy...is finally a political distinction, a distinction with the *political* aim of claiming for some policy the name of principle.<sup>33</sup>

For Fish, there is nothing more to the concept "principle" than the rhetoric that might argue for something as a principle. He makes a similar point in three separate critiques, with the repeated criticism that Dworkin relies on some 'brute fact' meaning behind a judgment as text in order to distinguish between a judge applying the law and setting off in a new direction. So for Fish, Dworkin is in error to imagine that "principle" or any "true meaning" within previous legal texts can count as a constraint on judicial interpretation; these are just empty rhetorical terms that are hostage to interpretation toward a political end.

Schlag does something very similar in his critique of Dworkin's normative aims. Like Fish, Schlag sees this as a broader problem with any legal theorist whose "self-conscious motive is...norm adoption"<sup>34</sup>. Schlag uses an episode of the television series *L.A. Law* to illustrate how, in the sphere of legal practice, "truth, rationality and moral values play a role but only in an instrumental sense – only insofar as they aid the lawyer in effectively manipulating the jury". As a result, "[l]aying principle over practice and "making the law the best it can be" are nothing more than acts of "manipulation"<sup>35</sup>, devices used by legal practitioners and judges. There is nothing in concepts like "best" or "principle" that could fetter legal practice or send a judge in one particular direction or another. Normative theory, exemplified by Dworkin, thus provides a public relations exercise wherein these laudable sounding concepts are just empty rhetorical flourishes to make law look good.<sup>36</sup>

Fish, Schlag, and any of the numerous theorists that sympathize with this general starting point are free to make this criticism if they wish, but name-dropping Heidegger in support of this position is wrong. Heidegger was nothing like as 'anti-foundationalist' as some pithy descriptions of his philosophy suggest<sup>37</sup>. Heidegger espouses a metaphysical position – the metaphysical richness of

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<sup>33</sup> See STANLEY FISH *Still Wrong after All These Years* in *DOING WHAT COMES NATURALLY*, *supra* note 17, 356-371, 369.

<sup>34</sup> Schlag, *supra* note 12, 848.

<sup>35</sup> *Ibid.*, 868

<sup>36</sup> *Ibid.*, 866

<sup>37</sup> Moore notes how Heidegger demonstrates "an extraordinarily metaphysical way to write off all metaphysics", *supra* note 16, 923-928

his work has led to a lengthy, ongoing (and fascinating) debate in philosophy as to how that position is best described.<sup>38</sup> Heidegger's critique of Descartes is premised on the notion that our search for an ultimate grounding for knowledge of 'reality' or 'truth' is misguided because in our daily lives we demonstrate such knowledge all the time.<sup>39</sup> There is a fundamental flaw in trying to find the 'external reality' of what a hammer is; but this is a folly because the reality is not external. This is an entirely different proposition from the claim that reality is unavailable to us or the claim that it is non-existent or the claim that terms such as 'principle' are empty vessels that we are free to fill up with whatever we choose. If our ability to understand a hammer is demonstrated by our practical interactions, then our ability to understand the idea of a 'principle', 'best' or 'integrity', is also thus demonstrated. Heidegger does not distinguish between metaphysical kinds in this respect; indeed his philosophy could not support such a distinction. The whole point of the hammer analogy is that a theorist's relationship to a concept such as 'principle' is similar to a carpenter's relationship to a hammer. The same applies *mutatis mutandis* for any other concept that we might suggest to guide adjudication, 'justice', 'fairness', 'equality' or 'predictability'. For sure, our understanding of these concepts is situated and interpretative but Heidegger clearly explains in his later writings that our existing practices uncover truth.<sup>40</sup> According to Heidegger, our practical reflection 'enframes' truth.<sup>41</sup> Enframing treats the world around it as "standing-reserve",<sup>42</sup> something that can be 'ordered' and used practically. Heidegger uses coal-mining as an example.<sup>43</sup> In the process of extracting coal certain truths are revealed. The potential for yielding coal and the ease with which said coal might be extracted are the sorts of truths plucked out from the vastness and intricacy of the earth itself. We capture these useful bits of truth through a mixture of practical know-how and *theoria*. A full engagement with the meaning of the earth within our Being would be a task for the quietist position that Heidegger develops in later writings<sup>44</sup>. Furthermore, the elements exposed by our practice specific approaches will be practice specific truths. Yet Heidegger really could not be clearer, or more consistent throughout his work; existing attitudes in practice and theory can and do reveal truths about the world to us. This is a foundational, metaphysical commitment that Heidegger rigorously adhered to throughout his career.

