Heidegger and the Essence of Adjudication

George Souri*

Abstract

This paper presents an account of adjudication based on the philosophy of Martin Heidegger. As this paper argues, we can only hope to better understand adjudication if we recognize that adjudication is a socio-temporally situated activity, and not a theoretical object. Heidegger’s philosophical insights are especially salient to such a project for several reasons. First, Heidegger’s re-conception of ontology, and his notion of being-in-the-world, provide a truer-to-observation account of how human beings come to understand their world and take in the content of experience towards completing projects. Second, Heidegger’s account of context, inter-subjectivity, and common understanding provide a basis upon which to re-conceive judicial coherence, which forecloses judicial relativism while also allowing for judicial change and adaptation to new and novel situations. Finally, Heidegger’s account of “equipment” provides, as I argue, the best way to understand the relationship between adjudication and the law.

* DePaul University College of Law, 25 East Jackson Boulevard, Chicago, IL, 60604. Email: george.m.souri@gmail.com.
1. Introduction

In *Heidegger and the Theory of Adjudication*, Professor Brian Leiter employs aspects of Martin Heidegger’s philosophy to argue against a theoretical methodology of adjudication as it is employed to discharge both descriptive and normative functions.¹ Following Heidegger, Professor Leiter argues that adjudication, like all human activity, takes place against a background of intelligibility that cannot be entirely articulated or explained by explicit rules. Leiter suggests, in light of this view, that a “practical reasoning” approach to adjudication would be a preferable alternative. Although Professor Leiter does an effective job of deploying the Heideggerian critique to rethink adjudicative epistemology, he does not go on to explore how a Heideggerian approach might help us better understand adjudication generally.² The purpose of this paper is to do just that.

As a starting point, we must begin by clarifying the object of analysis. If we are to better understand adjudication, then it is with the actual activity that we must be concerned; for that is the thing we ultimately hope to understand. Our initial step, therefore, is a methodological departure away from theory and back to the object of our analysis. We must, as Heidegger would say, return to “the things themselves.” This requires us to recognize that studying theories of adjudication is not the same thing as studying adjudication itself. Indeed, we can no more hope to understand adjudication by studying theories of adjudication than can a zoologist hope to understand elephants by looking at drawings in a book instead of observing actual elephants. The theoretical exercise unquestionably has a great deal of benefit, but theory for the sake of theory

---

² Despite Heidegger’s powerful insights, the application of Heidegger’s philosophy, particularly when the audience is not intimately familiar with Heidegger, poses significant practical challenges, not the least of which is Heidegger’s linguistic style. As such, in this paper I have intentionally focused on presenting a more straightforward description of Heidegger’s philosophy. Although I have used different language, and simplified the presentation for the purposes of accessibility, I believe the presentation will remain true to Heidegger’s points.
will not help us in the current project; theory is only useful if it comports with, and serves the purpose of understanding, the actual phenomenon. John Dewey describes the importance of this methodological move as follows:

Reference to the primacy and ultimacy of … ordinary experience protects us, in the first place, from creating artificial problems which deflect the energy and attention of philosophers from the real problems that arise out of actual subject-matter. In the second place it is a constant reminder that we must replace them, as secondary reflective products, in the experience out of which they arose, so that they may be confirmed or modified by new order and clarity they introduce into it; and the new significantly experienced objects for which they furnish a method. In the third place, in seeing how they thus function in further experiences, the philosophical results themselves acquire empirical value; they are what they contribute to the common experience of man, instead of being curiosities to be deposited, with appropriate labels, in the metaphysical museum.

The Heideggerian approach starts by recognizing that theoretically driven attempts to understand adjudication take the wrong path by displacing the actual phenomenon to be studied with a representation of that phenomenon, which itself then becomes the object of study. But if we hope to understand adjudication itself, such a methodology will not do. Thus, pace Dewey, and according to Heidegger, a proper approach must go beyond mere representations and return to the actuality itself so as to disclose, or unconceal the true nature of adjudication as an in-the-world phenomenon – this is what is meant by, and where we may hope to disclose, the “essence” of adjudication.

Accomplishing this task, however, requires us to immediately come to terms with certain realities that make the examination especially challenging. First, in-practice-adjudication is seen primarily as a profession, or a sort of *techne* that judges engage in, rather than as a philosophical endeavor. Thus, although the foundations of “legal reasoning” rest on, or at least presuppose, certain ontological and epistemological commitments, the consideration of these philosophical aspects is not typically seen as something with which professional judges are actively concerned.

---

Although there are a number of judges who are aware of, and actively consider, the philosophical implications of their role, it is no stretch to say that most professional judges focus on performing their role under the established manner and leave the philosophical questions to academic discourse. But this lack of philosophical concern is a mistake on the part of professional judges because, inasmuch as judges are required to determine “what the law is” and ground their legal conclusions in some basis of “truth,” or more precisely “legal correctness,” the very nature of the job requires a judge to make ontological and epistemological commitments, even if these commitments are made as an unintentional by-product of the activity. Thus, whether professional judges like it or not, the very nature of adjudication is such that philosophical concerns are always already presupposed, entangled with, and inherent to, the professional practice.

This is not to say, however, that the philosophical aspects of in-practice adjudication are the sort of philosophical considerations that are taken up theoretically. The theoretical examination of adjudication need not burden itself with the actual practice, and has the luxury of ignoring the practical, and often times messy, aspects of the activity. For the everyday practice of adjudication, on the other hand, these realities are not only inescapable, but primary. Thus, whereas in theory the philosophical aspects of adjudication may be treated as discrete and isolated questions, in practice, the philosophical aspects of adjudication are always already imbedded in the practical endeavor. An examination of in-practice-adjudication cannot rely, as a theoretical examination might, on the convenience of ceteris paribus because, in practice, the factors of experience with which adjudication is concerned are never equal. An examination of adjudication itself, therefore, must find a way to bridge the gap between theory and practice. This is to say that we can neither detach the philosophical aspects of the activity from the practice for
the sake of theoretical clarity, nor pretend that they are irrelevant for the sake of professional expedience. If we are to proceed honestly, we can neither fane a level of coherence and clarity which may or may not exist in actuality, nor ignore the philosophical aspects of adjudication for the sake of tradition or judicial efficiency; we must instead let ourselves see adjudication as-it-is, come what may. This means that we must forego the project of explaining adjudication, and instead focus on trying to better understand it, a project that will become clearer below.

The paper proceeds as follows. In the first section, I describe what I am calling the project of adjudication, and present certain challenges that are inherent to adjudicating. In the second section, I briefly examine the formalist conception of adjudication, and argue that such a view is not adequate to understanding adjudication as a socio-temporally situated activity. The third section presents Heidegger’s account of ontology and being-in-the-world, and describes how Heidegger’s conception is better suited to understanding adjudication. The fourth section examines Heidegger’s concept of worldhood, and how this account of inter-subjective existence and understanding provides a basis upon which to re-conceive judicial coherence. The final section describes Hiedegger’s conception of equipment and argues that the best way to understand the being of the law is as the equipment of adjudication.

2. The Project of Adjudication

To adjudicate is to hear and settle a case by judicial procedure. Among other things, adjudication requires an adjudicator to establish the facts at issue in a controversy by examining the evidence at hand and considering the usually conflicting accounts of these facts as they are
presented by either the parties or a record. An adjudicator must also determine both what the applicable law “is,” and the manner in which the law should be applied; or if no applicable law is on point, a judge may be required to alter existing law, or devise new law that applies to the situation. Despite the judicial discretion adjudication requires, the process is not a free exercise of the judge, but is governed, or at least framed by, the layers of directives and protocols under which the adjudicator operates. Whether these delimiting factors be court specific rules that judges employ in a managerial fashion, legal statutes, codified rules of procedure and evidence, binding rules that come from precedent, or constitutional language, adjudication takes place against a background: a particular framework or schema that we generally refer to as a legal system. By extension, the legal system itself is not an autonomous entity, but sits within the larger socio-cultural situation in which it operates; the broader socio-temporal context from which the legal system derives its particular place and authority.

Despite the breadth of laws, rules, and standards that aggregately establish the general protocol of a legal system within a society, the process of adjudication is neither simple nor automatic since judges have considerable latitude in both interpreting and applying the law. This is not to make a comment on the nature of this latitude, nor on the ways in which particular interpretations and applications of law are justified, but only to observe that reaching an answer to questions like “does this jury verdict ‘shock the conscience’?” or “does the Fourth Amendment apply to telephone communications made at a public phone booth?” are not the same sort of thing as reaching the conclusion that Socrates is mortal because he is a man and all men are mortal. The difference may turn out to be one of degree and not kind, but it remains

---

4 In the U.S., for example, the fact that appellate courts have to depend on a record poses a special kind of problem because the record established at the trial court level further restricts what facts and evidence can be considered at the appellate level even beyond base level matters of admissibility as established by rules of evidence and procedure.
nonetheless. To understand the essence of adjudication, then, we must confront at least two initial problems adjudication has to deal with.

