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ARTICLES

INSIDE-OUT: BEYOND THE INTERNAL/EXTERNAL DISTINCTION IN LEGAL SCHOLARSHIP

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INTRODUCTION

A distinction commonly drawn in legal scholarship deserves scrutiny. To begin to see why, consider this question: What do the following claims by legal scholars have in common?

> (1) That economic explanations of tort law which interpret it as an instrument for achieving social goals, such as compensating victims or deterring unreasonably risky conduct (or both), are defective in part because such explanations do not "work through" the concepts that judges invoke in their opinions when deciding cases.[1]
>
> (2) That historical accounts of judicial decisionmaking that explain case outcomes by reference to judges' ideologies or economic self-interest do not threaten normative interpretations of legal practice because such explanations do not offer courts any concrete guidance as to how to decide future cases.[2]
>
> (3) That political scientists' criticisms to the effect that legal scholars commonly make fallacious inferences miss their mark because they

[1] Discussed infra Part III.
[2] Discussed infra Parts I, II, and IV.

> fail to understand that legal scholars have rhetorical goals not shared by political scientists.[3]
>
> (4) That the arguments of philosophers and neuroscientists about the existence or nonexistence of free will are irrelevant to "all the participants in the legal system" because the criminal law assumes that people are morally responsible for their actions irrespective of whether those actions were causally determined.[4]
>
> (5) That when lawyers write history they ignore evidence and distort the facts in order to rationalize and legitimize legal practice.[5]

There are really two answers to this question. The first is that legal scholars have framed all of these claims around a distinction between "internal" and "external" forms of explanation, criticism, or argument.[6] In each case, the suggestion made is that a particular kind of analysis is flawed or misguided because it is not of the right sort. It is "external"

[3] Discussed infra Part IV.

[4] Discussed infra Part IV.

[5] Discussed infra Part IV.

[6] See Ronald Dworkin, Law's Empire 14 (1986) ("Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective, like innumerate histories of mathematics . . . ."); Stephen A. Smith, Contract Theory 29 (2004) ("Insofar as a theorist's explanation of the law reveals the law to be based on concepts that are external to legal reasoning—on concepts, in other words, that are not just different from those that the judge did use but from those that the judge *might* have used—then the law's belief that its reasons were real reasons is not just mistaken, but conceptually confused (and hence not intelligible)."); Jack M. Balkin & Sanford Levinson, Law and the Humanities: An Uneasy Relationship, 18 Yale J.L. & Human. 155, 165 (2006) (distinguishing between "internalist" and "externalist" attitudes about law and observing in that context that "a familiar criticism of lawyers, whether or not they are originalists, is that they engage all too often in what is called 'law-office history'—mining the historical record to support their favored legal conclusions"); Jack Goldsmith & Adrian Vermuele, Empirical Methodology and Legal Scholarship, 69 U. Chi. L. Rev. 153, 153–54 (2002) ("Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship . . . . Epstein and King miss this point because their empirical methodology blinds them to legal scholarship's internal perspective."); Stephen J. Morse, The Non-Problem of Free Will in Forensic Psychiatry and Psychology, 25 Behav. Sci. & L. 203, 214, 216 (2007) [hereinafter Morse, Non-Problem] (observing that any argument that purports to show an incompatibility between criminal responsibility and the thesis of universal causal determinism, including those made by psychologists or neuroscientists, "provides an external critique of responsibility," and later concluding that, for that reason, "all participants in the legal system, including forensic psychiatrists and psychologists, have good reason to embrace compatibilism").

when what is required is an "internal" analysis, or vice versa. That all of the above claims have been conceptualized in this way may at first seem odd since they otherwise seem to be about quite unrelated issues.

From a broader perspective, however, each of these arguments can be seen as making judgments about what counts as a "legal" argument or critique and what does not. That is the second thing these claims have in common. They are all efforts to draw the boundaries of law. Each seeks to distinguish, for one reason or another, the aims and methods of law from those of other academic disciplines. In particular, they seek to distinguish law from those disciplines whose methods are aimed at better understanding the natural or social world, whether in the humanities, sciences, or social sciences. Here I do not mean "law" in the sense of those rules or principles that are (or properly ought to be) enforced by the state, but rather "law" in the sense of those materials, methods, and values that influence the form and content of those rules and principles.[7] In other words, each makes a claim about the nature and boundaries of what John Chipman Gray called the "sources" of law.[8]

Such an effort does not alone warrant criticism. To the contrary, questions about which materials and values judges and other legal decision makers ought to rely on are foundational ones. So, too, are questions about which materials, methods, and values they actually do rely on, whether they should do so or not. Moreover, the internal/external distinction captures well a powerful intuition. Some forms of scholarship—say, traditional doctrinal analyses—do seem to be in some sense launched from *within* the legal enterprise, whereas others—such as em-

[7] I include the parenthetical to clarify that in distinguishing the sense of "law" I have in mind from the one at issue in traditional jurisprudential debates about the nature of law I do not mean to implicitly endorse a positivist conception of law. That is, the law of some society, properly understood, may include certain values or moral principles. See generally, e.g., Dworkin, supra note 6 (arguing that determining what the law of a jurisdiction is requires making judgments about which principles of political morality best justify the state's use of coercive force). Regardless, the topic of this Article is the set of concepts, methods, and values that judges, lawyers, and law professors can and do draw on to either interpret, revise, or understand the "law," as understood in this more conventional sense.

[8] John Chipman Gray, The Nature and Sources of Law 291–92 (1909). For Gray, those "sources" included statutes, judicial precedents, the opinions of experts, custom, and morality. I mean the term to include not only those things but also any sort of arguments and evidence that courts either do or should rely on when deciding cases.

pirical studies of judicial behavior—appear to offer descriptions or critiques from *outside* it.[9]

In part for these reasons, the internal/external distinction has now become so entrenched in the consciousness of legal scholars that recently a pair of prominent scholars has felt compelled to call out various judges and legal theorists for having committed what they call the "inside/outside fallacy." According to Professors Eric Posner and Adrian Vermeule, these theorists suffer from "methodological schizophrenia" because they adopt "internal" and "external" perspectives simultaneously.[10] The point of their article, they explain, is not that one type of scholarship is better than the other, but rather simply that the two perspectives are fundamentally incompatible and so must be kept separate.[11] Although they recognize that the inconsistency they identify could be framed in other terms, they dub it the "inside/outside fallacy" on the ground that the internal/external distinction has been "traditionally a central issue for legal theory."[12]

And that is true.[13] Or at least it is true if by "traditionally" one means "for the past few decades." For most of the twentieth century, legal theo-

[9] Compare Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 194–97 (1890) (using case law to argue for the existence and value of a right to privacy), with Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court 288 (1999) (arguing that what precedent dictates rarely determines how Supreme Court Justices actually decide cases).

[10] Eric A. Posner & Adrian Vermeule, Inside or Outside the System?, 90 U. Chi. L. Rev. 1743, 1745 (2013).

[11] See id. at 1797 (observing that "analysts who speak both as political scientists and as legal theorists must be careful not to switch their hats so rapidly that they end up attempting to wear two hats at the same time").

[12] Id. at 1789.

[13] Stephen M. Feldman, The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making, 30 Law & Soc. Inquiry 89, 91 (2005) ("The internal-external debate goes to the very heart—or perhaps, more precisely, to the apex—of American jurisprudence."); Brian Z. Tamanaha, The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies, 30 Law & Soc'y Rev. 163, 163 (1996) [hereinafter Tamanaha, Internal/External] (observing that "[t]he internal/external distinction is gradually assuming a central position in legal theory and sociolegal studies"). For other discussions of the distinction see H.L.A. Hart, The Concept of Law 88–90 (3d ed. 2012) [hereinafter Hart, Concept] (emphasizing the importance of distinguishing between "internal" and "external" aspects of rules for the purposes of understanding law and "the normative structure of society"); Smith, supra note 6, at 15 ("Since at least the publication of H.L.A. Hart's *The Concept of Law*, there has been broad, if not quite universal, agreement amongst legal theorists that law's self-understanding (an aspect of what Hart called 'the internal perspective on law') is a feature of law that legal theories must take into account."); Ernest Weinrib, The Idea of Private Law 5 (1995) (arguing that private law can

rists did not conceptualize philosophical, historical, or sociological investigations as "outside" of, or "external" to, law. Although a version of the distinction has a long history in the philosophy of the human sciences (or what are today called the "social sciences"), its introduction into legal theory is relatively recent.[14] H.L.A. Hart famously invoked the distinction between two "points of view"—one "internal," the other "external"—in his 1961 jurisprudential classic, *The Concept of Law*.[15] But the

"be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes"); Balkin & Levinson, supra note 6, at 161 ("Each question suggests a basic divide between an 'internalist' and an 'externalist' approach to law and legal education."); John C.P. Goldberg & Benjamin C. Zipursky, Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties, 75 Fordham L. Rev. 1563, 1575 (2006) (arguing that Hart's distinction between the internal and external points of view "creates philosophical space for a non-Holmesian, duty-accepting account of tort law," and concluding that "[a]fter Hart, there are no grounds for supposing that Holmesian reductionism about duties is the only analytically respectable or hard-headed position to take on the issue of how to understand law generally and tort law in particular"); Goldsmith & Vermuele, supra note 6, at 164 (defending legal scholarship against a critique leveled by a pair of political scientists, and noting that their "incessant demand for empirical confirmation reveals incomprehension of the assumptions demanded by the internal perspective of any practice"); Stephen J. Morse, The Status of NeuroLaw: A Plea for Current Modesty and Future Cautious Optimism, 39 J. Psych. & L. 595, 603 (2011) [hereinafter Morse, NeuroLaw] ("We must begin with a distinction between internal relevance and external relevance. An internal contribution or critique accepts the general coherence and legitimacy of a set of legal doctrines, practices or institutions, and attempts to explain or alter them . . . . By contrast, an externally relevant critique suggests that the doctrines, practices, or institutions are incoherent, illegitimate, or unjustified."); Richard Posner, Legal Scholarship Today, 115 Harv. L. Rev. 1314, 1321 (2002) ("The contrast between the internal and the external perspective in legal scholarship . . . tracks the contrast I am now discussing between scholarship written for the bar (broadly defined) and scholarship written for the academy. The latter type tends to be external, that is, to use techniques, vocabulary, and insights from other fields."); Robert Post, Legal Scholarship and the Practice of Law, 63 U. Colo. L. Rev. 615, 617 (1992) ("The internal point of view is always framed by a concern for the achievement of the proper purposes of legal practice; the external point of view, in contrast, has no such frame."); Michael L. Rustad, Twenty-First-Century Tort Theories: The Internalist/Externalist Debate, 88 Ind. L.J. 419, 422–23 (2013) (introducing a symposium on tort law by explaining that the "basic theme of this symposium issue" is the persuasiveness of the "civil recourse paradigm" offered by Professors John Goldberg and Benjamin Zipursky, whose "internalist perspective challenges other twenty-first-century theories that embrace an external or instrumental view of tort law").

[14] See Terry Pinkard, German Philosophy 1760–1860: The Legacy of Idealism 133 (2002) (explaining that Johann Gottfried Herder believed that "one must understand both the agent's culture and the agent himself as an individual from the 'inside,' not from any kind of external, third-person point of view"). I thank Dan Priel for bringing this book to my attention.