Any *theoria* of 'justice' will uncover some truth about 'justice' as it enframes for practically useful purposes. The world we engage with may be a network of useful tools for our ends, but it does *not* end here. We grapple with truth in all of these engagements at every time and in every

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<sup>38</sup> For idealist arguments, see Christina Lafont, *HEIDEGGER, LANGUAGE AND WORLD-DISCLOSURE*, (Graham Harman trans., Cambridge University Press, 2000) and William Blattner, *Is Heidegger a Kantian Idealist?*, 37 *INQUIRY* 185 (1994). For realist arguments see Daniel R. Cerbone, *World, World-entry, and Realism in Early Heidegger*, 38 *INQUIRY* 401 (1995) and Hubert L. Dreyfus and Charles Spinosa, *Coping With Things-in-themselves: A Practice-Based Phenomenological Argument for Realism*, 42 *INQUIRY* 49 (1999). These arguments are just examples taken from a much larger debate. Even within realist interpretations there is debate as to whether Heidegger is a "robust" or "deflationary realist" see Jeff E. Malpas, *The Fragility of Robust Realism: A Reply to Dreyfus and Spinosa*, 42 *INQUIRY* 89 (1999) and Hubert L. Dreyfus and Charles Spinosa, *Robust Intelligibility: Response to Our Critics*, 42 *INQUIRY* 177 (1999). The deflationary realist interpretation convinces most in a judicial context, see Gavin Byrne, *The Self and Strong Legal Theory: A Heideggerian Alternative to Fish's Scepticism*, 1 *THE CANADIAN JOURNAL OF LAW AND JURISPRUDENCE* 3 (2006). For discussion of Heidegger's influence on Donald Davidson's deflationary realism see Jeff E. Malpas, *DONALD DAVIDSON AND THE MIRROR OF MEANING*, (Cambridge University Press, 1992).

<sup>39</sup> On this point see Mark Wrathall, *Heidegger, Truth, and Reference*, 45 *INQUIRY* 217, pp.219-220. Wrathall is on the 'deflationary realist' side of the debate noted *supra* note 38.

<sup>40</sup> MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* (William Lovitt trans., Harper and Row 1977), 21

<sup>41</sup> *Id.*, 5-6.

<sup>42</sup> HEIDEGGER *supra*, note 40, at 23-24.

<sup>43</sup> MARTIN HEIDEGGER, *WHAT IS CALLED THINKING?* 7 (Fred D Wieck and Glenn J. Gray trans., Harper and Row, 1968), 14.

<sup>44</sup> MARTIN HEIDEGGER, *The End of Philosophy and the Task of Thinking* in *ON TIME AND BEING* 431 (Joan Stambaugh trans., University of Chicago Press 1972) at 435.

place. This means that we should not simply throw away the past, as though previous conceptions of 'the earth' or 'justice' were wholly alien to our own. There *is* some truth that we share with past generations and while our background culture of understanding may alter over time and our practical needs may differ from era to era, the idea that these concepts are just empty rhetorical devices does not fit at all with Heidegger's philosophy. It does not have much in the way of intuitive appeal, either, when we reflect on the impact that writers and orators from very different cultural backgrounds and epochs have on us. Fish and Schlag specifically attack contemporary normative legal theory, but the same rationale must hold that the speeches of Martin Luther King or the words of Socrates resonate with us simply because they are practically useful for our political ends. It is happy coincidence and nothing more that our cultural background has a place for their rhetoric. In lieu of explanation of this phenomenon, we have to rely on pure luck. If we truly take the Heideggerian turn, however, certain words resonate because the speaker was actually on to something; these figures captured some truth that still holds today and will continue to hold against every background, cultural shift. Not only is does this resonance of past ideas make sense, it is to be expected.

For Dworkin, "Law's attitude is constructive; it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past"<sup>45</sup>. Schlag's criticism of this claim is that this is "exactly what ...bureaucratic-lawyers say *and do* as they delay, threaten....manipulate and otherwise kick people around"<sup>46</sup> [my emphasis]. Dworkin's position requires us to accept that "principles" are in some sense real, we have captured at least some of that reality in the past and should seek to extend those principles through rational engagement. For Schlag, "principles" are just empty pieces of rhetoric, used to do some pretty unprincipled things. Heidegger's explanation of the relationship between man and world, past engagement and practically oriented reflection fit far better with Dworkin's side in this argument.