The first problem has to do with meaning. Although certain laws are straightforward and relatively well-defined, the problem of deciphering a law’s meaning is especially challenging when the meaning has to be gleaned from previous cases, or ambiguous statutory language that does not lend itself to a hard and fast application. This problem is compounded by the fact that the adjudicator has to decipher “what the law is” under the limiting presupposition that there is a “correct” interpretation of the law, or at least interpretations that are more or less correct than others. The general problem of meaning, then, requires us to assess, not only how a law’s meaning is deciphered and understood as such, but also how a particular understanding comes to be accepted as more or less correct given the state of the system in which a particular understanding of the law is operative. This is particularly true when there is vast disagreement about “what the law is,” or when a law’s textual language remains unchanged but the law’s meaning and application have changed in the common and operative legal understanding.

The second problem adjudication has to confront regards a law’s particular application and extension, and how certain of these applications are deemed to be more or less “correct” in the context of the operative legal framework, and in light of external considerations. Even if the meaning of a law is relatively unambiguous, just how and to what extent the law should be applied may remain up for debate. As Judge Richard Posner observes, “we thus have a paradox

---

5 The differing arguments for what determines correctness will be more fully discussed below.
6 The best example of this is probably the Fourteenth Amendment. The language of the Amendment has not changed since it was ratified, but the meaning and application of that language has changed significantly.
7 By particular application, I mean the application as it relates to a specific case or controversy. By extension, I mean the application as it relates to a class or type of case or controversy.
that a legal question might be at once determinate and indeterminate: determinate because a clear rule covers it, indeterminate because the judge is not obligated to follow the rule.\textsuperscript{8}

If we are to accept what has been said thus far, then adjudication involves a requisite three-dimensional task: adjudication requires a judge to (1) determine “what the law is,” (2) determine where and how the law applies, and (3) apply this understanding to a particular controversy so as to arrive at a conclusion. Call this the project of adjudication. To understand the essence of this project, we must necessarily attempt to understand the human act of judgment generally: the way in which human beings take in the content of experience, come to understand their world such that this content gains intelligibility, and make inferences towards conclusions based on this understanding. To borrow Kant’s formulation, “if the understanding in general is explained as the faculty of rules, then the power of judgment is the faculty of subsuming under rules, i.e., of determining whether something stands under a given rule or not.”\textsuperscript{9} At base, this is what adjudication does. Therefore, if we are to understand adjudication itself, we must focus on how the law, in both meaning and application, comes to be understood as such, and how, based on this understanding, the content of experience is subsumed under the adjudicative understanding towards legal conclusions. Heidegger’s account of being-in-the-world provides the best path for accomplishing this task. But before taking up Heidegger’s view, let us consider how the project of adjudication has been traditionally understood in the legal field.


\textsuperscript{9} Immanuel Kant. \textit{Critique of Pure Reason}. (A130-132/B170-172). By borrowing Kant’s formulation, I am not adopting Kant’s larger thesis on the origin of rules and the manner in which the content of experience is subsumed under them.
3. Adjudication and the Formalist Conception

The subsuming of facts under legal rules, as it is performed in the activity of adjudication, has been traditionally characterized as an intentional, or consciously directed, act of judicial reason, both by theorists and practitioners.\(^\text{10}\)

Most practicing judges subscribe to the school of legal formalism, and in particular, the legalist theory of adjudication.\(^\text{11}\) According to the legalist, adjudication is, or should be, a value-free process of determining what the law is, and of reaching true legal conclusions through the use of “legal reasoning.”\(^\text{12}\) For the legalist, the meaning of a law is, and should be, based on objective reference to “preexisting rules found stated in canonical legal materials… or derivable from those materials by logical operations,” rather than on subjective judicial interpretation.\(^\text{13}\) As Judge Posner explains:

> The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusions. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the “canons of construction”), so that the interpretation too becomes a rule-bound activity, purging judicial discretion.\(^\text{14}\)

The legalist is one type of formalist, but all formalists, theorists and practitioners, share in one or all of the following general notions: (1) that laws have a singular, value-free, “true” meaning and that adjudication is about deciphering and applying the “true law” in a manner that is as free from judicial discretion as possible, or (2) that “true” legal conclusions can be reached


\(^{12}\) Ibid.

\(^{13}\) Ibid.

\(^{14}\) Ibid.
by employing proper methods. I do not here mean to imply that legal formalism describes a homogeneous class, or that there is agreement amongst formalists about approaches and answers to the relevant questions; indeed, many theorists and practitioners who can be described as formalists hold contradicting views. The point to be made is that formalist theories of adjudication, despite their variety, all share, to varying degrees, what Nassim Taleb refers to as Platonicity: a “tendency to mistake the map for the terrain, to focus on pure and well-defined forms” instead of on the in-the-world phenomenon; a tendency to prioritize the rationalized theory or model over the actual activity for the sake of epistemological expedience.\(^{15}\) This is the defining aspect of legal formalism that spans “the considerable distance between the philosophies of adjudication of Antonin Scalia and Ronald Dworkin.”\(^{16}\) For the purposes of this paper, the specifics of the various arguments are not relevant, and as such will not be examined here, since it is the underlying methodological approach, which we may call representationalism, that I am taking issue with. The fundamental weakness of the representational approach is that it conceives “of [the] law as a system of relations among ideas rather than as a social practice;” which is to say that the law is seen as something that can be analyzed in a purely subject-object relation. The problem with this premise is that it ignores what observation confirms to be the case - that adjudication is, to varying degrees, an idiosyncratic and contextually affected activity, not a homogeneous process that can be modeled. The formalist therefore, by ignoring this fact, ends up casting attention away from the actual phenomenon and redirecting it towards the rationalized clarity of a representation. But this does little more than abstract the subsequent inquiry. Observation tells us that actual adjudication is complex, and dependant on a number of dynamic variables, many of which cannot be articulated.


\(^{16}\) Rachard Posner. *How Judges Think*, supra, pg. 175
A proper examination of adjudication, therefore, must take this complexity into account. Heidegger’s methodology accomplishes this task in at least two primary ways.

First, Heidegger rejects the notion that every aspect of human activity and decision making can be made explicit by intentional mental activity. For Heidegger, the operative understanding by which we make sense of and navigate the world not only takes shape prior to our states of conscious or intentional thinking, but is itself always already pre-personally shaped by the socio-temporal background in which we exist. Since all human activity is anteriorly affected by these background factors, the mechanisms of human understanding and reason cannot be fully captured or explained by conscious intentional reflection. Second, Heidegger rejects the notion of a disinterested observer and argues instead that humans are always inescapably involved in-the-world. This is to say that human beings are never really disinterested, but always already embedded-in, and entangled-with, the projects that arise in their existential situation. Human understanding, therefore, is always already pre-personally shaped by the socio-temporal context in which one exists. For Heidegger, humans can no more escape their existential condition and reason from the disinterested perch of pure reason than can a fly escape from a jar of honey once it has been sucked in. These methodological departures lead Heidegger to develop a new account of human understanding and behavior that provides a better basis upon which to understand adjudication.

17 Posner offers the following sobering commentary on the consequences of examining adjudication as an activity, as in this paper: “Redscribing law in activity terms tends to erase the distinction between natural law and positive law, and the distinction has indeed outlived its usefulness. Judges make rather than find law, and they use as inputs both the rules laid down by legislatures and previous courts (“positive law”) and their own ethical and policy preferences.” Richard Posner. The Problems of Jurisprudence, supra, pg. 457 (My Emphasis)
4. Heidegger’s Conception of Ontology

To begin, we must examine Heidegger’s notion of ontology and how it differs from traditional approaches to both ontological and epistemological questions.\(^\text{18}\) Since the scope of this paper does not permit a full analysis, we will focus on the aspects of Heidegger’s philosophy that are most relevant to the current project.\(^\text{19}\)

Although Heidegger’s philosophy has profound implications for issues of consciousness and intentional thought as they relate to human activity and behavior, Heidegger’s main purpose is even more fundamental. Heidegger’s main concern is to provide an account of how human beings understand being itself, or “that which is.” As Heidegger observes, all of human activity, no matter how minor, necessary implicates the question of being: “Being is used in all knowing and predicating, in every relation to beings and in every relation to oneself.”\(^\text{20}\) And so it is to this fundamental question that Heidegger initially turns.

Heidegger begins by observing that being is not a being, and that the study of beings is not the study of being itself, which is what ontology is purportedly concerned with.\(^\text{21}\) Unlike beings, one cannot point to being itself and say: “there it is!” Rather, being is something that beings possess, not as a descriptive characteristic, but as something by virtue of which they are. Heidegger calls the distinction between being itself and beings themselves the ontological

\(^{18}\) Heidegger did not, himself, draw a line between ontology and epistemology: “every metaphysical question always encompasses the whole range of metaphysical problems. Each question is itself always the whole.” Martin Heidegger, What is Metaphysics?, in Basic Writings: from Being and Time (1927) to The Task of Thinking (1964), ed. David Krell (New York: HarperPerennial/Modern Thought, 2008), pg. 93

\(^{19}\) Readers interested in more Heidegger are directed to….