[15] Hart, Concept, supra note 13, at 89–91. Actually, other legal theorists had introduced distinctions similar to those Hart used. See, e.g., Paul Vinogradoff, Common-Sense in Law 16 (1914) ("Human thought may take up one of two possible attitudes in regard to facts ob-

distinction did not really take hold as a way of interpreting theoretical claims about law until after Ronald Dworkin made use of a similar distinction in his 1986 opus, *Law's Empire*.

The distinction's recent popularity thus invites at least three sorts of questions. The first is historical or explanatory: Why has the distinction come to play such a leading role in legal theory? Why does it today seem so natural? The second is conceptual or analytic: Is there really just one internal/external distinction or are there several going under the same name? And if there are multiple distinctions, what are they and how do they relate to each other? The third set of questions is evaluative or normative: What functions does the distinction serve? And are those functions useful ones for legal theory, practice, or education?

The aim of this Article is to offer some answers to these questions. It argues, in brief, that the distinction has taken hold as a result of both intellectual and institutional changes in the legal academy in the last few decades of the twentieth century. These changes created a need for, and a method of, reconciling increasingly popular forms of interdisciplinary scholarship with more traditional legal scholarship. The internal/external distinction has largely met that need, which contributes to its popularity. But it has done so in part by trading on a crucial ambiguity—between a substantive distinction, on the one hand, and various methodological distinctions, on the other. That ambiguity first appeared in Hart's work and has clung to the distinction ever since. Thus, distinguishing among, and clarifying the meaning of, the different versions of the distinction is a worthwhile endeavor in itself.

Moreover, even when its meaning is clear, today the various methodological versions of the distinction do more harm than good. When used as a methodological criterion, the distinction rarely serves as a useful conceptual tool to clarify issues or open up avenues of inquiry. Instead, it operates mainly as a rhetorical weapon whose function is to insulate particular substantive views from arguments deemed to be

served by it: it may either watch their relations from the outside and try to connect them with each other as causes and effects, or else it may consider them in relation to man's conscious action, and estimate the connection between ends and means."); John Dickinson, Legal Rules: Their Function in the Process of Decision, 79 U. Pa. L. Rev. 833, 843–44 (1931) ("The view that law is a prophecy of what will be decided has the weakness of emphasizing exclusively the outside spectator's point of view—the point of view of the advocate or client who is interested in reading the future,—and consequently of ignoring the point of view of the judge through whose active agency the future is to be transmuted into fact."). But Hart was the primary influence on modern theorists who invoke the distinction.

threatening to it. Its tendency has thus been to cabin scholarly debate about the nature and purposes of law, rather than to widen it, and to dampen original thinking about such questions, rather than to stimulate or provoke it.

The burden of this Article is to support these broad claims. It will do so in four Parts. Part I will seek to identify and distinguish among the three main versions of the distinction as they first appeared in the jurisprudential writings of H.L.A. Hart and Ronald Dworkin. It will also describe the historical context in which Hart and Dworkin wrote in an effort to explain why the distinction may have appeared when it did. The primary aim of Part I, however, is to show the role that the "internal point of view" played in each theorist's philosophy of law and, more specifically, to show how the methodological versions of it enabled both thinkers to obscure or evade difficult questions. In other words, the point is to show that the trouble with the internal/external distinction began at its inception.

Parts II through V will then analyze and evaluate each of these three versions of the distinction in more detail. In each case, the particular version of the distinction that Hart and Dworkin drew has been applied in other contexts by scholars who have then modified it in subtle ways. For this reason, it is possible to see Hart's and Dworkin's particular distinctions as instances of more general dichotomies. I will give each of these more general versions a new name in order to distinguish them more clearly from each other. Part II will take up the Genuine versus Instrumental Rule Follower distinction, which is a *substantive* one about how legal actors use (or fail to use) rules in guiding their conduct. This is the least objectionable use of the distinction, though even here I will suggest that framing the distinction as one of "point of view" or "perspective" is misleading and results in confusion. Part III will then consider the first *methodological* version of the distinction. I call this the Participant Perspective versus Non-Participant Perspectives distinction, which distinguishes between a variety of different ways of understanding or explaining social (and hence legal) phenomena. I will argue that only a commitment to very controversial epistemological or metaphysical views could justify adopting either the Participant Perspective or any of the Non-Participant Perspectives to the exclusion of other methods and that, instead, the defense of any method of social inquiry should lie in the adequacy of the explanations it offers.

Finally, Part IV will consider what I call the Participant versus Scholar distinction, which distinguishes between scholarly efforts which engage in practical forms of argument in the posture of Participants "within" legal practice, on the one hand, and those which aim merely to understand or criticize legal practice from the "outside," on the other. This version of the distinction is the most popular these days, and there are a few different variations on it, depending on which legal actor is understood to be the paradigmatic "participant"—the legal advocate, the judge, or the teacher of law. In all its varieties, however, this version of the distinction enables scholars to raise the crucial questions about what "legal practice" values or demands, rather than provide answers to them.

In a short conclusion, I will propose that the methodological versions of the distinction be abandoned entirely. There I will also suggest that trial argument may offer a better model than appellate argument for conceptualizing the relationship among and between the various disciplines that make claims about how best to understand or advance legal practice.

Before commencing, however, I offer two quick caveats. First, many of the particular criticisms I make of different applications of the internal/external distinction, as will be clear, are not original with me. And that is part of my point. Those engaged in the various doctrinal or jurisprudential debates often see clearly the way in which drawing the distinction functions as a rhetorical sleight of hand, allowing those who invoke it to assume, rather than argue for, certain conclusions.[16] My goal is to show that these various individual criticisms can be seen as identifying particular symptoms of a more general and pervasive pathology.

Second, I should note that although many (though not all) of the criticisms I level in this Article are aimed at those who privilege the "internal" perspective on some debate, my own intellectual sympathies actually lie with them. That is, I am inclined to think that the law generally does and should constrain legal actors, that legal participants at least sometimes offer the best accounts of the practice in which they work, and that the rule-of-law values on which legal practice rests are legiti-

[16] See, e.g., Pierre Schlag, Normativity and Politics of Form, 139 U. Pa. L. Rev. 801, 920 (1991) (observing, in the context of criticizing Dworkin's *Law's Empire*, that "the rhetorical conventionality of the inside/outside distinction and its derivative, the internal/external perspective, have enabled controversial matters to be assumed into and out of existence without being questioned").

mate and important ones. But, as a law teacher from the last century once said in a different context, "I want my side to fight fair."[17]

I. HART, DWORKIN, AND THREE INTERNAL POINTS OF VIEW

Explaining why the different versions of the internal/external distinction took hold in legal scholarship when they did properly demands a full intellectual history of mid- to late-twentieth-century legal thought. What follows is not that. Its twin goals are far less ambitious. Its primary purpose is to distinguish clearly among the three main versions of the distinction and to explain what theoretical role they serve in the works that introduced them, H.L.A. Hart's *The Concept of Law* (1961) and Ronald Dworkin's *Law's Empire* (1986). In so doing, I try to show how the difficulties and ambiguities that plague the distinction today can be traced to its inception. The secondary purpose is to give some sense of the intellectual contexts in which the different versions of the distinction arose in order to suggest why they may have been introduced and taken hold when they did.

A. The Concept of Law *and Legal Obligation*

In 1961, an English lawyer and Oxford philosopher named H.L.A. Hart published a work that was intended as a textbook for English law students but which eventually became the most important work on the philosophy of law of the twentieth century.[18] In that work, one of Hart's chief ambitions was to develop a theory of law that was consistent with the core thesis of legal positivism—that "the existence of law [was] one thing, its merit or demerit another"[19]—but that cured the defects of earli-

[17] Jerald S. Auerbach, The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech, 42 New Eng. Q. 511, 525 (1969) ("My sympathies and all my associations are with the men who save, who manage, and produce. But I want my side to fight fair" (quoting Chafee, in discussing *Abrams v. United States*, 250 U.S. 616 (1919))); cf. John Henry Schlegel, A Certain Narcissism; a Slight Unseemliness, 63 U. Colo. L. Rev. 595, 607 (1992) (arguing for a more theoretical, critical, and nontraditional form of legal education but observing that such an education would be better "not because I think that law cannot withstand such 'external' criticism," and stating that "[i]ndeed, contrary to most of my intellectual friends, I think the law would likely survive such criticism").

[18] See Leslie Green, Preface *to* Hart, Concept, supra note 13, at xi (observing that Hart's book, which began as a series of introductory lectures, "quickly became the most influential book in legal philosophy ever written in English").

[19] John Austin, The Province of Jurisprudence Determined 132 (David Campbell & Philip Thomas eds., Dartmouth 1998) (1832).

er positivist theories, including both the "sanction theory" of John Austin and Jeremy Bentham and the realist or "predictivist" version of positivism associated with Oliver Wendell Holmes.[20]

For Hart, the fundamental defect of these theories was their inability to explain adequately the normative dimension of law—notions like obligation, duty, right, and authority.[21] Hart introduced the idea of an "internal point of view" in an effort to show how one could correct the defects of sanction theories without subscribing to the natural law view that the validity of law or the existence of legal duties depended on morality. As we will see, Hart seemed to use that concept in two ways. Before considering either, however, it will first be helpful to get a sense of the intellectual climate in which Hart was working.

1. Linguistic Philosophy

At the time Hart was writing *The Concept of Law*, so-called "ordinary language philosophy," or linguistic philosophy, dominated the philosophical scene, particularly at Oxford, where Hart taught. Linguistic philosophy was associated in particular with J.L. Austin, Gilbert Ryle, and Hart himself, all at Oxford, as well as Ludwig Wittgenstein, at Cambridge.[22] The following brief description of its core ideas is hopelessly simplistic, but it is nevertheless sufficient, I think, to give a rough sense of where Hart was coming from, philosophically.[23]

To understand the aims and methods of the linguistic philosophers, one must understand that they were in many ways reacting to the school of philosophical thought known as logical positivism. The logical positivists sought to be rigorously empirical and were deeply distrustful of

[20] Id. at 131; Oliver Wendell Holmes, The Path of the Law, 1 Bos. L. Sch. Mag. 1, 1 (1897).

[21] Hart, Concept, supra note 13, at 80 (observing that the "root cause of [the] failure" of the sanction theory was its failure to include the notion of a rule). As we will see, for Hart, rules provided the key to explaining the normative dimension of law.

[22] See Green, supra note 18, at xlvii ("Hart was influenced by, and saw himself as an advocate of, the 'linguistic turn' in philosophy. His particular path was influenced by the ordinary language philosophy developed at Oxford by his colleagues J. L. Austin and Gilbert Ryle."); Frederick Schauer, "Hart's Anti-Essentialism," *in* Reading H.L.A. Hart's *The Concept of Law* 237, 243 (A. Dolcetti et al. eds., 2013) (observing that when he was writing *The Concept of Law*, Hart "was very much in the middle of Oxford philosophical discussions in which JL Austin was a major figure and in which his and Wittgenstein's ideas were the normal fare").

[23] For a more extensive discussion of Hart's intellectual and personal influences, see Nicola Lacey, A Life of H. L. A. Hart: The Nightmare and the Noble Dream (2004).