Critical legal theory takes certain debates to have been settled by Heidegger – the relationship between man and world, and issues surrounding knowledge of that world. It then assumes that normative theories of adjudication such as that of Dworkin are misguided from that position. This conclusion simply does not follow. For critical legal theory to adopt Schlag's position on Dworkin and normative theory generally it would need to re-open metaphysical and epistemological debates that it has regarded as closed since the mid-twentieth century or at least distinguish certain metaphysical kinds from others, in a way that Heidegger does not.<sup>47</sup>

### 3.B The 'one-off political goals' argument

One could concede the point that our 'principles' are as real as anything else that we engage with, yet still remain hostile to a normative project like Dworkin's. Once we accept that our concepts are interpretative and practical, the theorist and the judge are both free to use rhetoric in any way the community will allow in order to meet expedient needs – the external 'reality' is of little consequence – the argument might go. If I am against abortion and I am against euthanasia there is no need for me to use the concept of 'justice' consistently between the two. If the judge has a range of theories of adjudication in his or her background, he or she need not worry about selecting one and sticking to it. Normative theories of adjudication are thus largely redundant because a judge can and will adopt whichever one leads to the desired outcome in one case, then depart from that theory in favour of another if it suits their agenda in different instance.

At this point Schlag's critique of Dworkin ceases to be useful. Schlag's exposition of how Dworkin as normative theorist has little to no credible 'role' to play in a particular *L.A. Law* episode fails to meet Dworkin head-on. Dworkin is concerned primarily with good judging in appellate

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<sup>45</sup> [add Dworkin 413] See also Schlag, note 12, 862.

<sup>46</sup> Schlag, *supra* note 12, 862.

<sup>47</sup> Moore does this see, Michael S. Moore, *Moral Reality* WISCONSIN LAW REVIEW 1061 (1982), 1143-1150.

courts, Schlag demonstrates how normative theory such as Dworkin's seems entirely alien to shoddy judicial practices in a fictional drunk-driving case. While this may be a legitimate criticism of Dworkin generally, it does not help move our discussion forward.

Fish's critique of Dworkin, on the other hand, is useful. Heidegger was strongly against any conception of time as a series of isolated, one-off moments without future repercussions. For Heidegger, it is not possible to use a piece of equipment for current needs only. We simply do not understand in this way. In practical activities we are always mindful of others within our interpretative community. Fish is enough of a Heideggerian to say something similar, but from this position he criticizes Dworkin's normative ambitions. The only standards, according to Fish, are these interpretative community ones. We reproduce such standards on a rote basis; a judge cannot fail to do so and still be regarded as "judging" at all. A repeated criticism of Dworkin, by Fish, is that his normative aspirations fall flat because they simply tell judges to do what they are already doing.

Again, Fish is free to launch this attack on Dworkin if he wishes, but again Heidegger is more on Dworkin's side of this debate than Fish's, in spite of the assumptions of both analytical and critical legal theorists. Heidegger made normative claims about what we ought to do in day-to-day activities that would rule against cherry-picking arguments to suit immediate political goals.

'Being-with Others' is an essential aspect of our existence.<sup>48</sup> Others infiltrate our individuality. Our very Being is dissolved into that of "Das Man" or "the They".<sup>49</sup> This means that when we grasp things as useful pieces of equipment, we grasp them as useful for other people at other times and in other contexts.<sup>50</sup> Common law provides a particularly good instance of this.<sup>51</sup> If a judge uses a theory of 'judging well' in-order-to reach a verdict, they do so automatically mindful of others. This use of a grand purpose behind law is only possible by projecting how future judges might also use this idea of judging well. If normative theories of adjudication really are nothing more than part of a toolbox for practical engagement then how Justice O'Connor reaches a decision is part of the legacy of her decision for future judges just as much as her claims about 'Federal Authority' or her use of the public/private distinction. This way of judging is part of what theorists read when they consult the written judgment. It will inform their normative claims about adjudication when they contribute a theory of 'judging well' or 'judging badly' to academic discourse. The miasmatic squall of the very culture that we use to understand and reason involves a constant interplay between practice and theory where each informs the other. Using any tool requires us to project as to how others might use it in other circumstances, even if that tool is a normative theory of adjudication. There is no immediate, one off, use. The consequences for other judges of seeing law in this way are part of the practice.