\(^{21}\) Ibid pg. 26
difference. If this is the case, then the proper question, according to Heidegger, is not “what is being?” but rather “what does it mean to be?” Ultimately for Heidegger, this leads to the conclusion that “to be” means “to be understood as.” For example, when I say that John is human, I am able to attribute being human to John only because I have some understanding of what it means to be human. But to ask about the meaning of being, or of anything for that matter, requires that there be some being understanding the being of beings as such. According to Heidegger, human beings are such beings, and Heidegger calls the type of being human beings are Dasein, or beings whose very way of existing is such that they are always already concerned with being, or “what is.” Heidegger must therefore examine the relation of Dasein to the question of being, which is to say that he must examine how “that which is” comes to be understood as such.

I wish to present a simplified example to clarify what Heidegger is getting at here, and to orientate the reader to the following discussion. Let us say that we are trying to answer the question: “what does it mean to be tall?” How would we go about addressing this question? We could create a rule and define “tall” by setting a threshold for “tallness,” then compare individual heights to this threshold to determine if they are, or are not, tall. But why do we understand the particular threshold we have chosen as equaling tall? In other words, I could pick a number out of a hat and say that anything above the number is tall, and that anything below is not tall such

22 According to Heidegger: “being is always the being of a being. Being is essentially different from a being... If being is not itself a being, how then does it nevertheless belong to beings, since, after all, beings and only beings are?... We call [the distinction between being and beings] the ontological difference” Martin Heidegger, The Basic Problems of Phenomenology, trans. Albert Hofstadter, Bloomington: Indiana University Press, 1982, pg. 17
24 To see a such and such as a so and so is simply to say that when I see an animal with four legs, that has black and white stripes, and that resembles a donkey, I initially see this entity as a Zebra, not as the sum of characteristics that I then use to determine what the animal is.
25 Martin Heidegger, Being and Time, supra, pg. 32
that we could analytically determine *what it means to be* tall. But this is arbitrary; the whole idea of the rule was to capture a metric of tall that had meaningful empirical content. In other words, our goal was not simply to create a rule or definition of tall for its own sake. Rather, our purpose was to create a formulation of *what tall is* that comports with what we *understand tall to mean* in reference to observation such that we can use the rule to make a *meaningful* determination as to who *is*, and *is not* tall. But this necessarily means that “what tall is” is not actually a function of a definition or a rule at all, but rather is derivative of what tall is *already understood to be*; without this understanding, the rule itself would have no meaningful empirical content. Therefore, we are once again forced to turn to the source from which the question “what does it mean to be tall?” is given content, or experiential meaning. In a world where the average height of the population is two-feet, *what it means to be* tall is much different than *what it means to be* tall in a world where the average height of the population is six-feet; and in trying to meaningfully define “tall” by creating a rule, our very ability to create a meaningful rule or definition will always already depend on the understanding we have derived from existing in the particular context we find ourselves in.\(^{26}\) It is not because of the rule that I am able to understand *what it means to be tall*; rather, it was my understanding of what it means to be tall - an understanding that I gained by existing in the socio-temporal context I am in - that provides the content for the rule. Here we begin to see the complex relation of being to understanding and context which are developed in Heidegger’s notions of the background of intelligibility, being-in-the-world, and the pre-ontological or primary understanding – all of which we shall now turn to in more detail.

\(^{26}\) One might argue that a rule could be created and applied universally such that in all cases tall means X and only X. But even here, the definition only holds because of assent, and is therefore still synthetic rather than analytic. For a full discussion of this issue see W. V. Quine, "Two Dogmas of Empiricism," *Philosophical Review* 60 (1951): pg. 20-43.
In taking up the question of being, Heidegger differentiates the ontological being of beings from the ontical being of beings. According to Heidegger, the ontical being of beings refers to the factual dimensions of beings. Ontically, the being of tall is merely a metric that is identified in reference to a number or definition, and not a meaningful dimension that captures experiential content. From an ontic standpoint, it is assumed that we are able to reach the conclusion that the object we are observing “is” a hammer, for example, because we intentionally compare the features of the object with a series of externally derived rules and definitions that themselves tell us “what a hammer is.” On this view, then, the question of “what is” can be derived objectively from external rules and definitions. The general premise is that all of experience can be reduced to an aggregate of distinct and ready-made features and structures such that discovering “truth” is only a matter of discerning the proper representation of the world.\textsuperscript{27} This is the sort of approach the legal formalist employs with respect to the being of the law and adjudication. The idea is that, by representing the world through a-contextual formal models, which presumably provide a set of rules or analytical apparatus, the content of experience can be explained, and determinations made, free from subjective interference.

For Heidegger, this traditional approach is problematic because it baselessly presupposes that (1) human beings, in-fact, come to understand the content of experience by internalizing external rules and definitions, and (2) human beings are capable of taking up the perch of the disinterested observer. In contrast, Heidegger argues that, not only are these presuppositions unjustified, but that the activity of intentional thought by which we develop rules and definitions

\textsuperscript{27} Richard Rorty puts it as follows: “To know is to represent accurately what is outside the mind; so to understand the possibility and nature of knowledge is to understand the way in which the mind is able to construct such representations. Philosophy’s central concern is to be a general theory of representation, a theory which will divide culture up into the areas which represent reality well, those which represent it less well, and those which do not represent it at all (despite their pretence of doing so).” Richard Rorty, \textit{Philosophy and the Mirror of Nature} (Princeton: Princeton University Press, 1979), pg. 3
itself depends on a more fundamental mode of human understanding. In other words, Heidegger argues that, even prior to the activity of conscious intentionality, there is a more original, pre-intentional way in which human beings, by the very nature of our particular way of existing, come to understand being itself, or understand what is, as such. For Heidegger, humans do not exist subjectively, set against an external, objective world, but rather exist in-the-world, which is to say that humans are always already embedded into a socio-temporal context against which they understand both the world and themselves; and it is from this context, or background, that being itself becomes intelligible.

Thus, departing from the traditional subject/object view, Heidegger argues that our primary understanding is derived pre-ontologically, or prior to the thematized descriptions which arise as a product of conscious intentionality. In other words, rather than envision human understanding primarily as a set of internalized rules and definitions, Heidegger envisions human understanding arising organically as a natural consequence of our particular way of existing as conscious, socially-engaged beings; what Heidegger calls being-in-the-world. One understands what it means to be tall because one understands that tall means “of more height than most other people” such that, in a world where most people are two feet tall, a three foot tall person is “tall,” whereas in a world where the average height is 5 feet, he is not “tall.” On Heidegger’s account, the understanding we derive by being-in-the-world is fundamentally an activity of meaningful recognition and qualitative significance, rather than hard line rules and deductive calculation. In other words, we do not derive our understanding of what it means to be by way of the ontical

28 Heidegger explains: “It is understanding that first of all opens up or, as we say, discloses or reveals something like being. Being "is given" only in the specific disclosedness that characterizes the understanding of being. But we call the disclosedness of something truth. That is the proper concept of truth, as it already begins to dawn into antiquity. Being is given only if there is disclosure, that is to say, if there is truth. But there is truth only if a being exists which opens up, which discloses, and indeed in such a way that disclosing belongs itself to the mode of being of this being. We ourselves are such a being.” Martin Heidegger, Basic Problems, supra, pg. 19
facticity of beings, or by associating generic characteristics with rules and definitions towards conclusions. Rather, being is understood ontologically in reference to experience; which is to say that things initially show up in their fullness, as conveying particular meanings and significances in relation to the context in which they are encountered, and has having relevance to the projects in which we are engaged.

According to Heidegger, the content of this primary understanding derives from our “mindless” everyday interaction in the world.29 But in describing our everyday dealings as “mindless,” Heidegger does not mean “thoughtless.” To the contrary, Heidegger sees human existing as primarily a thoughtful activity. But for Heidegger, this thoughtfulness is not the thinking activity of a disinterested Cartesian “mind,” or cogito, that sits over against the world from an unaffected perch. Rather, it is the understanding and familiarity with the world that naturally develops as a consequence of our concernful dealings, or our involvement30 in-the-world.31 Thus, being is understood derivatively as a function of practical experience, and not as a product of disinterested pure reason.