"metaphysical" concepts, which for them included all concepts that purported to refer to unobservable entities.[24] According to the "verificationist" theory of meaning, associated with logical positivism, if a sentence was not either tautologically true or susceptible to observational verification, it had no substantive meaning.[25] This view cast aside as literally meaningless whole areas of traditional philosophy, including moral philosophy and metaphysics. And in the social sciences, the influence of logical positivism led to a strict behaviorism that sought to explain human behavior without making any recourse at all to mental or psychological states (which, after all, one cannot see).[26]

Linguistic philosophers made a number of criticisms of logical positivism, but the most important for our purposes was their effort to rehabilitate traditional areas of philosophical inquiry by turning to language.[27] For them, the meaning of words derived from how people *used* them, not from their capacity to satisfy some epistemological criterion. How people used words and language in different contexts, they argued, typically followed certain patterns or rules, so the philosopher's job was to identify those patterns and rules through careful analysis of language.[28] In the words of J.L. Austin, which Hart quotes twice in *The Concept of Law*, the aim of philosophy was to use "a sharpened awareness of words to sharpen our perception of the phenomena."[29] Thus, just as the linguistic philosophers sought to rescue traditional forms of philosophical inquiry from the skepticism about their value implicit in logical

[24] Dan Priel, Jurisprudence Between Science and the Humanities, 4 Wash. U. Juris. Rev. 269, 277 (2012) [hereinafter Priel, Jurisprudence] ("It is impossible to describe the ideas of the logical positivists in a sentence, but it is fair to say that what motivated their work was a rejection of what they perceived to be the erroneous concern of philosophers with metaphysics.").

[25] See Alfred Jules Ayer, Language, Truth and Logic 38–39 (1946) ("[I]t is the mark of a genuine factual proposition . . . that some experiential propositions can be deduced from it in conjunction with certain other premises without being deducible from those other premises alone.").

[26] See Roger Smith, The Norton History of the Human Sciences 802–03 (1997).

[27] Cf. Priel, Jurisprudence, supra note 24, at 303 (suggesting that "ordinary language philosophy is better understood as an attempt to offer a humanistic alternative to the scientism of the logical positivists").

[28] For a classic example of this kind of analysis, see generally Gilbert Ryle, The Concept of Mind (1949) (offering such an analysis for the concept of mind).

[29] Hart, Concept, supra note 13, at vi, 14.

positivism, so too did Hart seek to rescue jurisprudence from the behaviorist tendencies of the American and Scandinavian realists.[30]

But there was always a certain ambiguity about linguistic philosophy that seemed to conceal a lurking skepticism. The ambiguity lay in exactly what such linguistic analysis purported to reveal. Did studying the use of moral terms, for instance, yield insights into morality itself or just into people's beliefs about morality? The lurking skepticism, particularly associated with Wittgenstein's version of linguistic philosophy, was the thought that once the philosopher discerned how terms were used within some social or intellectual activity—whether morality, science, religion, astrology, or law—there were no further questions to ask about that activity. In particular, there was no further question as to whether the terms in those practices referred to anything *real* in the world.[31]

Whether or not Hart meant to endorse such a skeptical view,[32] the ambiguity about what exactly linguistic analysis reveals pervades *The Concept of Law* and is found in a highly concentrated form in his use of the concept of an "internal point of view."[33] Hart used that term in two related but distinct ways, so let us take a look at each.

2. The Internal Point of View as the Attitude of the Genuine Rule Follower

Hart identified various defects of sanction theories of law (which understood law as simply the commands of a political sovereign, backed by force), but at the root of most of them was a failure to adequately explain how various normative concepts, like right, duty, and authority, could play the role they seem to play in the creation and application of

[30] See John Ferejohn, Positive Theory and the Internal Point of View, 10 U. Pa. J. Const. L. 273, 276–77 (2008) ("Hart's target in this critique of austere externalism seems to have been the behaviorists who eschewed recourse to internal mental states as causally relevant to action.").

[31] See Michael S. Moore, Causation and the Excuses, 73 Calif. L. Rev. 1091, 1125 (1985) [hereinafter Moore, Causation] (observing that for linguistic philosophers like Ryle, "[o]ne discovers the 'logic' of each expression by doing 'conceptual analysis,' without for a moment being concerned to inquire into the reference of the expressions").

[32] Below I take up this question, where I suggest that we ought not interpret Hart as endorsing the more skeptical version of this view. See infra note 142 and accompanying text.

[33] Indeed, this ambiguity accounts for Ronald Dworkin's characterization of Hart's theory as a "semantic theory," see Dworkin, supra note 6, at 34, though whether or not that is a fair characterization remains a subject of interpretive debate, see, e.g., Green, supra note 18, at xlvii–xlviii (arguing that, much of Hart's rhetoric in the work to the contrary, Hart's analysis was not primarily a semantic or linguistic one).

law.[34] People often understand law to impose genuine obligations or to give people a *reason* to act in a certain way, but it was unclear why, under the sanction theories, they would do so.[35] One obvious way of curing the defect of sanction theory would be to insist that law consists of not simply the commands of a sovereign, but the commands of a *legitimate* sovereign. But Hart did not want to go down that road, for that would have marked an abandonment of legal positivism's core thesis that the law's existence was entirely a matter of fact, not of morality.

Instead, Hart argued that the source of the normativity that law possesses (but which sanction theory could not explain) lies in the idea of a fundamental rule or set of rules, which he famously called the "rule of recognition."[36] These rules specify how valid law could be promulgated, and, once they are accepted by the officials who apply the law as the proper criteria for legal validity, one has the makings of a legal system.[37] So, for instance, if officials accept a rule of succession that says that a king's son takes the throne when his father dies, then that explains why a prince has the *authority* to rule upon his father's death.[38]

But this notion of "acceptance" is still a bit ambiguous on the crucial issue that divides natural law theorists from positivists. For one might still think that Hart's requirement that the fundamental rule or set of rules be accepted suggests some important connection between law and morality.[39] Maybe, for instance, rules properly count as "law" only if the

[34] Hart, Concept, supra note 13, at 82.

[35] Of course, Thomas Hobbes had offered a theory of political obligation, based in the idea of a social contract, which purported to trigger a citizen's obligation to obey the directives of even an authoritarian coercive regime. See Thomas Hobbes, Leviathan (Michael Oakeshott ed., 1970) (1651). But Austin offered no such political theory to accompany his conceptual analysis of law. See Austin, supra note 19, at 146 ("With the ends or final causes for which governments ought to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern.").

[36] Hart, Concept, supra note 13, at 100–10. Technically, what is accepted is the "ultimate" rule of recognition, see id. at 107, though Hart often dropped the "ultimate" when discussing the rule of recognition, as have subsequent theorists. Hart also sometimes used the term in its singular form, id. at 100, and sometimes as a plural, id. at 95.

[37] Id. at 116.

[38] Id. at 114.

[39] In particular, one of Hart's interlocutors, Lon Fuller, took this view. Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 639 (1957) (quoting H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 603 (1958)) (noting that he had been encouraged by Hart's emphasis, in an article that preceded *The Concept of Law*, on the "fundamental accepted rules specifying the essential lawmaking procedures" and that he had hoped Hart would go on "to confess there is something that can be called a 'merger' of law and morality").

rule of recognition is accepted as democratically legitimate by the people living under it. The question, then, is whether the existence of the rule of recognition depends on a normative judgment as to whether such acceptance is justified or if instead it simply depends on sociological facts about the attitudes and practices that members of a particular society happen to have.

Hart's answer was, in a sense, "both." And it was the distinction he introduced between two "points of view" that enabled him to give this seemingly paradoxical answer. Hart used it to distinguish between what he called "social rules" and mere "habits." Both social rules and habits involved forms of convergent social behavior, and so were indistinguishable from an "external" perspective. But social rules had an "internal aspect," which habits (or mere patterns of behavior) lacked. In particular, social rules (but not habits) were regarded as a "general standard to be followed by the group as a whole."[40] Hart observed that people who regard a rule in that way—who adopt an "internal point of view" of it—tend to employ a normative vocabulary with respect to it, using words like "should," "must," and "ought."[41]

Hart's analysis of social rules both revealed clearly the defect in sanction theories and showed how normativity could arise from purely social facts. The rule of recognition was a *social rule*, which established the authoritative criteria of legal validity. Since sanction theories restricted themselves to observable conduct—habits of obedience, in Austin's case; predictions of what courts do, in Holmes's—they were blind to its internal aspect.[42] But once one sees that officials take an internal point of view of the rule of recognition, one can see that for those to whom it applies (that is, officials), the rule imposes genuine obligations or duties. And this is true even though, from an "external" perspective, the fact that a particular rule has been accepted as establishing the criteria of legal validity (and so exists as a rule of recognition) is purely a matter of fact.[43]

[40] Hart, Concept, supra note 13, at 56; id. at 10 (distinguishing between people going to cinema each week (habit) and men taking off their hats in church (rule)).

[41] Id.

[42] Austin, supra note 19, at 147; Holmes, supra note 20, at 4 (explaining that the "bad man" does not "care two straws for the axioms or deductions," but that "he does want to know what the Massachusetts or English courts are likely to do in fact").

[43] Hart, Concept, supra note 13, at 110 ("[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.").

We now can state the first of the three main versions of the "internal point of view," ("IPOV") which is Hart's *substantive* understanding of that term:

> *IPOV(1): The internal point of view as the attitude of the Genuine Rule Follower*[44]: The internal point of view describes the attitude of someone who accepts a given rule as a guide for his or her conduct (whereas the external point of view describes the attitude of those who conform to rules only out of fear of negative consequences that result from its violation).[45]

Crucially, this version of the distinction need only apply to legal *officials*—not citizens, and not legal theorists—for it to play the role Hart intends for it in his theory. That is why I have dubbed it the "substantive" version of the internal point of view. Hart used it to make a substantive, conceptual point about the nature of legal obligation and, therefore, the existence conditions of a legal system: Only if a sufficient number of officials adopt the internal point of view of the rule of recognition (or, as he also put it, only if they "regard it as a common, public standard") may the rule of recognition (and therefore a legal system) be said to exist. They cannot all be Holmesian Bad Men, who follow it only out of fear of the consequences of violation.[46] The point here has nothing to do with the question of whether people actually do or should take

[44] The terms "deontic" or "deontological" are often used loosely to describe a non-instrumental form of reasoning, but that term is also used to refer to the normative structure of non-consequentialist moral theories, see, e.g., John Rawls, A Theory of Justice 30 (1971), or to the philosophical issues related to rights, duties, and obligations generally, see, e.g., William P. Alston, The Deontological Conception of Epistemic Justification, 2 Epist. 257, 258–59 (1988). So to avoid confusion and the unnecessary use of philosophical jargon, I use the simpler "genuine."

[45] In the case of a social rule, this negative consequence might simply take the form of "manifestations of disapproval" by others, thereby eliciting feelings of shame or remorse, Hart, Concept, supra note 13, at 86, whereas when it comes to legal rules, the negative reaction imagined is typically formal sanctions.

[46] Id. at 116 (requiring, as one of the two "minimum conditions necessary and sufficient for the existence of a legal system" that "its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials"). It is crucial to see that this is a conceptual claim, not an empirical one about the sociological conditions necessary for legal systems to thrive or survive. Unless officials regard the rules in that "internal" way, they cease to exist as social rules. See id. at 116 ("This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system.").

the internal point of view of any particular society's rule of recognition. The distinction is entirely conceptual.