We can say the same thing of concepts that we encounter as tools within the critical mass of scholarship. We are incapable of seeing normative arguments about adjudication, or the tools contained therein, as disposable implements for present use and no more. When we use terms like 'justice', 'equality' and 'fairness' we add to the judicial and academic 'world' from which further uses will emerge. Leaving these concepts in good repair for others, and other uses to which they might be put, is part of *how* we understand them. We might do this well or badly, but the idea that we are capable of using a normative theory in a one-off fashion then discarding it afterwards does not fit with Heidegger's claims.<sup>52</sup>

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<sup>48</sup> HEIDEGGER *supra* note 10, at 155.

<sup>49</sup> *Id.* at 164

<sup>50</sup> *Id.* at 154.

<sup>51</sup> On Common Law as a form of customary law see Brian Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND COMMON LAW 8 (William Twining, ed., Oxford, Blackwell, 1986).

<sup>52</sup> Part of Fish's Heidegger influence involves the idea of the "self" as socially constituted, but he does not do the same thing as Heidegger when it comes to "future use for others". On Fish's conception of self and its relevance to legal theory see Michael Robertson, *Principle, Pragmatism and Paralysis: Stanley Fish on Free Speech* 16 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 287 (2003).

The idea that a judge even could ride roughshod over principles with little to no regard for other uses thus requires judges to act in a way that Heidegger believes human beings cannot. Fish by-and-large seems to be on the same side as Heidegger up to this point.<sup>53</sup> Fish and Heidegger clearly part ways, however, when it comes to the possibility of recommendations as to what we ought to do within this conception of human nature. Like Dworkin, Heidegger rescues the possibility of normative claims from within this context laden, interpretative paradigm.

In a world where we are “thrown” into a background that we had no choice over, and a being-with that makes any one of us inextricably part of the “They”, the quest for meaning in our lives is to become an “Authentic self”<sup>54</sup>. We can never escape the world into which we have been thrown, but we *can* seize hold of our being-in-the-world to achieve a limited sense of individuality. I can harness my thrown self and steer it in a particular direction from within the array of possibilities that my background presents. We do this by treating our past, present and future as a continuous, evolving whole. Any practical engagement that I have can become an Authentic one, but only if I make it fit with my past engagements and do it mindful of future ones. To be Authentic we must be conscious of our past and our future and try to make our present fit with both of these. Heidegger saw Authenticity as something achievable that we ought to strive for in practical engagements. The ‘do what thou wilt’ style argument is *In*authenticity incarnate. Perhaps Schlag is right that in some instances of adjudication it is difficult to see how Dworkin’s theory plays a role other than as an ironic sideshow about how instances of judging lack integrity. Heidegger accepts that most people, most of the time are inauthentic; this is to wilfully ignore our past and our future and make no effort to have these cohere. If one accepts that how we comprehend is ultimately down to how we live, then the possibility of normative theory is merely shifted onto a question of how we ought to live. Heidegger takes this question seriously and provides an answer with Authenticity.

It would be wrong to suggest that Authenticity and “adjudication as integrity” amount to the same thing. Authenticity is about instilling our existence with meaning. Dworkin’s theory is about judging well. Nevertheless, a normative theory applicable to all facets of our practical engagement is needed in order to become Authentic, In order to instil his or her existence as a judge with meaning, said judge would need to adopt a consistent approach towards the practice of judging.<sup>55</sup> So Dworkin’s general enterprise and that of other normative theorists is justified rather than undermined according to the Heidegger, whether we agree with the substantive content of such theories or not.