On Heidegger’s account, inasmuch as we are always imbedded into a situational context, we pre-intentionally adopt an assignment of meanings that itself gives the content of experience intelligibility; and it is against this background that certain focal points convey the particular

30 For Heidegger involved activity meant concerned activity. What should be understood from this idea is that at all times, in all of man’s existence there is always already meaning present for man, such that certain issues show up to us as mattering more or less than others, and such that we go about living in the world by way of these projects that matter, most significantly, the project of ourselves. This mode of concern, which Heidegger calls existentiale, inclines, or disposes, the way an individual exists in the world. The underlying meaning present in involved being-in-the-world was not something articulated to consciousness according to Heidegger, but rather present and manifest in Dasein.
31 Heidegger explains: “The Being of those entities which we encounter as closest to us can be exhibited phenomenologically if we take as our clue our everyday Being-in-the-world, which we also call our "dealings" in the world and with entities within-the-world.” Martin Heidegger, Being and Time, supra, pg. 95
significances that we recognize as such as we go about making determinations, pursuing projects, and navigating the world. For Heidegger, since our primary understanding operates prior to thematic description, and even prior to our intentional states of recognition, this contextually dependent, meaning-giving function of human understanding cannot be stripped away under the auspicious of pure objectivity, Cartesian rationality, or positivist analysis. Although human thinking can reflect and de-center to some degree, this phase of thought always supersedes, and flows from, our pre-intentional understanding. In other words, although reflective intentional thought can supplement and influence our understanding at large, these states of intentional reflection will always nonetheless be parasitic upon the primary understanding that we derive pre-intentionally by existing as we do, or by being-in-the-world.

To demonstrate what has been said thus far, let us consider Heidegger’s well-known example of a hammer. Ontically, a hammer is seen merely as an object that corresponds to our definition of a hammer, or as the aggregate of the hammer’s shape, color, weight, and material composition. This description might perhaps even include a set of rules that explain how to hammer. But does such a description capture what it means to be a hammer? In other words, could we adequately understand the hammer simply through the description and set of rules, or is something else involved in the way we understand, and therefore use, the hammer as such?


1. To breach the hard boundary between spaces of causes and reasons, we need to allow for a kind of understanding that is pre-conceptual.
2. For this we need to see this understanding as that of an engaged agent, determining the significances of things from out of its aims, needs, purposes, desires. These significances arise out of a combination of spontaneity and receptivity, constraint and striving; they are the ways the world must be taken in for a being defined by certain goals or needs to make sense of it.
3. The original, inescapable locus of this constrained, pre-conceptual sense making, however, is our bodily commerce with our world.
4. Our humanity also consists, however, in our ability to de-center ourselves from this original engaged mode; to learn to see things in … a “view from nowhere.”
If what it *means to be* depends on our primary understanding and how we come to see a *such and such as a so and so*, then in order to understand what *it means to be a hammer* we must recognize that the being of the hammer entails more than the description of the hammer as an object possessing a particular set of physical characteristics; what *it means to be a hammer* encompasses more than the ontic facticity of the hammer. Ontologically, a hammer is a tool that is used for certain tasks, by certain people, and that has a place and use in the broader contextual framework in which it is seen as a *hammer*; the hammer *is* more than the sum of its characteristics. Synthesis, then, is not the function of first taking in the content of experience, referring to a set of rules and definitions, and then combining features together under the rules so as to reach conclusions; rather, synthesis is our ability to understand the hammer already in its fullness, and in relation to the context in which it is understood as *such*. This is to say that, it is only because we already have an experientially derived understanding of the hammer, in reference to our practical schema or contextual situation, that particular features (i) show up as having their specific significance and (ii) become intelligible *as such* to our intentional mental states. According to Heidegger:

“synthesis” does not mean a binding and linking together of representations, a manipulation of psychical occurrences where “the problem” arises of how these bindings, as something inside, agree with something physical outside. [Synthesis] has a purely apophantical signification and means letting something be seen in its *togetherness* with something-letting it be seen as something.33

Extending the example, let us say that you are studying an indigenous tribe in the Amazon rainforest and, while assembling your shelter, you say out loud: “if only I had a hammer!” A tribesman overhears you and asks “what is a hammer?” Imagine trying to explain to the tribesman what hammers and hammering are all about by giving him the definition of

33 Martin Heidegger, *Being and Time*, supra, pg. 56
“hammer” and providing him with a set of hammering rules. One may be able to convey some sense of a hammer and hammering in this way, but for the tribesman, who has only ever bound twigs with vines, the definition: “a hammer is an object that has a handle and a metal head that is used to drive nails” would not make much sense because he has no concept of hammering, or of nails, or of building things by nailing boards together, and so on. Imagine, however, if instead you simply picked up a hammer and nailed some boards together and built something while the tribesman looked on. In this instance, the tribesman would “get it” – he would understand what it means to be a hammer even though he would not likely be able to fully articulate this newly gained understanding into words. But even here there is a more fundamental nuance to Heidegger’s sense of understanding and its pre-personal aspects.

As the tribesman and his fellow tribesmen begin to hammer and build things with hammers and nails, their understanding of the hammer, and therefore their recognition of what the hammer “is,” will evolve as the hammer takes up a more familiar and consistent place in the tribe’s building habits. Whereas to the first generation of hammer users the hammer would be new and novel, to the fifth generation of hammer users the hammer would be common place. What once stood out as new and novel in the tribe will eventually become so familiar that it will seamlessly blend into the contextual background, and in this process, both the general social understanding, and the tribesmen’s own understanding of what it means to be a hammer will evolve through time.\(^{34}\) But we must further note that, although the tribal understanding of the

---

\(^{34}\) The scope of this paper does not allow me to discuss Heidegger’s notion of time and temporality at length, although this temporal aspect of being-in-the-world is an important aspect of Heidegger’s philosophical project. For Heidegger time is another meaningful dimension of the world. The past is always contained in the present, and the present always exists in light of the future. One salient selection gives a general sense of how Heidegger understands this temporal dimension of being-in-the-world: “Every now and every time-determination is spanned within itself, has a range that varies and does not grow by means of a summation of individual nows as dimensionless points. The now does not acquire a breadth and range by my collecting together a number of nows, but just the reverse; each now already has
being of the hammer might resemble the understanding someone from New York would have, it will remain sufficiently different in its relational significance because the tribesmen’s understanding is derived from an entirely different context than the New Yorker’s.

Continuing this line of thought, we recognize that, on Heidegger’s view, *what it means to be* a hammer goes beyond value-free, a-contextual rules and definitions. Ontologically, the “weight” of the hammer is not just a metric of mass, but the ease or difficulty with which the carpenter is able to swing the hammer. The shape of the hammer is not merely a physical dimension of measure, but a significance that allows the carpenter to perform certain tasks more effectively – a finishing hammer is much different than a framing hammer for example.

Additionally, the different features of a trim hammer that convey particular significances to the carpenter which make it suitable to trim-work will not show up to the tribesman *as such* because he has no concept of trim and trim-work. The tribesman will recognize particular features as significant only in so much as they are recognized as significant in his context, or to the extent they affect his ability to complete whatever project he is involved in. In other words, the tribesman might recognize that the lighter weight of a finish hammer makes it less suited to driving spikes, but he will not recognize the significance of the hammer’s smooth face as significant to not ding-ing trim-work in the way a carpenter would. Heidegger’s point is that the particular features of experience always initially show up, not as generic characteristics, but as conveying particular meanings and significances that we recognize as such, and which we employ in trying to successfully pursue our everyday projects. This seeing *something as*

---

this spannedness within itself in a primary way. Even if I were to reduce the now to a millionth of a second it would still have a breadth because it already has it by its very nature and neither gains it by a summation nor loses it by a diminution… As the primary outside-itself, temporality is stretch itself. Stretch does not forst result from the fact that I shove the moments of time together but just the reverse; the character of the continuity and spannedness of time in the common sense has its origin in the original stretch of temporality itself as ecstatic.” Martin Heidegger, *Basic Problems*, supra, pg. 270
something in its contextual whole, as meaning laden and significant, is an inescapable and essential feature of our particular way of being-in-the-world according to Heidegger.\(^{35}\)

To present a simple legal example of the point, let us consider the example of civil battery. An ontical analysis of civil battery would be concerned with stating a rule and then listing the sorts of instances which, either by definition, or because of analogy and precedent, qualify under the rule. The Restatement Second of Torts states that an actor commits a battery if he acts intentionally either to cause a harmful or offensive contact, or to cause imminent apprehension of such a contact and a harmful or offensive contact actually occurs.\(^{36}\) Heidegger’s account recognizes that notions such as intent, harmful, and offensive are only intelligible, and that the rule only makes any sense as applying to particular situations and not others, because being-in-the-world has already given us some sense of what these terms mean with regard to empirical content. Absent this understanding, the facts we observe in experience could not be subsumed under the rule because the rule would be meaningless – we could not have even written the rule had we not shown up with some understanding of the content that we attempted to capture in the text and application of the rule. The robustness of this understanding, says Heidegger, cannot be fully articulated by explicit rules and definitions. This notion is anecdotally captured in Justice Potter Stewart’s famous remark concerning pornography:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…\(^{37}\)