3. The Internal Point of View as the Participant's Perspective

The way in which Hart used the internal point of view to explain the notion of legal obligation and other normative legal concepts is at least one reason why he is considered to have so transformed and reinvigorated not only legal positivism, but the philosophy of law in general.[47] But Hart did not so much solve the problem that he set out to solve as he did relocate it. Recall that his goal was to explain how a legal system could generate genuine normative demands like rights and duties (in a way sanction theories had failed to) without endorsing something like a natural law thesis according to which the existence of a legal system depends in part on its rules satisfying some moral criteria. His solution was to suggest that whether or when law does generate normativity itself depends, in a sense, on which "point of view" one adopts.

Consider, for instance, what Hart says about those who live in and among various rules but nevertheless take the external point of view of them and so do not treat them as genuine standards of behavior. Such people, Hart explains, may say things like "'I was obliged to do it'" or "'I am likely to suffer for it,'" for these are factual statements about the consequences of their actions or inactions. But Hart insists that "they will not need forms of expression like 'I had an obligation' or 'You have an obligation,' for these [normative sorts of statements] are required only by those who see their own and other persons' conduct from the internal point of view."[48]

[47] Benjamin Zipursky, The Internal Point of View in Law and Ethics: Introduction, 75 Fordham L. Rev. 1143, 1144–45 (2006) ("Hart's description of 'the internal point of view' in *The Concept of Law* is part of what made him the most illustrious English legal philosopher of the twentieth century, and what made *The Concept of Law* the most important single work in twentieth-century jurisprudence . . . . Hart's breakthrough with the internal point of view was in showing a way to retain the law/morality distinction of Holmes while not entirely jettisoning normativity."); see also Lacey, supra note 23, at 228 (observing that Hart's notebooks reveal the degree to which Hart "struggled with the concept of legal obligation" and that Hart thought that legal obligation "would be the linchpin of his delicate middle way between Realism or crude positivism and natural law: the idea of law as generating genuine obligations rather than merely forcing compliance, those obligations however falling short of moral obligations").

[48] Hart, Concept, supra note 13, at 90. This understanding seems in tension with Hart's claim that, once there is a rule of recognition establishing the criteria of legal validity in place, there can be legally valid "primary" rules (and, therefore, legal obligations) irrespec-

Since only those who take the internal point of view about some rule or set of rules make statements about rights and obligations those rules might entail, and since not everyone in a given society (and not even all officials) takes the internal point of view of legal rules, Hart's original problem of normativity now reemerges as a methodological dilemma: If an observer or analyst says of certain individuals living under a system of rules that they have "legal" obligations, does that statement amount to a *normative* statement that those rules actually give them reasons to act pursuant to them? Or is it only a *descriptive*, sociological statement that those individuals behave or talk in a way that suggests that they believe themselves to be under such obligations?[49] In other words, must the observer himself or herself adopt the internal point of view in order to make a judgment about the existence of law?

To this last question, Hart's answer was "no." As he famously (or notoriously) stated in his preface, his project was one of "descriptive soci-

tive of what attitude citizens adopt towards those rules. See, e.g., id. at 117 ("In an extreme case the internal point of view with its characteristic normative use of language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house."). This is another instance of the ambiguity discussed in the text.

[49] This ambiguity is nicely crystalized in Hart's assertion that

> the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference.

Id. at 83. Hart never explains what that "very different" class of statements is to which an assertion that someone has an obligation apparently belongs. Nor is it at all obvious. As some anecdotal evidence of its unclarity, I occasionally ask legal philosophers in conversation what type of statement they think Hart had in mind. The answers I have received vary considerably. They include "normative," "logical," "dispositional," and "sociological." Adding to the confusion is the fact that it seems as if Hart is saying that having an obligation describes a different state of affairs than merely being obliged. But if one continues reading on, it becomes clear that that is not what he is saying. Instead, he is saying that *asserting* that someone has an obligation is different from *asserting* that someone is obliged. Id. In other words, he again avoids making actual claims about legal obligation, instead resting on linguistic claims about the nature of statements about legal obligation. This is what I mean when I say in the text that Hart converts the substantive question about obligation into a methodological one. For the frustrated reader wants to ask, "What do you, Herbert Lionel Adolphus Hart, mean when you say that someone has an obligation?" It is also passages like this that support Dworkin's interpretation of Hart's theory as a semantic one. See Dworkin, supra note 6, at 34–35.

ology," a point he reiterated in his postscript.[50] The methodological approach it requires of the theorist, he later clarified, was not an *adoption* of the internal point of view. Rather, the approach requires looking at rules from the perspective of the member of a group or society under examination, which will often mean *recognizing* the way in which rules serve as standards of conduct but which does not require the theorist to actually endorse such rules.[51] Hart later called this approach a "hermeneutic" one, but because of its particular concern with emphasizing the internal point of view of legal actors, some scholars have referred to it as the "internal point of view."[52] Thus, we now have our second version of the internal point of view:

> *IPOV(2): The internal point of view as the perspective of a Participant*: The internal (or hermeneutic) point of view is that of the theorist or observer who "portray[s] rule-governed behavior as it appears to the participants who see it as conforming or failing to conform to certain shared standards"[53] (whereas the external point of view is that of the observer who limits himself to describing phenomena in terms of "observable regularities of conduct, predictions, probabilities, and signs"[54]).

The crucial point here is that this version of the internal point of view involves a *methodological* distinction between two different ways an analyst or observer of legal phenomena (or any social phenomena) studies

[50] Hart, Concept, supra note 13, at vi; id. at 240 ("My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law . . . .").

[51] See Neil MacCormick, H.L.A. Hart 38–39 (1981) (suggesting that Hart's distinction omits a third, "hermeneutic" point of view, which is that of an observer who does not accept the rules under study himself but does recognize that the participants of the practice do so); Joseph Raz, The Authority of Law 155 (1979) (arguing that Hart's dichotomy excludes the possibility of a third point of view of someone who understands, but does not accept herself, a system of rules). Hart seemed to recognize this possibility in *The Concept of Law* itself when he described the view of someone who may "without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which they are concerned with them from the internal point of view." Hart, Concept, supra note 13, at 89.

[52] See, e.g, Stephen R. Perry, Interpretation and Methodology in Legal Theory, *in* Law and Interpretation 97, 99 (Andrei Marmor ed., 1995); Tamanaha, Internal/External, supra note 13, at 188–89.

[53] H.L.A. Hart, Essays in Jurisprudence 13 (1983).

[54] Hart, Concept, supra note 13, at 89.

and characterizes the behavior under examination.[55] This distinction is easy to conflate with the substantive version because Hart sometimes seems to assume that the Bad Man, who cares about rules only for instrumental or prudential reasons (substantive external point of view), adopts a perspective of those rules that looks only for behavioral regularities, without trying to understand why some people take them as guides for action (methodological external point of view).[56] But the two are analytically distinct: The first describes a particular *attitude* towards the rules that members of a social group may have; the latter is the *method* one might employ to analyze or predict the rule-conforming conduct of the members of that group.[57] Indeed, Hart himself purports to be adopting the methodological sense of an internal point of view (that is, seeing the rules as more than regularities) without adopting the substantive version (that is, without "accepting the rules").

The important point is that this methodological version of the distinction is incapable of performing *either* the sociological or normative tasks Hart demanded of it. As an empirical matter, it assumes what it purports to investigate.[58] At a few places Hart suggests that he thinks most people adopt the internal point of view of legal rules, and he implicitly assumes that a sufficient number of officials in the United States and England—both of which he treats as paradigmatic legal systems—do so.[59] But he never offers any actual sociological or psychological evidence to support that claim.[60] This is so even though at other points Hart acknowledges

[55] Tamanaha, Internal/External, supra note 13, at 189 ("Note that I have said nothing about the alternative possibilities of being committed, detached, or critical of the judge's understanding. These alternatives have nothing to do with the methodological aspects of the internal/external distinction. Rather they are *evaluative* questions which arise after the internal view has been *described*.").

[56] Hart, Concept supra note 13, at 90.

[57] See Scott J. Shapiro, What is the Internal Point of View?, 75 Fordham L. Rev. 1157, 1158–61 (2006).

[58] See Tamanaha, Internal/External, supra note 13, at 190 ("By defining the internal perspective in terms of acceptance, Hart in effect stipulated the answer to what can only be determined through case-by-case inquiry.").

[59] See, e.g., Hart, Concept, supra note 13, at 90 (explaining that the external point of view "cannot reproduce . . . the way in which the rules function as rules in the lives of those who normally are the majority of society").

[60] For criticisms of Hart along these lines, see Frederick Schauer, The Force of Law 47 (2015) [hereinafter Schauer, Force] ("Hart offered the puzzled man [a Genuine Rule Follower in our terms] as an empirical claim, but he provided no empirical support for that claim beyond bald assertion."); Brian Leiter, Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence, 48 Am. J. Juris. 17, 51 (2003) (suggesting that Hart's method of

that many people living under a legal system adopt the external point of view of the rules and so do not take them as guides.[61]

Nor does this approach allow him to explain the normativity of law in the way he set out to explain it.[62] Insofar as his project really is one of "descriptive sociology," it offers no *justification* for treating legal obligations as relevant to a person's practical decisionmaking. The source of obligations, in Hart's view, derives entirely from the attitudes of other members of a group, which have no obvious moral significance.[63] For some, this is not a failing because it was not, nor should it have been, Hart's task to explain the normativity of law.[64] But there is much in *The*

conceptual analysis "can deliver no more than ethnographically relative results"). For a recent effort to test Hart's claim empirically, see David R. Howarth & Shona Wilson Stark, The Reality of the British Constitution: H.L.A. Hart and What "Officials" Really Think (U. of Cambridge Faculty of Law Legal Studies, Working Paper No. 53, 2014), available at http://ssrn.com/abstract=2466001.

[61] See, e.g., Hart, Concept, supra note 13, at 90–91 ("At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules . . . and those who, on the other hand, reject the rules and attend to them only for the external point of view as a sign of possible punishment."). This is why Professor Scott J. Shapiro argues that Hart could not have intended the "internal point of view" to refer to the methodological stance of looking at something from the participant's point of view. Hart recognized that Holmesian Bad Men are participants as well. Shapiro, supra note 57, at 1158–59.

[62] For criticism of Hart's failure to develop an adequate normative argument, see Scott Hershovitz, The End of Jurisprudence, 124 Yale L.J. 1160, 1168 (2015) ("Hart's picture is elegant. But it has drawn lots of critics, and even some positivists worry about it. They worry because it seems to run afoul of David Hume's famous injunction that you cannot derive an ought from an is.").

[63] See Stephen Perry, Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View, 75 Fordham L. Rev. 1171, 1173 (2006) ("Since the internal point of view is nothing more than an attitude that a standard is binding, Hart is not offering an account of the normativity of law that looks to its (potential) reason-givingness."). Other philosophers, however, have taken up the challenge of showing why other people's beliefs and attitudes might give one reasons for action, typically by showing the normative value of conventions. See, e.g., Gerald J. Postema, Coordination and Convention at the Foundations of Law, 11 J. Legal Stud. 165, 166 (1982) ("It is my contention that this notion of convention, when properly understood, successfully bridges the gap between social fact and genuine obligation . . . because a convention is both a social fact *and* a framework of reasons for action.").