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<sup>53</sup> Others have used Heidegger’s concept of ‘being-with’ as a basis for normative ethics, based largely on how he encourages us to do so with ‘care’, see Frederick A. Olafson HEIDEGGER AND THE GROUND OF ETHICS (Cambridge University Press, 1998) see also Joanna Hodge HEIDEGGER AND ETHICS (Routledge, 1995). This is not an argument that I wish to make here as it involves much in the way of extrapolation from Heidegger. Nevertheless, the possibility of a normative ethics with Heidegger’s work is yet another point that Law School Theory Sceptics ignore. Any attempt to explore the possibility of normative ethics in Heidegger’s work faces the challenge of his involvement in Nazism. This point may be missed by Law School Theory Sceptics who fail to seriously engage with his ideas, see Gay Morgan *Searching for Common Ground* 12 JOURNAL OF CONTEMPORARY LEGAL ISSUES 757 (2001-2002) 779-782. It is astonishing that an argument in favour of value pluralism in a multicultural society should lean on Heidegger in this way and not so much as mention his Nazism. Morgan also briefly sketches Heidegger in support of his position without citing a single primary source. For an argument that Heidegger’s philosophy is fundamentally informed by Nazism and anti-Semitism see Emmanuel Faye HEIDEGGER: THE INTRODUCTION OF NAZISM INTO PHILOSOPHY (Michael B. Smith trans., Yale University Press, 2009). Faye may overstate the case, but as more evidence emerges it is increasingly difficult to excuse Heidegger’s behaviour during the war.

<sup>54</sup> HEIDEGGER *supra* note 10, 349-382. For more on how this might impact upon the life of a judge see Byrne.

<sup>55</sup> For a similar point made elsewhere, see George A. Martínez *Some Thoughts on Law and Interpretation* 50 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 1651 (1996-1997) 1660-1662. Martínez is another that plucks a bit of Heidegger from obscurity to back up an argument that he could easily have made in his own terms without such ‘support’, Martínez also relies heavily on secondary sources, but at least the claim that he makes is a tenable one.



Once again, the only way that critical theory can maintain its scepticism as to the value of normative theories of adjudication is by parting ways with Heidegger. This would require critical legal theory to re-open foundational philosophical disputes that it has regarded as closed apart from within the other tradition of analytical philosophy.

Normative legal theory is possible and impactful if we take the Heideggerian turn to its logical conclusion. Indeed, judges need a theory of adjudication in order to do their job if we apply Heidegger's hammer analogy to their practice. Furthermore, the goal within such theoretical enterprises is "correctness". Moore is correct to point out that neither Heidegger nor Gadamer provides us with a criterion of best interpretation, but Heidegger believed that "correctness" is the very goal of theory that is in service to practice; Dworkin is doing exactly what Heidegger believes he should. He offers an account of a 'true' or 'best' interpretation of law with 'truth' taken to mean 'correctness' by the lights of that specific practice.

A remaining and significant issue is whether this is the sort of enterprise with which theorists ought to engage. There is a definite sense in which Heidegger tried to lead us toward a new type of philosophical engagement, or at least a type of philosophical engagement that was new in the immediate postwar period. This may be one of the contributing factors behind the assumption that Heidegger's legacy only supports departure from 'analytical' jurisprudence in legal philosophy; in what follows I will show that en route to articulating his later form of fundamental ontology Heidegger justifies the broad project of analytical legal theory as conceived of by John Finnis.

#### 4. Finnis and Heidegger on Practical Philosophy

Douzinis and Warrington are critical legal theorists who have engaged with Heidegger's later work in a sustained fashion. They also provide a collection of typically 'critical' readings of the texts of various leading analytical jurists, though in doing so they rely more on Heidegger disciples, in particular Derrida. This includes a deconstruction of John Finnis' *Natural Law and Natural Rights*<sup>56</sup>. As with Schlag's attitude toward Dworkin, Douzinis and Warrington operate from the position that analytical jurisprudence tells us more about the interpreter than the subject matter. *Natural Law and Natural Rights* is read as a literary work. Douzinis and Warrington emphasize the use of metaphor, imagery and analogy by Finnis. They do so in order to claim that the purported 'reason' and 'rationality' of Finnis' position in fact owes its basis to rhetorical sweep and literary device.

Douzinis and Warrington make no mention of the opening chapter in *Natural Law and Natural Rights*, in which Finnis discusses the nature of contemporary analytical jurisprudence and its 'selection of viewpoint'. When Heidegger makes his case for a new type of detached philosophy in later work, he does so because he felt that our existing philosophical approaches were too much a part of the practical activities that they sought to describe. Theory is too in service to practical goals to provide a means of engaging with the question of Being. Finnis suggests that the development of contemporary analytical jurisprudence has involved a growing acceptance of this very point. There is a concession to Douzinis, Warrington and Schlag that acts of interpretation tell us much about the interpreter, and like Heidegger, Finnis sees analytical approaches as 'practical philosophy'; crucially, recent and contemporary figures engage in 'viewpoint selection' and *consciously* select one from within practice.