\(^{35}\) “The being of beings means whatness, howness, truth. Because every being is determined by the what and the how and is unveiled as a being in its whatness and howness, its being-what and being-how, the copula is necessarily ambiguous. However, this ambiguity is not a defect but only the expression on the intrinsically manifold structure of the being of a being- and consequently of the overall understanding of being.” Martin Heidegger, Basic Problems, supra, pg. 205

\(^{36}\) \(\text{Jacobellis v. Ohio 378 U.S. 184 (1964) (Stewart, J concurring)}\)
One might respond that, even if this is the case, once the rule is written, there is one, and only one, “true” understanding of the meaning of the law (although there is vast disagreement as to what makes a meaning “true”), and that any ambiguity can be shored up through more precise definitions and the addition of more rules. Such clarification, the formalist might say, would result in less need for judicial interpretation and preserve the possibility of arriving at objective conclusions. This argument not only misses Heidegger’s point, because the new rules would still be meaning-laden, but it confuses precision with truth and objectivity.38

First, even if we concede for the sake of argument that these additions would create added clarity, we are still left with establishing the source from which the clarification has been made. In other words, even if the rule has been further clarified by intentional reflection, the clarification itself remains derivative of the primary understanding in relation to the content of experience because the intentional state by which the clarification was explicitly made remains parasitic on the primary pre-intentional understanding. Secondly, adding more and more rules would not remedy the problem that new situations will likely always arise that are of such a nature that they cannot be readily subsumed under the existing rules without some level of judicial determination. Unless the rules can exactingly accommodate every potential situation in which they might eventually be applied, sooner or later someone will have to decide what rules apply to novel situations and in what way. Since this is the very definition of judicial intervention, the problem of indeterminacy cannot be thematically resolved in such a manner.

Finally, and perhaps most importantly, laws are not static entities like numbers. Laws assume empirical content, and as such, are necessarily subject to interpretive processes.

38 Along this line Heidegger says: “Mathematical knowledge is no more rigorous than philological-historical knowledge. It merely has the character of ‘exactness,’ which does not coincide with rigor.” Martin Heidegger, What is Metaphysics?, supra, pg. 94
Although some wish to argue otherwise, there is not a single example of a law whose meaning was not affected by societal and temporal contexts. If history shows us anything, it is that a law can come to mean significantly different things depending on the context and time in which it is applied, even if the textual language has not changed. 39 This returns us to Heidegger’s point that it is not the letter of the law that is central, but the understanding upon which the being of a law is understood as such, and by which the law comes to be-as-it-is that is critical.

As it relates to adjudication, Heidegger’s ontological account would recognize that the being of the law, in both its meaning and application, is predicated upon both a personal and communal understanding of its content such that the understanding and use is the law; absent this understanding, the law would have no meaning or application, and could not, therefore, operatively exist in the context of adjudication. Judges do not show up as Cartesian minds ready to adjudicate from the unaffected perch of the judicial bench. Like everyone else, judges exist in a particular societal situation and time, have a history of personal experiences, come from a particular upbringing, have been trained to “think like lawyers,” and have been assimilated into a way of doing things. A judge can no more free himself from these influences when he puts on the robe than can a lion free itself from the instinct to hunt. But here, the formalist’s objection rings out. If the argument is that “the law is what the judge understands it to be,” am I not making the claim that the law is a subjective undertaking of the judge? And if this is the case, then doesn’t such a view of adjudication open the door to relativism and the catastrophic result that judges are free to decide that the law is whatever they please? This is a valid objection, but one that misunderstands the argument completely. I shall explain how momentarily.

39 Even Justice Scalia seems to acknowledge this point in Sacramento v. Lewis, 523 U.S. 833 at 860 (1998) (Scalia, J concurring). “Today’s opinion gives the lie to those cynics who claim that changes in this Court’s jurisprudence are attributable to changes in the Court’s membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, “That was then, this is now.”
There is little question that an effective legal system must retain a high degree of coherence and consistency, and that a relativistic mode of adjudication would likely preclude this possibility. The problem that has to be addressed, then, is: how can we maintain a coherent legal system and some notion of “correct” legal conclusions if the being of the law – “what the law is” – arises initially from the primary understanding we have been discussing? I shall now attempt to demonstrate, not only how such a thing is possible, but also that the current legal system operates in the manner to be described.

5. Wordliness, Context, and the Background of Intelligibility against which coherence is recognized.

As I have been arguing in my presentation of Heidegger’s view, our understanding of “that which is” develops (1) as a consequence of our particular way of existing: being-in-the-world, and (2) in relation to our contextual situation: being-there. From this view, “the world” is not simply the sum of objective facts and rules against which we are subjectively set, but the experiential contextual schema in which we are embedded, of which we are a part, and against which being is understood as such. We see things as we see them because, in the context in which we are imbedded, and from which we derive our basic understanding, particular things are understood in particular ways such that they obtain some meaning and significance that we recognize as such, and upon which we depend to make inferences and draw conclusions. A red

---

40 Along these lines Judge Posner observes: “When "rule of law" is used in either of the two senses of "a government of laws not men," the word "law" has to be bulked up a bit; it has to achieve some level of general predictability, and publicity, as otherwise it would collapse into raw political power. If judges are not constrained at all, there is no rule of law but only rule by judges. But this is an unsatisfactory dichotomy.” Richard Posner, *How Judges Think*, supra, pg. 89
light at an intersection, for example, is not merely a red light, but a point of reference that I recognize as meaning “stop.”

The macro-context in which we come to “see something as something” gives the factual world what I will call its worldliness: the pre-personal contextual understanding from which the individual understanding of “what is” is derived, and the source of the assignments of meaning that make the content of experience intelligible as such. Before turning to how worldliness relates to the possibility of coherence in adjudication, we must first more fully develop the notions of world and worldliness.

Heidegger explains the different senses of world in the following passage. The third description gives the sense of world as a context in which one exists; what I shall refer to as a micro or macro-context.

1. “World” is used as an ontical concept, and signifies the totality of those entities which can be present-at-hand within the world.
2. “World” functions as an ontological term, and signifies the Being of those entities which we have just mentioned. And indeed ‘world’ can become a term for any realm which encompasses a multiplicity of entities: for instance, when one talks of the ‘world’ of a mathematician, ‘world’ signifies the realm of possible objects of mathematics.
3. “World” can be understood in another ontical sense – not, however, as those entities which Dasein essentially is not and which can be encountered within-the-world, but rather as that ‘wherein’ a factual Dasein as such can be said to ‘live’. “World” has here a pre-ontological existentiell signification. Here again there are different possibilities: “world” may stand for the ‘public’ we-world, or one’s ‘own’ closest environment.
4. Finally, “world” designates the ontologico-existential concept of worldhood. Worldhood itself may have as its modes whatever structural wholes any special ‘worlds’ may have at the time; but it embraces in itself the a priori character of worldhood in general. We shall reserve the expression “world” as a term for our third signification. 41

In Heidegger’s conception, worldliness develops as an emergent common understanding through existing inter-subjectively in a particular macro-context. The macro-context is comprised of the socio-cultural, temporal, and other factors that together provide the fabric of common

---

41 Martin Heidegger, *Being and Time*, supra, pg. 93

© George Souri 2011.
familiarity and understanding that allows us to recognize particular judgments as having the characteristic of fitting in. On this account, the notion of pure subjectivity is already foreclosed by the fact that we are always already imbedded into a common inter-subjective context from which we derive any sense of being in the first place. 42 I do not come to understand things merely as “I” understand them, but rather come to understand things as “one” understands them. Heidegger describes this anonymous public “one” as follows:

The “one” as that which forms everyday being-with-one-another...constitutes what we call the public in the strict sense of the word. It implies that the world is always already primarily given as the common world. It is not the case that on the one hand there are first individual subjects which at any given time have their own world; and that the task would then arise of putting together, by virtue of some sort of an arrangement, the various particular worlds of the individuals and of agreeing how one would have a common world. This is how philosophers imagine these things when they ask about the constitution of the inter-subjective world. We say instead that the first thing that is given is the common world – the one.

The first dimension to consider with regard to the “world” of adjudication is the interplay of micro-context and macro-context as the background of both being-in-the-world and being-there. In the broader sense, micro-context refers to each situation in the continuum of existential situations in which the judge has dwelled: the judge’s experiences to date that have shaped the judge’s understanding. A judge, like everyone else, grew up in a particular time and place, has developed certain beliefs, preferences, and ethical standards, and has developed his particular understanding in light of the micro-contexts in which he has been embedded throughout his life. In the more constricted sense, micro-context refers to the judge’s immediate situation, and includes all of the affective variables operative in the specific adjudicative process.

42 This leaves open the issues of truth and correctness. In other words, to say that there is a context against which judgment fits in or does not, does not make any statement on whether or not these judgments are true or correct with regard to “reality.” This issue will be discussed below.