[64] Leiter, supra note 60, at 38 ("Hart has nothing to say about the normativity of law in the main text of *The Concept of Law*, beyond a refutation of the Austinian account."); Shapiro, supra note 57, at 1166 ("Hart did not intend for the internal point of view to provide an explanation for the reason-giving nature of social rules and law."). But see Veronica Rodriguez-Blanco, Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View, 20 Can. J.L. & Juris. 453, 460 (2007) (interpreting Hart as seeking to explain how "rules give reasons for actions").

Concept of Law that suggests that he was indeed trying to show the way in which law could generate genuine obligations.[65] It may be no surprise, then, that Hart himself apparently remained unconvinced that he had solved the dilemma he had set out to solve.[66]

We will see in Part III that other theorists have followed Hart's lead in using this methodological version of the internal point of view as a means of bootstrapping to empirical or normative conclusions without engaging in the substantive argument necessary to support them. First, though, let us look at an effort to take up the challenge of developing an account of law in a more explicitly justificatory vein.

B. Law's Empire *and "Constructive Interpretation"*

Just as Hart had sought simultaneously to offer a substantive philosophy of law that cured the defects of sanction theory and to defend his more linguistically sensitive form of philosophical analysis, so too did Ronald Dworkin have both substantive and methodological aims in

[65] To my mind, the most persuasive evidence that Hart sought to show the reason-giving power of law includes: (1) his characterization of the rules of recognition, change, and adjudication as "remedies" for the "defects" that plague a regime consisting exclusively of primary rules, Hart, Concept, supra note 13, at 91–99; (2) his claim that adopting a "narrow" conception of law that applies the concept only to rules that satisfy some moral standard "may grossly oversimplify the variety of moral issues to which [immoral laws] give rise," so that people might "regard it as a matter of indifference whether or not he thinks that he is faced with a valid rule of 'law' so long as he sees its moral iniquity and does what morality requires," id. at 210–11; (3) his suggestion, in the context of a discussion of the so-called Case of the Grudge Informer, in which people living under the Third Reich informed on others for selfish purposes, that "morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbad," id. at 211; and finally, (4) his suggestion that "the certification of something as legally valid is not *conclusive* of the question of obedience," id. at 210 (emphasis added). Each of these passages or claims suggests that Hart was trying to show that (and how) the existence of a legal obligation was relevant to one's practical decisionmaking (that is, how it could be "normative"). Further circumstantial evidence lies in the fact that, in responding to an earlier article in which Hart's theory was less well-formed but in which his initial ambitions were arguably more transparent, Fuller welcomed what he perceived to be Hart's recognition of the importance of taking on such normative questions, which he described as those concerning the "fidelity to law": "Now, with Professor Hart's paper, the discussion takes a new and promising turn. It is now explicitly acknowledged on both sides that one of the chief issues is how we can best define and serve the ideal of fidelity to law." Fuller, supra note 39, at 632.

[66] Lacey, supra note 23, at 228 ("Herbert was never convinced that he had satisfactorily resolved this dilemma about the restricted, but genuinely normative, notion of obligation in law: he returned frequently to the issue, trying to capture the precise sense in which law, its existence in his view a matter of social fact, generates genuine obligations to conform to its duty-imposing rules.").

Law's Empire. He sought to offer an alternative to Hart's positivist understanding of law while at the same time defending the validity of an explicitly normative philosophical reconstruction of legal practice. It was in making this methodological argument that Dworkin invoked the notion of an internal point of view, in a manner similar to, but crucially different from, either of the two ways Hart had drawn it. Again, though, before looking carefully at what work that conceptual device does for Dworkin, it helps to take a look at the intellectual context in which he wrote, which was in some ways quite different from that in which Hart wrote.

1. Critical Legal Studies and the Explosion of "Law Ands"

During the postwar period, from the 1940s to the early 1960s, American society generally, and the legal academy specifically, enjoyed a high degree of relative political consensus.[67] During this time, legal scholarship was dominated by what has been called the "legal process" school of legal thought (in part because of its association with the Hart and Sacks teaching materials known as "The Legal Process," which were used at Harvard Law School for over three decades).[68] Exactly what process theory is and how it responded to realism remain issues of scholarly debate.[69] But the conventional view is that process theory was an effort to "tame" or "domesticate" the legal realism of the 1930s by acknowledging that judges had a certain amount of discretion in deciding hard cases, while at the same time reaffirming the value and existence of the rule of law by reinterpreting it as a commitment to procedural regularity in public decisionmaking.[70]

But that period of consensus soon eroded, due in part to the Civil Rights movement and, later, the Vietnam War. And with it went the dominance of legal process theory in American legal thought. Beginning

[67] Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962–1987, 100 Harv. L. Rev. 761, 765 (1987) [hereinafter Posner, Decline].

[68] Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems, *in* The Making and Application of Law II, II (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The course was taught at Harvard from 1957 to 1979 except for the 1976–77 school year. William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to *The Legal Process*, *in* The Making and Application of Law, supra, at li, xcix n.212. An estimated eighteen other schools had adopted the materials for classroom use by 1963. Id. at ciii.

[69] For my own contribution to this debate, see Charles L. Barzun, The Forgotten Foundations of Hart and Sacks, 99 Va. L. Rev. 1 (2013) [hereinafter Barzun, Foundations].

[70] Eskridge & Frickey, supra note 68, at liii; see Barzun, Foundations, supra note 69, at 9–11.

in the 1970s, legal theorists began questioning the fundamental assumptions on which process theory seemed to rest, including the idea that courts could decide cases according to "neutral principles."[71] Instead, theorists began emphasizing the inherently political dimension of all judicial decisionmaking. They did so, however, in different ways. Whereas some looked to history to show how powerful segments of society had shaped legal doctrine to serve its own interests,[72] for instance, others offered interpretations of legal doctrine in order to show that it was indeterminate or contained internal contradictions.[73]

In some ways, such skeptical arguments, which became associated with the movement known as Critical Legal Studies ("CLS"), harkened back to criticisms that the legal realists of the 1930s had made of legal formalism. But there were (at least) two crucial differences, one intellectual, the other institutional, between CLS and realism. First, whereas the realists were part of an intellectual movement (which included logical positivism, discussed above) that had aspired to be as scientifically rigorous as possible and to exclude "value judgments" from social analysis,[74] CLS grew out of intellectual developments that denied the possibility of clearly separating questions of value from fact and so challenged the validity of science itself.[75] Theorists in philosophy, liter-

[71] That term comes from Herbert Wechsler's famous article, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). But what Wechsler meant by that term remains a subject of debate, and scholars have denied that he or other process theorists believed that judges could decide cases without reference to values. See Richard H. Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 Vand. L. Rev. 953, 973 n.85 (1994) (denying that process theorists like Hart or Wechsler considered complete value-neutrality "to be either necessary or possible"); Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 991 (1978) (arguing that Wechsler "recognize[d] that judges must often make difficult choices among values and he [did] not suggest that the judge can somehow be neutral among those values"). I strongly concur with this latter assessment, at least as applied to Henry Hart. See Barzun, Foundations, supra note 69, at 33–36.

[72] See, e.g., Morton J. Horwitz, The Transformation of American Law, 1780–1860 (1977); Robert W. Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981).

[73] See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

[74] Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 57–58 (2007) (observing that "[t]he 1920s and 1930s marked the heyday of 'positivism,' in philosophy and the social sciences: natural science was viewed as the paradigm of all genuine knowledge and any discipline—from philosophy to sociology—which wanted to attain epistemic respectability had to emulate its methods," and interpreting the realists as part of that intellectual movement).

[75] G. Edward White, From Realism to Critical Legal Studies: A Truncated Intellectual History, 40 Sw. L.J. 819, 834 (1986) ("The first suggestion [of CLS theorists] was that empirical

ary theory, anthropology, and other disciplines during this time were arguing that all knowledge claims were "theory laden" and thus only had truth-value relative to the linguistic context, the social practice, or the "interpretive community" in which it was offered.[76] Often this emphasis on the context-dependent nature of all knowledge, even scientific knowledge, and on the inseparability of facts from values, was motivated by, or at least associated with, leftist politics, but that was certainly not always the case.[77]

Second, whereas the realists were all mainly educated as lawyers, many of the new breed of scholars had advanced degrees from other disciplines, such as history or sociology. This meant that some of them self-identified as not only academics, rather than lawyers, but also as sociologists, historians, or literary theorists, rather than law professors. And even some who were mainly educated as lawyers nevertheless emphasized that they leveled criticisms from the perspective of an "outsider" to the legal system.[78]

Nor was this trend limited to CLS scholars. During this same period, the legal academy attracted scholars from a whole host of different disciplines, each of which brought to bear on law and the legal system their own concepts, methods, and assumptions about human behavior. Thus, in 1986, a noted intellectual historian described the state of the legal academy in this way:

research legitimated the status quo by implying that the 'facts' of the research were somehow inevitably 'there' as part of the permanent 'reality' of American culture. The second, related, suggestion was that a scholar could not separate ideology from methodology in empirical, or any, research: to be politically reformist and methodologically neutral was a contradiction in terms.").

[76] Some of the more influential works include Stanley Fish, Is There a Text in This Class?: The Authority of Interpretive Communities (1980); Clifford Geertz, The Interpretation of Cultures (1973); Thomas S. Kuhn, The Structure of Scientific Revolutions (1970); W.V. Quine, Ontological Relativity and Other Essays (1969); Peter Winch, The Idea of a Social Science and Its Relation to Philosophy (1958); Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans., 1953).

[77] See, e.g., Alasdair MacIntyre, After Virtue (1980); White, supra note 75, at 842 ("But one need not believe in political revolution to endorse the perhaps revolutionary intellectual contribution [of Critical Legal Studies].").

[78] See, e.g., David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 587 (1984) (observing that "while doctrinalists try to define what the law is and should be, empiricists look at the operations of the law from the outside, asking what causes the law to develop as it does and what impact the law has").

> We now find on the map, reading from right to left, the Law and Economics movement; reconstructed substantive rights theory, with its emphasis on "principles" and, depending on one's political point of view, libertarian or contractarian "rights"; so-called mainstream scholarship, a blend of an older analytical tradition, emphasizing doctrinal exegesis and the assumptions of unreconstructed Law, Science, and Policy or Process Jurisprudence; the unreconstructed Law and Society movement, whose practitioners, with a handful of exceptions, now distinguish themselves from Critical Legal Studies as well as from mainstream scholarship; and Critical Legal Studies.[79]

2. Dworkin and the Theorist-as-Judge

It was in this somewhat fractured intellectual environment within the legal academy that Ronald Dworkin launched his ambitious effort to offer what he called a "full political theory" of law—one which includes claims not only about how judges should decide which legal propositions are true, but also about why, or under what conditions, the law morally compels obedience on the part of citizens. In so doing, Dworkin aimed not only to offer an alternative to Hart's positivism (and to legal realism), but also to place on firmer philosophical footing the quite traditional forms of legal reasoning and argumentation once associated with legal process theory.[80] It was in service of that latter ambition that Dworkin invoked the internal point of view.

He does so early on in his book, in response to an objection he anticipates. Dworkin suspects that historians or social scientists might object that his approach, which takes seriously the reasons that courts offer for their decisions, is misguided because it ignores the way in which law has shaped or been shaped by social, political, or economic forces.[81] According to this objection, Dworkin's philosophical interpretation of legal practice might be seen as equivalent to that of an anthropologist who

[79] White, supra note 75, at 839.