Hart and Raz are clear that a descriptive theorist, in 'deciding to attribute a central role' to some particular feature of features of a field of human affairs must 'be concerned with', 'refer to', or 'reproduce' one particular practical point of view....he must assess importance or significance in similarities and differences within his subject-matter by

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<sup>56</sup> Douzinis & Warrington, note 1, above, 74-92.

asking what would be considered important or significant in that field by those whose concerns decisions and activities create or constitute the subject matter.<sup>57</sup>

As Finnis describes it, analytical jurisprudence accepts that any theoretical engagement will involve 'a judgment of significance and importance' when it comes to engagement with the subject matter; otherwise 'a vast rubbish heap of miscellaneous facts' will be the result of any descriptive account.<sup>58</sup> The viewpoint selected for this enquiry in analytical jurisprudence is the practical one described above. This service to practice is precisely the 'technological thinking' that all philosophy has engaged with in the western tradition, according to Heidegger. The only difference would appear to be that now Finnis, Raz and others are conscious of doing it.

Analytical jurisprudence displays awareness that it is one of a number of possible perspectives and that this perspective is a practice specific one. This is indicative of the degree to which the Heideggerian turn or something like it has become the norm in all theoretical enterprise. A failure to recognize this is a significant oversight when it comes to Heidegger-inspired dismissals of analytical jurisprudence generally.

Heidegger's philosophy cannot endorse all types of mainstream jurisprudential *theoria*. Heidegger cannot support the notion of prescribing a new set of rules for adjudication that are based on reasons that are independent of adjudication itself. The sort of normative legal theory that Schlag attacks *is* illegitimate and wrongheaded according to the Heideggerian turn:

As in virtually all the work of normative legal thought, the social, rhetorical, institutional, or professional mechanisms of realization are assumed to be present, functioning and responsive to the ideational recommendations of normative prescription. It is as if the machinery of the social and political world were already constructed with a series of workers waiting at the levers for instruction from normative legal thinkers.<sup>59</sup>

No serious, contemporary normative theory of common law adjudication provides the sort of advance blueprint or map that is anathema to the Heideggerian turn. *Being and Time* was written in 1922. Normative legal theory produced since is *premised* on the idea that judges face a limited set of options, based on existing practice. Fish, Schlag, Douzinas and Warrington attack the normative ambitions of writers like Dworkin, Moore and Posner. The explicit attack (or general disregard) is not limited to these writers but includes anyone that works within a broad field of normative legal theory. All of these scholars write at a time when the idea that we operate within contextual discourse is itself deeply ingrained.<sup>60</sup> For sure, Heidegger was an influential figure in this shift, along with the later Ludwig Wittgenstein, W.V.O. Quine and Thomas Kuhn in various different ways. Regardless of the source this is so much a part of our psyche that an argument would never be published or taken seriously unless the normative side is an account of 'good practice' as it already exists. This starting point is so pervasive as to be largely implicit in all writing. It is *part* of the background of our culture from which we understand everything according to the Heideggerian turn. It is part of our "fore-conceptions" when we do anything as scholars.<sup>61</sup>

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<sup>57</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford University Press; 2001) 12.

<sup>58</sup> *Ibid.*, 17.

<sup>59</sup> See Schlag, note 12, 879.

<sup>60</sup> For example, see the excellent Oliver W. Sacks, *AWAKENINGS* (Penguin Books, 1973) 259-285. Nearly forty years ago, in a book intended for popular audiences and where philosophy is not the main focus, Wittgenstein is referenced and thoughtfully discussed and Heideggerian terminology is used albeit via a secondary source. On this point see Edward L. Rubin *The Practice and Discourse of Legal Scholarship* 86 MICHIGAN LAW REVIEW 1835 (1987-1988), here Rubin name-drops Heidegger in a list of scholars whose position he summarizes as the "critique of methodology", 1836-1837. It is difficult to see what Rubin was hoping to achieve by doing this; a seventy page discussion was not in the least bit enriched by this verbal padding.