43 Martin Heidegger, Basic Problems, supra, pg. 246
In the micro-context of the judicial world, adjudication is disposed by the particularities of the situation in which it transpires, generally and specifically. A judge sitting in a state court that presides over a small rural population adjudicates in a different micro-context than does a federal appellate judge sitting in the Seventh Circuit. A judge adjudicating over a matter or area of law with which he is very familiar adjudicates in a different specific micro-context than he does when the matter or area of law is unfamiliar to him. Judges adjudicating in the year 2011 do so in a different world than did judges sixty years ago. The dimensions of context that comprise the world in which the judge adjudicates, therefore, anteriorly dispose, or situate, the activity itself.

Although micro-contexts vary greatly from judge to judge, inasmuch as the different micro-contexts are part of a larger, inter-subjective macro-context, the emergent understandings of the judges will be mutually intelligible and familiar, even in cases of disagreement. This is to say that, although each judge has a particular sense of worldiness, inasmuch as judges dwell in the same inter-subjective macro-context, there will exist overlapping points of experience that create a commonality of understanding such that intelligibility and judgments of coherence remain operatively possible, even if they fall short of being absolutely determinative. The judge is always a part of the judiciary, which itself is always already part of a larger legal system, which is itself part of a larger socio-cultural-temporal context, and all these levels of context are operative in shaping the judge’s understanding, both pre-personally and intentionally.

To demonstrate this point with a simple example, let us consider the issue of applying the Fourteenth Amendment to cases involving race-preference or affirmative action. Although two judges may have different personal views on the matter, the question itself is familiar to both parties since it is the sort of question that arises in their shared macro-context; it is something
“one” might consider. Inasmuch as the question is something “one” might consider, the question is already situated by a framework in which such questions are considered. There is, therefore, a common intelligibility between diverse judges sharing the same macro-context that would not be shared with someone who has just arrived from Amman, Jordan or the year 1905 for example, where the entire notion of race preference and affirmative action is alien. The question of affirmative action and the Fourteenth Amendment only arises and makes any sense because there is a shared inter-subjective macro-context that gives the question its particular significance towards a common mode of understanding, despite the differing micro-contextual influences of various judges. The background of jurisprudence, against which the legal question is understood, provides the relevant content for examining the question, as well as the subsequent mode of consideration by which “one” takes up the question. Aggregately, these factors comprise what we might call a domain of understanding. The domain of understanding, then, establishes a sort of expectation of what “one” might reasonably consider in taking up the question.

If we accept the notion that the understanding of the public “one” precedes an entirely subjective assignment of sense and meaning, it follows that there is an operative pre-subjective understanding, or a commonality of intelligibility, that provides the ground of convention against which meanings gain a sort of operative cohesiveness. I would not, for example, cite Hölderlin in a legal brief, nor write a legal brief in iambic pentameter because I understand that these are not the sorts of things “one” does when writing a legal brief. But how do I know this? There is no rule that tells me “don’t write a legal brief in iambic pentameter.” How then did I come to understand what is a proper or improper practice when writing a legal brief, or in deciding the outcome of a legal controversy for that matter? I learned how to do because I was taught how one does, and by actually doing. But in both learning and doing, we are always alongside others. This
is to say that, even prior to the conscious decision to pursue a particular project, the path by which a project is pursued was already shaped to varying degrees by the inter-subjective context in which we exist. Once we recognize that our ability to understand and operate in the world is dependent on our social constitution and the inter-subjective, pre-personal contextual understanding of the “one,” we can begin to see how the commonality of convention and acceptability that arises from existing as such might establishes systemic coherence.

Returning to our previous example of the hammer, we have already said that the carpenter understands the “harnerness” of the hammer, and uses hammers in the manner he does because the carpenter lives in a world where people assemble things with hammers and nails, not just glue for example, and where nails are driven with a hammer, not a rock for example, and where a hammer is recognized as a piece of equipment “carpenters” use, and because during his time as an apprentice the carpenter was taught how to hammer in a particular way. The carpenter does not arrive as a blank slate to the task of hammering, but was assimilated into a mode of hammering wherein “one” hammers in a given way. If the carpenter showed up with a rock to drive a nail, his boss would recognize this behavior as absurd, disjoint, and out of place – which is to say incoherent – and he would certainly chide the carpenter. In the same way, adjudication is shaped by the understanding of the “one” that is operative in the judge’s world.

Heidegger’s point here would be that the project of adjudication, and therefore the being of the law itself, is neither a product of objective legal operations and an “in-itself” notion of the law, nor a product of the judge’s subjective inclinations. Rather, adjudication takes place in a sort of middle-ground between the pre-intentional dimensions of understanding and disposition, and the conscious activity of intentional reasoning. The judge is not controlled by his personal dispositions, but neither is he wholly unaffected by them. Although the project of adjudication
does not lend itself to objectively applying clean logical operations to universal rules and objective data, neither is adjudication a wholly subjective undertaking because the judge adjudicates as “one” adjudicates, and is able, through intentional deliberation, to comport his adjudication to this common standard. In sum then, adjudication is shaped and comported, as it is, by (i) the complex relation between the whole of judicial contexts in which the adjudication takes place, (ii) the pre-personal common understanding of these contexts from which the judge himself comes to understand his project in the first place, and (iii) the judge’s intentional deliberation and comportment towards the common mode.

If these observations are to be accepted, we might say that the pre-personal context of the world and the mode of “doing as ‘one’ does” set a constraint on how the judge understands the law and its application, his role as judge, and how he recognizes the range of legal “correctness” or “coherence.” In other words, since the inter-subjective context of the world and “doing as ‘one’ does” fundamentally shape how a judge understands what the law is – the being of the law in meaning and application – and how the judge actually goes about adjudicating, these factors can be seen to assign, what Posner calls, a “zone of reasonableness” that acts as a pre-personal constraint on an entirely subjective or, in the extreme, relativistic mode of adjudication. This is so because such factors establish the common context to which the judge comports his adjudication, and against which it is publicly understood as more or less fitting in, or as being coherent in the domain. As Posner explains:

The amount of legislating that a judge does depends on the breadth of his "zone of reasonableness" - the area which he has discretion to decide a case either way without disgracing himself. The zone varies from judiciary to judiciary and from judge to judge... The breadth of the zone varies with the field of law. It is narrower in fields of ideological consensus, which at present is the approximate situation in, for example, contract law."44

44 Richard Posner, How Judges Think, supra, pg. 86-87
Although the judge still has varying levels of flexibility and discretion, he remains constrained to a domain of possible understandings and applications; a district court judge cannot ignore a higher court ruling in making his own determinations without risking the likelihood of being overruled, for example. The fact that we have, and regularly employ such a mechanism evidences that there is an operative notion of coherence at work in adjudication, even if it is not explicitly defined or absolutely determinate. A higher court could not overrule a lower court - which is to say find that a lower court’s decision is incoherent or inconsistent - if the higher court does not itself have an operative sense of coherence and consistency; this is a simple logical deduction.\textsuperscript{45} Thus, notions of coherence and consistency are clearly operative and understood in adjudication despite the imprecision and lack of certainty that comes with the task; and it is the fabric of context and worldliness that makes such a thing possible.

But yet the formalist, enamored by the thought of precision and absolute clarity, continues to insist that such a notion of coherence is inadequate to the noble task of adjudication. If the formalist wishes us to adopt this claim, then the formalist must also show us how his posited alternative is possible, not in the free domain of theoretical speculation, but in the everyday activity of adjudication. It would be wonderful if I had a flying car, but since that option is unavailable to me, I am forced to sit in traffic despite my dissatisfaction. It would be great if, when controversies arose, we could simply sit down with our pencils and calculate, as Leibniz had once hoped; but observation tells us that adjudication is not so straightforward. Indeed, the formalist project has defied philosophers for centuries, and is no more likely to be accomplished by even the most ingenious of jurists because, even if we normatively agree with the formalists’ vision, the formalist conception simply does not comport with the actuality of the

\textsuperscript{45} We cannot conclude that something is not an X if we don’t have some sense of what an X is.
task and the practical “messiness” that infests it anymore than the Kantian ideal of the synthetic a-priori, despite its normative appeal, comports with the practical actuality of human thought, language, and experience. Dewey describes the issue as follows:

The distinctive characteristic of practical activity… is the uncertainty which attends it. Of it we are compelled to say: Act, but act at your peril. Judgment and belief regarding actions to be performed can never attain more than a precarious probability. Through thought, however, it has seemed that men might escape from the perils of uncertainty. . . The intellect, however, according to traditional doctrine, may grasp universal being. . . which is fixed and immutable. . . man’s distrust of himself has caused him to desire to get beyond and above himself; in pure knowledge he has thought he could attain this self-transcendence.46

If we are to accept Heidegger’s account, then we will recognize that the adjudicative understanding of coherence is determined pre-subjectively by the world in which adjudication takes place. It follows that adjudication itself recognizes a sort of coherence based on its wordly understanding, and comports itself to this understanding. Adjudication therefore already includes an inherent check on relativism, even though the common understanding against which individual adjudication is checked for coherence is not one that is absolutely determinate for all times and places. If we accept Heidegger’s account, then we will recognize that the choice is not one between subscribing to a notion of objective disinterest which observation tells us does not exist, or else having to see ourselves as tacitly approving of relativistic judicial decision making. Rather, we will come to see that the recognized domain of judicial coherence arises out of the discourse of adjudication itself, and that this discourse can adequately maintain the coherent integrity of the legal system. The key point of departure is recognizing that the form of judicial coherence I have been describing not only more closely resembles what we find in observation, but is, and has been, adequate to maintaining a largely consistent and coherent body of jurisprudence even though it is internally constituted by the inter-subjective activity of

adjudication itself, and not derived from some external bedrock source. It would be a mistake to see the evolution of judicial understanding as a sign of incoherence, or of a judiciary run afoul, because it is only through this evolution that the judicial understanding is able to become more robust and able to deal with new and novel situations, and correct previous errors.