[80] On the connections between Dworkin and process theory, see Barzun, Foundations, supra note 69, at 29 ("In their call for judges to look to the 'policies' and 'principles' of the law in this way, Hart and Sacks seemed to foreshadow the work of Ronald Dworkin, the most well-known modern anti-positivist philosopher of law."); Vincent A. Wellman, Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks, 29 Ariz. L. Rev. 413, 470 (1987). I interpret Dworkin in this way even though he never acknowledged Hart, Sacks, or Fuller as an influence.

[81] Dworkin, supra note 6, at 12–13.

gets "sucked into the theological disputes of some ancient and primitive culture."[82]

Dworkin responds to this objection in the following way. He insists that legal practice has a particular feature that distinguishes it from other social phenomena: It is "argumentative."[83] That is, law is a social practice whose participants debate the truth of certain propositions (namely, legal ones). They do so because they understand that what the practice "permits or requires" depends on the truth of those propositions.[84]

Dworkin then explains that one can study this argumentative feature of legal practice in either of two ways. First, one can adopt the "external point of view of the sociologist or historian," who asks why certain forms of argument develop in particular times or places.[85] Second, one can examine it from the "internal point of view," that is, the point of view of those people who actually engage in such argumentation.[86] For Dworkin, this is the point of view of a *judge*.[87] Although he recognizes that both the internal and external perspectives are "essential," he says that he adopts the internal one for the purposes of developing his theory of law.[88]

Later in his book, Dworkin returns to the same issue, now in the form of a response to the specific objection, leveled by historians associated with CLS, that legal doctrine has the content it does only because powerful segments of society have forged it from ideologies that legitimate their own political or economic interests.[89] He acknowledges that these

[82] Id. at 13.
[83] Id.
[84] Id.
[85] Id.
[86] Id.
[87] Id. at 14.
[88] Id. Somewhat confusingly, Dworkin also draws a different internal/external distinction, which distinguishes between two versions of philosophical skepticism. Id. at 78. Whereas the internal skeptic offers an interpretation of a practice and concludes it is in some way incoherent or bankrupt, the external skeptic simply refuses to offer *any* interpretation on the ground that none are sufficiently objective. Id. at 78–80. It is not entirely clear how Dworkin means to classify historical forms of critique, but he insists that Critical Legal Studies generally should be "understood in the mode of internal skepticism." Id. at 275.
[89] Id. at 273. Dworkin cites as examples of this sort of historical scholarship Professor Robert W. Gordon's classic articles Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981), and Critical Legal Histories, 36 Stan. L. Rev. 57 (1984). See, e.g., Gordon, Historicism in Legal Scholarship, supra, at 1021 (observing that a critical historian might "attempt to explain legal texts as determined, in an important sense, by some contextual variable such as the politics of a dominant class or temporarily dominant political coalition, the class affil-

accounts may be more persuasive than earlier, rosier historical accounts of legal development, which saw it as "the unfolding of some general functionalist design," but he insists that they do not threaten his project because they are of the wrong argumentative form.[90] Such critical histories, "describe law genetically," and in so doing, they "may reflect a serious misunderstanding of the kind of argument necessary to establish a skeptical position: *the argument must be interpretive rather than historical*."[91] By "interpretive," Dworkin means that the argument must "try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning," even if it ends up failing to do so.[92]

Dworkin's point, therefore, is that external historical or sociological accounts of legal institutions that purport to call into question the value of the rules such institutions have generated are not the right *kind* of argument. They offer only *explanations* of events, whereas what the participants in legal practice want and give are "constructive interpretations" of their practice, which require using the materials of the practice in ways that help it proceed forward in the most just manner possible.[93] Under this view, to understand the practice, the theorist must, in some sense, join that practice by making arguments of the kind that participants make, which in this case means the arguments judges make. Thus,

iations of litigant parties or decisionmakers, the psychological makeup of officials, or the logic of some long-term historical trend, such as economic growth or the development of internal contradictions in capitalism").

[90] Dworkin, supra note 6, at 8.

[91] Id. at 273 (emphasis added); cf. Richard Holton, Positivism and the Internal Point of View, 17 Law & Phil. 597, 603–04 (1998) (distinguishing between "*genetic reasons for action*," which are causal explanations, and "*normative reasons for action*," which evaluate the an action by "saying whether or not [an action] was justified").

[92] Dworkin, supra note 6, at 47. Famously, Dworkin also makes the argument that such constructive interpretations constitute what law is. Id. at 88–90. But whether that is a sound conception of law is not exactly our concern here. For our purposes, what matters is that Dworkin understands arguments in formal adjudication to take this rationalizing form, regardless of whether those arguments are about how to (in some sense) "discover" the law or instead how to revise it through the process of adjudication. On this question, Dworkin's characterization seems largely accurate, with one exception I discuss below. See infra Subsection IV.B.2.a.

[93] Id. at 13 ("Their interest is not finally historical, though they may think history relevant; it is practical, in exactly the way the present objection ridicules. They do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.").

we now have our third and final version of the internal/external distinction:

> *IPOV(3): The internal point of view as the posture of the Judge*: The internal point of view describes the argumentative, practical posture of a judge who puts legal practice in the best light in order to determine people's rights and duties (whereas the external point of view is that of an historian or sociologist who merely "describes the law genetically").

Like Hart's methodological version of the internal point of view, Dworkin's version describes the point of view of the legal *theorist*. But if Hart was ambiguous as to whether the internal point of view referred to the (substantive) Genuine Rule Follower or the (methodological) Participant Perspective form of analysis, Dworkin is ambiguous as to whether he is endorsing Hart's Participant Perspective or something stronger. On the one hand, Dworkin argues that his goal is to *understand* legal practice; on the other, he says that taking the internal point of view requires making evaluative *judgments* about the rules within the practice in a way that, as we have just seen, Hart explicitly denied was necessary.[94]

Dworkin's account is thus better equipped than Hart's to explain how the existence of law affects one's moral obligations. Dworkin's argument is not exclusively descriptive or sociological; it is also normative and political.[95] Notice, though, that just as Hart's methodological version of the internal point of view seemed to assume what it set out to discover—namely, whether the members of a group actually accept the rules as guides to behavior—Dworkin's distinction does something similar with respect to the considerations that matter to his Theorist-as-Judge. In particular, he assumes that the kind of "genetic" descriptions

[94] Id. at 14 ("[T]he historian cannot understand law as an argumentative social practice, even enough to reject it as deceptive, until he has a participant's understanding, until he has his own sense of what counts as a good or bad argument within that practice."); see Tamanaha, Internal/External, supra note 13, at 195 ("There is nothing wrong with Dworkin's project of offering suggestions to judges about how they should engage in judging. But that is not what is meant by taking the internal view, at least not as developed in the social sciences. Dworkin passed over the investigation of the practice, which forms the core of the internal view, and went straight to prescription.").

[95] It was for this reason that Hart thought that he and Dworkin were engaged in entirely different theoretical enterprises. See Hart, Concept, supra note 13, at 241 ("It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory.").

of legal practice that historians or sociologists might offer (from the external perspective) do not qualify as the kinds of arguments necessary for the practical business of determining legal rights and responsibilities. In Part IV, I will suggest why I think that assumption is unwarranted. For now, though, let us take stock of where we are.

C. The Many Internal/External Distinctions

Our brief survey of Hart and Dworkin has yielded three distinct versions of an "internal point of view," each of which has been contrasted with an "external" point of view. Hart's (substantive) IPOV(1) distinguishes Genuine Rule Followers, who are legal actors who use rules as genuine guides for behavior, from Holmesian Bad Men, who use them only instrumentally. Hart's (methodological) IPOV(2) distinguishes observers who adopt the Participant Perspective of a practice, and who therefore recognize that there exist Genuine Rule Followers in that practice, from those observers who only record regularities of behavior. And finally, Dworkin's (methodological) IPOV(3) distinguishes the Theorist-as-Judge, who adopts the posture of a judge who makes arguments about rights and duties by constructively interpreting legal practice, from the sociologist or historian who seeks only to explain legal phenomena.

In the decades since *Law's Empire*, all three of these versions of the internal/external distinction have proliferated throughout legal theory. As noted in the Introduction, scholars now invoke those terms in debates about, among other things, the meaning of the criminal law,[96] the role of political science in constitutional theory,[97] the use of empirical methods by legal scholars,[98] the best explanation for private law doctrine,[99] studies of judicial behavior,[100] and the state of legal scholarship in the twenty-first century.[101] Sometimes scholars cite Hart;[102] other times they cite

[96] See, e.g., Morse, Non-Problem, supra note 6, at 203–04.

[97] See, e.g., Posner & Vermeule, supra note 10, at 1744–45.

[98] See, e.g., Goldsmith & Vermeule, supra note 1, at 153–54.

[99] See, e.g., Smith, supra note 6, at 15; Weinrib, supra note 13, at 2; Goldberg & Zipursky, supra note 13, at 1572–75.

[100] See, e.g., Richard H. Fallon, Constitutional Constraints, 97 Calif. L. Rev. 975, 992–1000 (2009) [hereinafter Fallon, Constraints]; Feldman, supra note 13, at 89; Tamanaha, Internal/External, supra note 13, at 180–86.

[101] See, e.g., Balkin & Levinson, supra note 6, at 161–66; Posner, supra note 13, at 1315–17, 1321–22; Post, supra note 13, at 617; G. Edward White, Constitutional Change and the New Deal: The Internalist/Externalist Debate, 110 Am. Hist. Rev. 1094, 1094–95 (2005) [hereinafter White, Internal/External].

[102] See, e.g., Smith, supra note 6, at 15 nn.18–19; Fallon, Constraints, supra note 100, at 993 nn.83–84; Goldberg & Zipursky, supra note 13, at 1564 n.6; Posner & Vermeule, supra

Dworkin;[103] still other times, they cite neither.[104] But in each case, an attempt is made to draw a line separating attitudes, arguments, or analyses that are in some sense "legal" from those that are not.

I suspect the distinction's popularity is due at least in part to the institutional and intellectual factors that led Dworkin to invoke it nearly three decades ago. And that popularity may have at one point been warranted. After all, the distinction has allowed novel, interdisciplinary approaches to studying legal phenomena to flourish without demanding that they show immediate practical consequences of their scholarship for legal decisionmakers. At the same time, it has offered a sophisticated intellectual justification for engaging in more traditional, doctrinal forms of scholarship. Furthermore, it has done all of this in a way that is congenial to today's tolerant and pluralistic intellectual sensibilities.

But this Part has sought to show the way in which the distinction has always dodged as many questions as it has answered—questions about the nature of legal obligation and the structure of legal argument.[105] So it is time to consider whether it remains a useful conceptual tool for legal scholars, judges, or lawyers. Answering that question requires looking more closely at each version of the distinction to see what precisely it means, and what function it serves in scholarly debates. Those are the tasks of the next three Parts.

II. DISTINCTION (1): GENUINE VERSUS INSTRUMENTAL RULE FOLLOWERS

The first distinction begins with Hart's substantive version of the internal point of view. As we will see, although drawing this distinction in any particular case will be controversial, there is nothing inherently problematic about it. Indeed, it identifies a question of interest to a wide variety of legal scholars. Still, framing the issue as a "point of view" is somewhat misleading, and tends to encourage precisely the kind of bootstrapping that we saw in Hart's original invocation of it.

note 10, at 1745 n.2. In 2006, Fordham Law School hosted a symposium devoted entirely to the Internal Point of View, as understood by Hart. See Zipursky, supra note 47, at 1143–44.