<sup>61</sup> HEIDEGGER *supra*, note 10, at 191-192

The 'Heideggerian turn' is also hostile to any descriptive account of adjudication which continues to operate within the Cartesian paradigm. As Finnis' account shows, such an approach is now atypical – the focus instead has been on trying to produce a vision of what is practically good from the perspective of situated actors within the practice itself. One example of such a position might be the descriptive side of Michael S. Moore's philosophy. Moore's robust realist metaphysics requires the existence of an 'external' world that we could be radically wrong about.<sup>62</sup> Heidegger's position is simply at odds with this approach. Moore is also hostile to the 'interpretative' turn in legal philosophy. Yet even Moore makes normative suggestions from *within* a range of options that are already part of the existence of the judge, not some radically new range of values and ideals that we never see in practice.<sup>63</sup> Moore argues, at length, that a natural law theory of interpretation is better for reasons of fairness, predictability and justice. He *has* to do this. Otherwise his arguments would fall on deaf ears within our intellectual milieu. Practical, Western Liberal Democratic concerns scream out at us, automatically, anytime that we make a claim about how a judge ought to decide a case.

Mainstream, normative theories of adjudication are examples of what Heidegger calls *theoria*; they are instances of goal-oriented, practically useful reflection. To draw the conclusion that *theoria* has no practical impact is to turn Heidegger on his head. Heidegger was not a jurist. After *Being and Time* he moved towards a vision of philosophy that was detached and reflective. Yet Heidegger's lament on existing theory's inability to remove itself from practical concerns ultimately leads to a response on behalf of such theory to the accusation that normative theories of adjudication have no practical impact. Heidegger writes of a "gulf" that "lies unbridgeably" between his later, detached position and the sort of theory that informs practical engagement.<sup>64</sup> The *theoria* of practical activities should remain as it is.<sup>65</sup> Heidegger claims "the sciences would constantly fall into the void if they did not operate within [their own] spheres"<sup>66</sup>; "law" is listed as a science.<sup>67</sup> This includes theoretical reflection within those spheres – practical philosophy as Finnis calls it.

All this really leaves is a query as to whether we should give practical *theoria* the name 'philosophy'. This is a debate for another day, but it is unlikely to be an interesting or important one. I very much doubt that it would matter to Dworkin, Moore or Posner. The important point is that what they do on the normative side, whatever one might call it, is justified rather than ruled out when we enumerate a proper Heideggerian account. Similarly, the claim that Heidegger might not like the way in which his philosophy is applied here is not particularly interesting. I am not convinced that Heidegger would have objected to the way in which I have applied his concepts, but let us suppose that he would have hated what I have done. Such disapproval would be of little consequence. If looking to past theorists matters at all, it is the realities of their argument, how it works and how it applies that are important. Whether this is what they hoped to achieve or some unintended bi-product is of biographical interest only and contributes nothing constructive to contemporary debate. *This* approach toward the past is itself very Heideggerian, unopening possibilities in past use for current and future ready-to-hand issues is precisely what Heidegger means by Authenticity.

To take the Heideggerian turn in legal theory leaves us with a clear choice. One can remain loyal to the various commitments and claims that Heidegger thought had ended such debates for good. This leads us to a position similar to that of Finnis on the purpose and place of analytical legal

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<sup>62</sup> See, Moore, *Moral Reality supra* note 47 and Michael S. Moore, *Moral Reality Revisited* 90 MICHIGAN LAW REVIEW 2424 (1992).

<sup>63</sup> See Michael S. Moore, *A Natural Law Theory of Interpretation* 58 SOUTHERN CALIFORNIA LAW REVIEW (1985) 277

<sup>64</sup> HEIDEGGER *supra*, note 43, 8.

<sup>65</sup> *Ibid.*, 32-33.

<sup>66</sup> HEIDEGGER *supra*, note 40, at 32-33.

<sup>67</sup> HEIDEGGER *supra*, note 44.

theory generally, and a role for normative theories of adjudication similar to that of Dworkin. The alternative is to re-consider the metaphysics, epistemology and ontology that got Heidegger to this point. If we take the first approach, critical legal theory's scepticism about normative jurisprudence makes no sense. If we adopt the second, we concede the classic concerns of analytical philosophy are still worth debating – Heidegger did not dissolve these problems for good.