But we should strongly note that coherence can only be maintained if there are adequate mechanisms of resistance and correction to judicial decisions that are recognized as being outside the domain of coherence, and which are unsubstantiated by a basis for the departure.\textsuperscript{47} In other words, coherence requires mechanisms by which carpenters can be prevented from using rocks to drive nails, so to speak; mechanisms by which actors can be held accountable and burdened to justify their decisions through adjudicative discourse. This is to say that if the judicial context comes to accept, as a normative matter, judicial decisions that are justified by the personal sentiment of the judge rather than reasoned legal discourse, coherence will be impossible. But to say, as I am here, that objectivity is a requisite normative requirement for coherence, is not to subscribe to the formalist notion of objectivity, for this would return us to the subject/object relation we insisted on doing away with. Judicial objectivity, in the sense I am here describing it, must be understood in a different light. By conceiving judicial objectivity as a function of recourse to the contextual inter-subjective understanding in which adjudication takes place, we can avoid judicial relativism while acknowledging what observation tells us to be the case: that the judicial understanding, through the discourse of adjudication itself, changes as the context in which it operates changes. It is not, therefore, change and adaptation per se that we should be concerned with, but deviation that has no basis in reference to the macro-judicial context, which includes the evolution of the broader socio-temporal dimensions of understanding.

\textsuperscript{47} The scope of this paper does not allow me to take up the issue of correction. See.........

© George Souri 2011.
as such generally. By demanding reasoned discourse, justification, substantiation, and warrant, we can keep relativism at bay while allowing for evolution and adaptation to meet new and novel conditions.

6. The Law as the Equipment of Adjudication and the Event of Breakdown

Having described how context and worldliness shape the pre-personal understanding of the law that, in the inter-subjective aggregate, establishes the domain of recognized legal coherence, we must now turn to the being of the law as it relates to adjudication, and to Heidegger’s notion of equipment.

One way to think about the being of the law - “what the law is” - is from the ontic point of view that presupposes that the law is something “in-itself.” In this conception, the law is seen as an independent entity to be observed, studied, and described, rather than as something whose being is understood in reference to the contextual situation in which it is encountered. Heidegger

48 Karl Popper makes a similar point in the following passage:

all of our knowledge is hypothetical. It is an adaptation to a partly unknown environment. It is often successful and unsuccessful, the result of anticipatory trials and of unavoidable errors, and of error elimination... such evaluations can evolve only if the organism is able to take action... What leads to action are the interpreted signals (and interpretationist part of action): signals plus the new theoretical evaluation of advantages and of danger. ... The emergence of the self-critical attitude is the beginning of something even more important: of the critical approach, an approach that is critical in the interest of objective truth... Theories become objects of criticism, like the beaver dam. And we can try to repair them in the light of that most important value: correspondence to the facts – truth. Karl Popper, All Life Is Problem Solving, trans. Patrick Camiller (London: Routledge, 1999), pgs. 70-71.

Popper’s observation makes two important points. First, that objective truth can be held as a normative goal, even if it is merely an ideal that cannot be obtained, and second, that the goal of objectivity is served by critical discourse that evolves as it attempts to better understand its project. Although Heidegger would likely disagree with any talk of objective truth, Popper’s more fundamental point, limited to the role of the critical attitude, is consistent with the notion of objectivity as dependant on context that I have previously described, and which is based on Heidegger’s notion of inter-subjectivity and being-in-the-world.
describes this state of being as being present-to-hand. One key feature of the present-to-hand is the lack of concern that attends it. In other words, the present-to-hand does not show up in its ontological significance, as meaningful, proximate, and relevant to a project, but rather shows up independently of such practically relevant dimensions. To the formalist, such a view of the law is attractive because, by treating the law as an “in-itself” object, the possibility of pure objectivity is preserved.

Yet inasmuch as adjudication attends to the concern of adjudicating, the relation of the law to adjudication does not take the form of being present-to-hand. As will be shown, the law instead derives its ontological structure from the concern of adjudication itself, and from the assignments of meaning and significance that arise within the context of this concern. In other words, deciding “what the law is” is not an activity with which adjudication is concerned for its own sake. Rather, adjudication always encounters the law in the context of deciding a legal controversy, and as a dimension of the project of adjudicating. To examine this relationship, then, we might begin by asking, along Heideggerian lines: what calls for adjudication? Here, the phrase “calls for” must be understood in two senses. First, we are asking what requires adjudication. Second - and this is the more subtle sense Heidegger wants to get at - we are asking: what is adjudication comported toward, by what is it motivated, and to what concern does it attend?

What calls for adjudication is the resolution of a legal controversy, not the making of law. “Making law” - in whatever sense one wants to understand the term - is certainly a consequence of adjudication, but there would be no adjudication absent the controversy and a desire for

resolution. Here, the two senses of “what calls for adjudication” become clear. In the first sense, the resolution of a legal controversy \textit{requires} adjudication. In the second sense, it is the project of resolving the controversy that creates a focal point upon which adjudication sets its sights, and towards which it comports itself. Since adjudication always encounters the law in the context of a legal controversy, the law is always understood in its practical significance, and as something that adjudication engages \textit{in-order-to} accomplish its project. Heidegger calls these familiar beings that show up within the context of our practical concerns, or that we employ \textit{in-order-to} accomplish our everyday projects, “equipment.” On Heidegger’s account:

We shall call those entities which we encounter in concern “equipment”... Taken strictly, there is no such thing as an equipment. To the Being of any equipment there always belongs a totality of equipment, in which it can be this equipment that it is. Equipment is essentially ‘something-in-order-to’. A totality of equipment is constituted by various ways of the ‘in-order-to’, such as serviceability, conduciveness, usability, manipulability. In the “in-order-to” as a structure there lies an assignment or reference of something to something.

Heidegger calls the sort of being that characterizes equipment \textit{readiness-at-hand}. Equipment ready-at-hand possesses several features. First, equipment is never encountered in isolation, but always relates to, and derives reference from, the whole context in which it is encountered. For example, the equipmentality of a hammer is understood in reference to nails, and building, and so on, and its features are understood as significant to the specifics of the task; a smooth face of the hammer is not just a smooth face - an optical feature - but a meaningful aspect of the hammer’s being that conveys a particular significance relevant to the project of hammering a trim nail without damaging the face of the wooden trim. Whereas, with the present-to-hand, the dimensions of an entity are reduced to sterile characteristics that do not convey a meaning or significance relevant to a project or use, in the case of equipment, the entity is understood in reference to the assignments of meanings and significances that are derived from

\footnote{Martin Heidegger, \textit{Being and Time}, supra, pg. 97}
the context in which equipment is employed in-order-to accomplish a particular project. Heidegger calls the relationship between concern and our recognition of significant assignment circumspection:

If we look at Things just “theoretically,” we can get along without understanding readiness-to-hand. But when we deal with them by using them and manipulating them, this activity is not a blind one; it has its own kind of sight, by which our manipulation is guided and from which it acquires its specific Thingly character. Dealings with equipment subordinate themselves to the manifold assignment of the “in-order-to.” And the sight with which they thus accommodate themselves is circumspection.51

Second, equipment is familiar and seamlessly employed in our everyday projects. The carpenter need not consciously think about how to adjust to the variety of hammering situations he generally encounters because the carpenter has used the hammer over time, and because the hammer is familiar, well suited, and proximate to his project. The being of the hammer is not understood thematically through explicit rules and definitions, but rather disclosed by the carpenter as he uses the hammer in the context of his concern. The usage itself reveals the range of the hammer’s manipulability and suitedness such that, in this revealing, the carpenter’s understanding of the hammer, as it relates to practical contexts, is shaped. The being of equipment, then, has a sort of elasticity in relation to the primary understanding. Heidegger explains this dynamic as follows:

In dealings such as this, where something is put to use, our concern subordinates itself to the “in-order-to” which is constitutive for the equipment we are employing at the time; 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, and the more unveiledly is it encountered as that which it is – as equipment. The hammering itself uncovers the specific “manipulability” of the hammer.52

Let us put what has been said thus far in the context of adjudication. We have said that adjudication is concerned with resolving a legal controversy and that, therefore, the law is

---

51 Ibid, pg. 98
52 Ibid
initially encountered as something in-order-to accomplish this project. Accomplishing this project requires the judge to determine the meaning and application of the law, and to subsume facts within the context of this determination to reach a conclusion. Inasmuch as the judge is tasked with reaching conclusions about empirical events, the content of his analysis always varies to differing degrees because no two cases are exactly alike. Thus, the judge cannot simply make computational decisions. Rather, in reaching a conclusion through adjudicating, a judge considers the being of the law in the context of the project. The judge considers the facts of the case, precedent, and the operative understanding of the law. He analogizes, distinguishes, interprets statutory language, deciphers legislative intent, and discerns how extrinsic facts inform these other questions in arriving at a conclusion. In adjudicating, therefore, the manipulability and method of the law - its suitability and adequacy to deciding a controversy - shows itself through use, which itself makes the law more proximate and familiar to the concern of adjudication, and further discloses the law’s being. In other words, the answers to the questions “what is the law?” and “what is the correct application of the law?” are derived, not from some external source, but through the equipmental use of the law in deciding a range of controversies, which itself reveals “what the law is,” or the being of the law as such.