[103] Feldman, supra note 13, at 98; Post, supra note 13, at 617.

[104] Balkin & Levinson, supra note 6, at 161–66; Morse, supra note 13, at 603.

[105] This was recognized by at least one scholar at the time. See Schlag, supra note 13, at 920 (arguing that Dworkin's use of the internal/external distinction has "enabled controversial matters to be assumed *into* and *out* of existence without being questioned").

A. The Distinction

Because Hart's targets were the sanction theories of Holmes and Austin, he distinguished actors who use rules as normative standards from those who follow rules purely to avoid the sanctions that result from their violation. For Hart, then, as we have seen, the external point of view was essentially Holmes's Bad Man. But official legal sanctions are not the only considerations that might bear on a person's purely instrumental calculations about whether she should follow a given rule or principle. Other such considerations might include the social, political, or economic consequences that result from doing so (or from refusing to do so), either for the person applying the rule or for society generally. We can thus state the distinction more broadly:

> *Distinction (1): Genuine Rule Follower Versus Instrumental Rule Follower*: The Genuine Rule Follower treats rules as offering genuine guides to action or standards of behavior and so tries in good faith to understand and follow them (whereas the Instrumental Rule Follower only follows rules unless or until doing so is no longer instrumentally efficacious in bringing about consequences she desires or in avoiding ones she does not).

There are two sorts of questions that one might want to ask about this distinction in any particular context: (1) *Ought* the relevant legal actors—whether judges, lawyers, or citizens—act as Genuine Rule Followers in this context? And (2) *Do* they actually do so? Of course, the term "rule" here is too simple. As Hart recognized, legal materials that judges make use of include not just rules, but principles and standards as well.[106] But the basic issue is whether citizens or legal actors are, or should be, genuinely *constrained* by the law in their decisionmaking.

The first, normative question, as applied to judges, has long been a central one for legal theory. But it is not one typically framed in terms of an internal/external distinction. Sometimes it is framed as a question about the "autonomy" of law;[107] other times it is framed as a debate be-

[106] Hart, Concept, supra note 13, at 263 ("I certainly did not intend in my use of the word 'rule' to claim that legal systems comprise only 'all-or-nothing' or near-conclusive rules.").

[107] See, e.g., Frederick Schauer, The Limited Domain of the Law, 90 Va. L. Rev. 1909, 1943 (2004) [hereinafter Schauer, Limited Domain] (arguing that "although the idea of law as a limited normative or decisional domain is not a necessary condition for law's autonomy, it is certainly one of the more obvious ways in which law could be thought of as at least partly autonomous from the larger domain in which it exists").

tween "formalist" and "instrumentalist" (or "pragmatist") theories of adjudication.[108] In either case, the issue is the degree to which a judge ought to consider herself genuinely constrained by the relevant materials. As we will see, there is good reason why this debate is not typically framed as one between two "points of view," but for now the important point is just to see how this issue is the normative variant of the second, descriptive question about how judges *actually do* treat rules when making decisions.

And this descriptive, or empirical, debate has indeed been framed in internal/external terms. Legal historians, for instance, distinguish between "internal" and "external" explanations of such judicial decisionmaking.[109] "Internal" historical accounts are those that explain the outcomes of court decisions—typically those of the Supreme Court—as a result of the Justices' application of the relevant doctrine, whereas "external" accounts are typically said to be those that explain the decision by reference to political, economic, or ideological factors.[110] The related debate between proponents of the "attitudinal model" of Supreme Court decisionmaking (which explains decisions as a result of the Justices' "personal policy preferences") and those of the "legal model" (which explains them as a result of genuine application of traditional legal sources) can also be, and has been, framed in terms of this version of the

[108] The possible examples here are nearly limitless. A mere sampling from those on both sides of the debate includes the following. First, on the side of formalism: Frederick Schauer, Playing by the Rules (1991) (offering an analysis of rules and a normative defense of their use in various contexts); Robert Samuel Summers, Instrumentalism and American Legal Theory 19–26, 161–176 (1982) (identifying and criticizing what he dubs an "instrumental" view of law, which he judges to be the dominant American conception of law); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (emphasizing the importance of constraining judges with rules for the sake of democracy). On the side of pragmatism or instrumentalism: Melvin Aron Eisenberg, The Nature of the Common Law 1–3 (1988) (arguing that common law judges are, and ought to be, relatively unconstrained by formal rules of law); Posner, Decline, supra note 67, at 778 (encouraging judges to be more welcoming of social science and more candid in their recognition of the "realistic premises of decision"); Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 605 (1908) (arguing that the law produced by judges "must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation").

[109] See Robert W. Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 Law & Soc'y Rev. 9, 11 (1975) ("The internal legal historian stays as much as possible within the box of distinctive-appearing legal things . . . ."); White, Internal/External, supra note 101.

[110] White, Internal/External, supra note 101, at 1095 ("Internalists and externalists assign importance to quite different sets of constraints on justices as constitutional interpreters.").

internal point of view.[111] In these contexts, the "external" accounts are those that hypothesize that judges reach the outcomes they do not because they are genuinely constrained by rules, but rather because they are able to manipulate the relevant doctrinal materials for the sake of attaining some instrumental benefit, such as to avoid unpleasant political consequences or to satisfy their "personal policy preferences."[112]

Drawing the internal/external distinction in this way is rife with conceptual and empirical complexities. As various scholars have observed, it is not always easy to distinguish "internal" or "legal" sources from "external" or "non-legal" considerations. First, sometimes judges might internalize certain rules, standards, or principles that deviate systematically from the official or "paper" rules that govern the case.[113] Here,

[111] Fallon, Constraints, supra note 100, at 993 ("Hart's external point of view approximates the attitude that some political scientists, employing a rational choice or game theoretical methodology, depict as underlying officials' conformity to the Constitution."); see also Feldman, supra note 13, at 90 (describing the debate in those terms); Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making, 26 Law & Soc. Inquiry 465, 471–72 (2001) (noting the relevance of taking the "internal point of view" to understanding and evaluating empirical studies of judicial decisionmaking). For an example of the attitudinal model, see Spaeth & Segal, supra note 9. For an extensive overview and critique of the attitudinal model specifically, and empirical studies of judicial behavior generally, see Hon. Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 Duke L.J. 1895 (2009).

[112] Jeffrey A. Segal & Harold J. Spaeth, The Influence of Stare Decisis on the Votes of United States Supreme Court Justices, 40 Am. J. Pol. Sci. 971, 973 (1996) ("[A]ttitudinalists argue that because the Supreme Court sits atop the judicial hierarchy, and because in the type of cases that reach the Supreme Court legal factors such as text, intent, and precedent are typically ambiguous, justices are free to make decisions based on their personal policy preferences."). Scholars have also complicated the analysis by treating case outcomes as the product of strategic behavior among judges on a panel—similar to how the behavior of legislators is modeled by political scientists—rather than as the expression of straightforward policy preferences. See, e.g., John Ferejohn & Barry Weingast, Limitation of Statutes: Strategic Statutory Interpretation, 80 Geo. L.J. 565 (1992); McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631 (1995). Another approach is to assume that judges seek to maximize not their own power, but leisure time. See, e.g., Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 2, 20–21 (1993). For a helpful discussion of the variety of approaches legal scholars and political scientists use to study judicial decisionmaking, see Lawrence B. Solum, The Positive Foundations of Formalism: False Necessity and American Legal Realism, 127 Harv. L. Rev. 2464 (2014) (reviewing Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (2013)).

[113] See Frederick Schauer, Legal Realism Untamed, 91 Tex. L. Rev. 749, 766–73 (2013) (exploring this possibility).

judges are adopting an internal point of view, but with respect to rules that are not the "official" rules (or, in Hart's terms, are not those that are specified by the rule of recognition). Second, under some theories of law, such as Ronald Dworkin's, a judge's determination of law properly depends on the judge's views of political morality. To the extent that view of law is correct, internal accounts ought properly include within their scope some things otherwise excluded as external.[114] Finally, it may often be difficult to determine, as an empirical matter, whether a judge considers herself genuinely constrained by a rule or is instead simply concerned with the consequences of her decision, because judges—even Supreme Court Justices—might interpret the political constraints on their actions (that is, external constraints) as themselves clues as to what their constitutional duties are (an internal constraint).[115]

B. The Distinction in Action: Uses and Abuses

For some, such complexities render futile any effort to draw a distinction between "internal" or "legal" sources or factors in decisionmaking and "external" or "political" ones.[116] That would be one reason to abandon this version of the distinction—and probably the others as well. But I mean to offer no such radical critique. To the contrary, asking ques-

[114] This is the basis for the charge, frequently made, that the attitudinal model operates with an overly simplistic model of legal reasoning. See Edwards & Livermore, supra note 111, at 1915 (observing that attitudinalists often assume a model of legal formalism but arguing that "legal formalism, at least in its most rigid formulation, has not been broadly embraced by the judiciary for many decades"); Feldman, supra note 13, at 99 (citing Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 32–53 (1993), and suggesting that Segal and Spaeth, cited infra note 196, use a model of stare decisis in their analysis that "is overly simplistic and misleading"); Gillman, supra note 111, at 486 (describing a view according to which a "legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decision possible in light of one's general training and sense of professional obligation").

[115] See Fallon, Constraints, supra note 100, at 1002 ("If I am correct in my suggestion that officials will tend, when reasonably possible, to interpret their constitutional duties to avoid collisions with external constraints, then external constraints not only reinforce, but also help shape, officials' perceptions of their obligations.").

[116] See, e.g., Andrew Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 Phil. & Pub. Aff. 205, 229 (1986) (explaining that CLS scholars, in denying the "law/politics distinction," are claiming that "all of the arguments and ideologies which are a significant part of political debate in our culture are to be found, in one form or another, in legal argument and doctrine"); Gary Peller, The Metaphysics of American Law, 73 Calif. L. Rev. 1151, 1274–75 (1985) (arguing that the "law/politics" distinction, along with others, "is actually an act of power through which other ways or understanding and experiencing the world are marginalized as 'personal,' 'ideological,' 'emotional,' or 'primitive'").

tions about whether judges (or other actors[117]) are and should be genuinely constrained by rules strikes me as a critical task for legal scholars. Still, there are two reasons to proceed gingerly when using this version of the distinction.

The first is that framing this issue as one of two different "points of view" or "perspectives," one internal, the other external, is misleading. In all its versions, the internal/external framing is, and always was, somewhat metaphorical, but that metaphor at least seems to fit when the issue is whether someone is acting as a participant in some activity or practice (as used in the other two meanings to be considered below). But here the spatial metaphor seems less apt. Hart used "internal" to describe the point of view of a person who takes a particular rule as a normative guide. But it is not obvious why someone treating a rule as a genuine guide or constraint on behavior is any more "inside" the rule than one who treats it as a factor in instrumental reasoning.[118] No surprise, then, that the normative version of the debate is rarely framed in such terms—or that when historians use it, they typically use the terms "internal" and "external" not to describe a point of view, but rather a particular kind of *explanation* of legal change or of a judicial decision. An internal one attributes causal significance to the materials "internal" to the practice of law.