Heidegger would probably have disagreed with a great deal in the philosophy of Finnis and Dworkin, my purpose is not to claim that they are identical on this or any other issue. The point instead is that there is no yawning chasm between their positions. Dworkin's overall project is justifiable in Heideggerian terms. Heidegger sees practical *theoria* as worthwhile for similar reasons to those put forward by Finnis. All of this means that the one position we *cannot* arrive at through Heidegger is the very position that he is lazily associated with, time and again, throughout legal theory. There is no philosophical basis to the analytical/critical split in jurisprudence – different legal theorists ask different questions, but there is no mutual exclusivity of projects along the presumed pro and anti-Heidegger lines. This is a serious challenge to a large section of contemporary legal scholarship, yet the lessons of this exercise extend much further. We should reflect on how it is possible that so important a shift in our intellectual paradigm as Heidegger's species of anti-Cartesianism should be so carelessly and routinely misused. In my concluding remarks, I suggest how this may have happened and discuss the warning it represents.

## 5. Conclusion

When Heidegger is mentioned by name it is as though writers are citing an unchallengeable authority, with no deep engagement, defence or discussion of his ideas.<sup>68</sup> At times secondary sources have been exclusively relied upon and it is obvious that Heidegger's work has not been read in sufficient depth or perhaps not read at all.<sup>69</sup> This use of Heidegger is symptomatic of a wide-reaching challenge in contemporary theory. There is more written word for us to contend with than at any other point in our history. This rate of production is increasing. We generate more analysis and there is more "past" work for us to draw on than ever before. Complex philosophical arguments of the past are increasingly reduced to one line general support for a contemporary argument or position as a result of this phenomenon. Philosophers are associated with one idea or "bottom line", they are then name-dropped or quoted as support for a particular position with little to no engagement with the ideas and hence no explanation as to how the argument supports the conclusion.

This use of past philosophers is not only dangerous, it is pointless. There is no practical goal to be achieved. The misuse of Heidegger in legal theory is the most destructive example that I am aware of; there are sure to be more. Name dropping someone famous from the past and pulling quotations out that sound a little like what one wishes to say achieves nothing. It is a rhetorical trick, a sleight of hand whereby academics try to legitimize their arguments by associating them with someone considered important or clever. This fawning attitude is not to venerate past thinkers, it is to diminish their work; it is not to preserve their ideas, it is to narrow their audience. Reducing

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<sup>68</sup> See *supra* notes 2, 12, 15, 17 34, 37, 55, Morgan *supra* note 53 and Rubin *supra* note 60.

<sup>69</sup> See Schanck *supra* note 1 in which no work by Heidegger is referenced. It appears that none was consulted; Heidegger is described as "[t]he existentialist philosopher", *id* 2519, in ignorance of the fact that Heidegger's debate with Sartre began precisely because Heidegger objected to this way of categorizing his work, see HEIDEGGER *supra* note 29. For another example see Morgan *supra* note 53.

complex arguments to a pithy bottom line may ingratiate a writer with some, but it will immediately put off others that do not agree with this (often inaccurate) tagline of what great philosophers stood for or which ill-defined “side” they were on. Often the greatest legacy of thinkers has come not from those that agreed with their “big idea”, but from those that *disagree* with what it says in their philosophy dictionary entry. Marx’s oeuvre and its vast legacy would have been lost to us had he not engaged with Hegel and Smith, two writers that he was utterly opposed to politically. Heidegger’s work is as good as lost to legal theory if we just reproduce where he was trying to go instead deeply engaging in how he tried to get there. As I have shown here, the results of engaging properly with Heidegger are quite the opposite of the assumed bottom line. There is every possibility that he would have disapproved of my use of his work, but this makes no difference. It does not matter whether the ideas that he has left us with are indicative of where he wished to go with his work, or some unintended bi-product. Philosophy is not cheerleading. It is not about proving that you are part of some team. Philosophy is inescapably about truth, regardless of one’s position on the meaning of the term. This includes legal philosophy. Whether truth is real or ideal, universal or particular, graspable or not, we are all trying to shine a light of discovery on the practice in what we do. Past argument may help us on that journey. Citing famous people like evidence for what we want to find will not. Heidegger himself warned against the dangers of a “forgetful” attitude towards the past. Not everyone will agree with Heidegger on all matters. I certainly do not. Yet the idea that our past must be seen in all its complexity and possibilities, rather than a closed book of one line answers, is one that we should all endorse.