Although the degree of flux between intentional reflection and tacit understanding that transpires in assessing a legal controversy varies depending on several factors (e.g. the complexity of the facts, the area of law), the oscillation between the pre-intentional and intentional aspects of adjudication organically provides content to the judge’s understanding, and thereby defines the bounds of the law’s being. As the understanding of the law is shown to be more, or less, able to resolve the legal controversy at hand, however, another dimension of the relation between adjudication and the being of the law is revealed. As Heidegger explains:
When we concern ourselves with something, the entities which are most closely ready-to-hand may be met as something unusable, not properly adapted for the use we have decided upon… In each of these cases equipment is here, ready-to-hand. We discover its unsuitability, however, not by looking at it and establishing its properties, but rather by the circumspection of the dealings in which we use it. When its unusability is thus discovered, equipment becomes conspicuous.\textsuperscript{53} BT 102

Inasmuch as the meaning and application of the law are discerned through the reciprocal activities of pre-intentional understanding and conscious intentional deliberation, the being of the law is such that it is always already understood and yet always a question. In other words, a judge presiding over a case likely has a good understanding of the law, but the manipulability, applicability, suitedness, and adequacy of this understanding to the project of resolving the controversy at hand remains somewhat ambiguous, to varying degrees, until adjudication goes about doing its business. The law, therefore, oscillates between the seamless usability of everydayness – as in more straightforward cases and areas of law – and conspicuousness – as in cases and areas of law that are less clear; and it is through the activity of adjudicating that the being of the law comes to be understood as such, and is disclosed as either familiar and equipmental, or distant and clumsy in application.

But yet there are cases in which the operative understanding of the law shows itself altogether ill-suited to resolving a controversy. This is not to say that the law is simply seen as inapplicable - because this would be a determination that attends to the concern of resolving the controversy. Rather, there are times when the understanding of the law is inadequate to even deciding the question of applicability. Whereas, in most cases, the issue of applicability is seamlessly resolved in the everyday mode and does not require intentional deliberation, in “grey area” cases the judge must explicitly decide whether a particular case can be subsumed under the judicial understanding at all, and if so, in what way, and to what extent. Here, the law ceases to

\textsuperscript{53} Ibid, pg. 102

© George Souri 2011.
be ready-to-hand -- seamlessly understood and adequate to resolving the controversy -- and becomes present-to-hand. In these cases, a breakdown occurs such that resolving the controversy requires an explicit, conscious, and intentional examination of the law itself. Here, the concern of adjudication shifts from resolving the controversy, to reestablishing the intelligibility of the law and its equipmental place. In other words, realizing that the everyday mode, upon which the judge has relied is not adequate to deal with a controversy, the judge is forced to revisit his understanding through conscious deliberation, and resolve the problem explicitly by making a new rule or basis for application. One example of such a situation can be seen in Pennsylvania Coal Co. v. Mahon; the case that gave rise to the Court’s regulatory takings jurisprudence.\(^{54}\)

Hubert Dreyfus explains this temporary breakdown as follows:

> Temporary breakdown, where something blocks ongoing activity, necessitates a shift into a mode in which what was previously transparent becomes explicitly manifest. Deprived of access to what we normally count on, we act deliberately, paying attention to what we are doing… Heidegger claims that when things are functioning smoothly, “the assignments themselves are not observed; they are rather ‘there’ and we concernfully submit ourselves to them. But when an assignment has been disturbed – when something is unusable for some purpose – then the assignment becomes explicit.”\(^{55}\)

> When the previously familiar and useable law becomes ambiguous and unusable, adjudication is confronted, not only with resolving a controversy, but with reestablishing the elastic bounds of the being of the law itself. The best general examples of this process are when the Supreme Court resolves a controversy over which the Federal Appellate Courts are in disagreement, or when the Court decides Constitutional issues. Whereas in the mode of everydayness, the being of the law is seamlessly understood and applied in the project of adjudication, in breakdown, adjudication leaves the mode of everydayness and directs its concern to the preliminary project of deciphering the law. Ultimately, in the cycle of breakdown and

\(^{54}\) 260 U.S. 393 (1922)

\(^{55}\) Hubert Dreyfus, supra, pg. 72
reorientation, a new understanding of the law’s being (“what is the law” and “how does it apply”) emerges. This new understanding, based on the elastic reconstitution of the being of the law, then gradually becomes more and more familiar at large until the law once again assumes its equipmental role in the judicial world, returning adjudication to the mode of everydayness.

As an example of this process, consider the evolution of Fourth Amendment jurisprudence as it grappled with the development of modern technology and questions like “does the Fourth Amendment protect telephone conversations?” Such issues presented novel situations that could not seamlessly be resolved by the operative understanding of the law as it stood prior to the introduction of the controversy. The five to four decision in *Olmstead v. United States* evidences how adjudication struggles to establish the manipulability of the law within the domain of coherence in such cases. But, because both the being of the law and the horizon of coherence against which it is understood must be disclosed through the discourse of adjudication, as it takes place within a particular macro-context, the process does not work itself out in a single case. For example, in overruling *Olmstead*, the Court in *Katz v. United States*, as if describing the process I am here describing, observed:

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry for that Amendment was thought to limit only searches and seizures of tangible property. But the premise that property interests control the right of the Government to search and seize has been discredited. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any technical trespass under local property law. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people -- and not simply "areas" -- against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

---

56 277 U.S. 438 (1928)
57 389 U.S. 347, 352-3 (1967)
In its ruling, the Court in *Katz* did not merely establish a new rule, but reconstructed the entire understanding of the Fourth Amendment. When *Katz* was decided, the text of the Fourth Amendment had not changed, nor had Congress created any laws that might supplement Fourth Amendment law, yet *Katz* came out the way it did nonetheless, and overturned *Olmstead*. One could argue over whether the Court in *Katz* “should” have reached the decision it did, but the argument would be futile because the fact remains that the Court did reach its decision, and it did so by reshaping the understanding of the being of the Fourth Amendment. Indeed, *Katz* is just one of a very many possible examples we could consider that provide evidence for the premises that I have thus far been describing. First, that the being of the law is not found in the law itself, but is rather derived from the understanding of the law as such that is itself the product of adjudication. Second, that adjudication itself defines the horizon of the being of the law (“what the law is”), and the bounds of the domain of coherence against which the law is understood as such. Thirdly, that the relation between the law, the adjudicative understanding, and the project of adjudication is not a step wise process of operations and deductions, but rather an ongoing discourse that evolves over time, and that itself provides the content by which the project of adjudication can be accomplished. Together these premises provide an account of the relationship between adjudication and the being of the law that more closely resembles the evolution of law and adjudicative understanding that we observe in experience.

7. Conclusion

I hope to have provided, in this paper, an adequate initial presentation of a Heideggerian account of adjudication. We have examined Heidegger’s account of being-in-the-world, and how this particular way of existing shapes how we understand being itself, and therefore the whole of
experience. We have considered the important role of context in shaping our understanding, and how the fabric of our inter-subjective and common understanding provides a background against which legal coherence is possible. And I have argued that the best way to understand the being of the law is as the equipment of adjudication.

Although we have made significant progress in developing this account, there is still a great deal more to be done. First, the notion of judicial objectivity as I have previously described it must be further examined and considered against Heidegger’s broad philosophical views. Second, the operative aspects of adjudication that I have here described, particularly with respect to the being of the law and the role of context, must be applied to concrete examples. This will not only help us better understand the account of adjudication herein presented, but will also help to reveal any inadequacies in the account. Finally, the notion of adjudication as critical discourse must be further developed. This requires us not only to examine the notion more closely in reference to concrete cases, but to also develop prescriptive suggestions on making the discourse of adjudication more robust and adequate to resolving ever more complex legal controversies.
Bibliography