The point would be merely semantic except that it leads to confusion. For instance, in diagnosing what they call the "inside/outside fallacy," Professors Posner and Vermeule allege (citing Hart) that various courts

[117] Whether other actors, including governmental officials, lawyers, and citizens, do or should internalize norms is also the subject of debate. See, e.g., Fallon, Constraints, supra note 100, at 1036 (saying that he finds it "hard to believe that the Constitution could function effectively without inspiring a motivationally efficacious sense of obligation in at least some officials," but also maintaining that "neither could I imagine a workable legal regime without external constraints on official action"); Schauer, Force, supra note 60, at 57–61 (arguing that the limited empirical evidence on the question suggests that most people are not Genuine Rule Followers in the way that Hart assumed them to be); W. Bradley Wendel, Lawyers, Citizens, and the Internal Point of View, 75 Fordham L. Rev. 1473, 1476 (2006) (arguing that "[t]he internal point of view is conceptually or normatively mandatory for lawyers and citizens when purporting to act lawfully").

[118] Brian Tamanaha makes a related point when he accuses Hart of confusing the traditional internal/external distinction as used in the social sciences, see infra Part III, with this substantive question of whether actors accept rules as guides. Tamanaha, Internal/External, supra note 13, at 189 (observing that legal philosophers, including Hart, "kept talking about what the participants were *doing*, not just about how to *observe* the participants doing what they were doing" with the result that these philosophers "were sent on this wrong track by Hart's initial assertion that an internal statement is from one who accepts the rule").

and legal theorists simultaneously adopt "two different perspectives," one internal, the other external, which results in a kind of "methodological schizophrenia."[119] But the primary form of the schizophrenia they identify attaches to public law scholars who, in diagnosing some problem with how the branches of government check (or fail to check) each other's power, assume that political actors act so as to maximize their own self-interest but then, in recommending doctrinal changes, appear to assume that judges (themselves political actors) act on the basis of public-spirited reasons (which, in this context, would mean being genuinely constrained by rules). Thus, the inconsistency Posner and Vermeule identify (their protestations to the contrary notwithstanding[120]) seems in reality to be an empirical one about whether judges act as Genuine Rule Followers or instead as Instrumental Rule Followers.[121] And if that is the case, then what they have identified is not methodological confusion, but primarily a substantive, empirical disagreement about whether judges are Genuine or Instrumental Rule Followers in a particular doctrinal context.[122]

This leads to the second reason to be wary of this use of the distinction, which is that its use tends to beg the very question at issue. An historical account may fairly be labeled "internal" or "external" on the basis of its *conclusion* about whether the law in a given context genuinely

[119] Posner & Vermeule, supra note 10, at 1744–45.

[120] See, e.g., id. ("Our point is not substantive or empirical. It is not to argue for, or against, any particular assumptions about the behavior of judges, other officials, or other legal or political actors."); id. at 1762 ("Substantively, the issues are empirical and contingent, and we are (for present purposes) entirely agnostic about the merits.").

[121] Posner and Vermeule seem to recognize the empirical nature of the inconsistency they identify when they describe it as "at least prima facie." See id. at 1744. For other criticisms of Posner and Vermeule's arguments, see Charles L. Barzun, Getting Substantive: A Response to Posner and Vermeule, 80 U. Chi. L. Rev. Dialogue 267 (2013).

[122] Primarily, but not exclusively. There is also the conceptual question of how one ought to understand the external constraints that limit a judge's (or any other political actor's) ability to maximize her own power. If some of the sources of constraints are themselves authorized by the Constitution's system of checks and balances, then judges may properly interpret those constraints as giving guidance as to what their legal obligations actually are. See Fallon, Constraints, supra note 100, at 1002 (making exactly this point). To the extent that is true, it may be difficult, or even impossible, to tell whether judges are simply responding to external constraints or following what they genuinely (and properly) believe to be the law, since those two will require the same outcome. Still, the point is that the disagreement, on this view, does not depend on the "perspective" of the analyst—it is a question of empirical observation and substantive constitutional interpretation. I consider another reading of Posner and Vermeule's point below. See infra notes 180–85 and accompanying text.

constrained judges or failed to do so.[123] Even economists or political scientists who proceed by positing fixed assumptions about what motivates judicial behavior could, in theory, test those assumptions empirically.[124] But framing the question of whether judges are genuinely constrained by rules in terms of two "points of view" encourages precisely the kind of bootstrapping we saw in Hart's use of it. That is, it enables theorists, perhaps unwittingly, to convert what are properly the *conclusions* of substantive argument—whether empirical or normative—into methodological premises.

An exchange between two scholars about a work of American legal history illustrates the point.[125] In a review of Professor Lawrence Fried-

[123] See, e.g., William E. Leuchtenburg, Comment on Laura Kalman's Article, 110 Am. Hist. Rev. 1081, 1083 (2005) ("I find the externalist explanation more cogent than the internalist, not because I think that justices are always political agents who write elaborate opinions as glosses for their preconceptions, but because in this particular instance—a highly unusual instance, one called nothing less than a 'revolution'—external influences are more congruent with the evidence."). But see White, Internal/External, supra note 101, at 1099 (criticizing Leuchtenburg's own account for ignoring constitutional doctrine entirely).

[124] See Robert Cooter, The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint, 75 Fordham L. Rev. 1275, 1282 (2006) ("Someday scholars will use economic techniques to estimate the intrinsic value of obeying a law."); Ferejohn, supra note 30, at 284 (observing that "the attitude of legal actors toward the political or legal constraints they face may not be to see them as something like physical impediments to taking desired actions, but as normative rules that provide guides or reasons for action or restraint" and that if "legal actors are motivated in this way, it seems plausible that a positive theory of their strategic interactions can be internal to law"); Priel, Jurisprudence, supra note 24, at 322 (endorsing as a project for jurisprudence a method that would "maintain the concern with the 'internal point of view' by examining the role law plays in people's lives and the way these issues touch on questions of legitimacy but adopt an 'external' methodology for answering this question"); Brian Z. Tamanaha, A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications, 75 Fordham L. Rev. 1255, 1273 (2006) [hereinafter Tamanaha, Socio-Legal] ("At least in theory, political scientists should be able to identify through their studies a baseline range of correlations between judges' decisions and their attitudes that represents the level of unavoidable subconscious influence.").

[125] The discussion in the text that follows refers to an example of empirical bootstrapping. An example of bootstrapping to normative conclusions may be found in Professor John Goldberg and Benjamin Zipursky's article on Hart's internal point of view, cited above and discussed in more detail below. See Goldberg & Zipursky, supra note 13. The authors there argue that Hart's use of the internal point of view "creates philosophical space for a non-Holmesian, duty-accepting account of tort law." Id. at 1575. Rather than seeing legal duties as merely labels for policy conclusions, the internal point of view shows how duties in tort may impose "genuine obligations," even if they do not amount to full moral obligations. Hart's insight, they explain, "was not to remove the ought-ness from law but to capture what is distinctive about legal ought-ness as opposed to moral ought-ness." Id. at 1579. The problem with this use of the internal point of view is the same one that plagued Hart's own account of legal obligation, discussed in Part I. It seems to authorize the analyst to make claims

man's book *The Republic of Choice*, Professor Don Herzog takes Friedman to task for asserting that judges make law but are not candid in doing so. "Legal theorists since Hart," Herzog explains, "out to describe the law from an internal point of view, have had no patience whatever with the view that judges are simply legislators by another name."[126] While recognizing that those scholars may be wrong, Herzog faults Friedman for offering no such argument. Herzog thus seems here to suggest that the conceptual distinction Hart drew between Genuine and Instrumental Rule Followers itself counts as evidence as to whether the judges in Friedman's story were in fact constrained by relevant legal materials when deciding cases, and that such evidence puts the burden on Friedman to respond with substantive argument. But it is hard to see how Hart's purely conceptual distinction could possibly provide such evidence.

Perhaps for this reason, Friedman refuses to accept that burden. He writes instead that it should be "clear from every page of the book" that "like all of my work, [it] is within the law and society tradition; it is an attempt to look at legal phenomena from an *outside* perspective."[127] The internal point of view, he explains, "interests me as a social fact, or as a

about the existence of "genuine" obligations without explaining why the relevant rules provide someone to whom they apply a reason to act in a certain way. Hart's concept of the internal point of view ("IPOV(1)," in our terms) does not alone support that conclusion. It asserts the possibility that people could be Genuine Rule Followers, but it implies nothing in itself about whether any particular group of people *ought* to be Genuine Rule Followers. Establishing that they ought to be—that is, that the particular rules in some context have genuine normative force—would seem to require normative argument about when and why those rules are good ones (for example, because they are democratically legitimate, rights-protecting, welfare-enhancing, or conducive to the common good, or some such moral argument). But Hart offers no such argument. Indeed, Hart's positivist theory of law is a particularly poor resource for supporting the genuine normative force of duties in tort law since, for Hart, the legal validity of such "primary" duties depends entirely on whether or not they are valid according to the rule of recognition, whose "acceptance" is only required by legal officials. Hart, Concept, supra note 13, at 117 ("In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world . . . . The society in which this was so might be deplorably sheep-like; the sheep might end in the slaughter-house."). Perhaps for this reason, Professors Goldberg and Zipursky also make a distinct and, in my view, stronger argument that Hart's jurisprudence offers *methodological* lessons for tort theory. Because that argument draws on Hart's second, methodological distinction (IPOV(2)), I take it up below in Part III.

[126] Don Herzog, I Hear a Rhapsody: A Reading of *The Republic of Choice*, 17 Law & Soc. Inquiry 147, 152 (1992).

[127] Lawrence M. Friedman, I Hear Cacophony: Herzog and *The Republic of Choice*, 17 Law & Soc. Inquiry 159, 163 (1992).

description of the ideology of lawyers," but he refuses to "treat it as 'valid' in itself."[128] In other words, Friedman recognizes the internal point of view as a fact to be explained, but then asserts that the explanation of that fact will be "external" because, well, that is the kind of historian he is. That a genuinely historical or social-scientific account could reveal that in fact judges' decisions are guided and constrained by the materials with which they work does not seem to be a possibility he considers a live one.[129]

In short, the substantive version of the internal/external distinction marks a real and important difference between two different judgments about how judges do or ought to treat legal rules in a particular context. So used it does little harm. The problem arises when scholars invoke the distinction—as Herzog and Friedman both do—as a premise for an argument or explanation, rather than as a conclusion.

III. DISTINCTION (2): PARTICIPANT PERSPECTIVE VERSUS OTHER-PERSPECTIVES

That problem occurs when the distinction is used in one of its two methodological senses. Herzog and Friedman seem to disagree, for instance, about what kind of inquiry is best equipped to explain the relevant social phenomenon—in this case, judicial decisionmaking. We are now in the territory of Hart's methodological distinction, though with two variations: First, there is a whole spectrum of possible approaches available, not simply the two Hart identified. Second, we must reckon with precisely the opposite claim of Hart's (and one suggested by Friedman's protests), namely, that a proper explanation of legal phenomena *must* be external—that is, offered in the terms other than those of the participants under study.

The discussion here takes us into some of the deepest waters of social theory, raising questions about what it means to understand or explain human actions. Fortunately, we need not resolve these issues, which in-

[128] Id.

[129] I am not the first to voice this complaint against this general approach. See White, Internal/External, supra note 101, at 1114 (arguing that external approaches to explaining Supreme Court decisions assume that judges are motivated by politics and ideology, so that they amount to self-fulfilling prophecies: "Ideology and politics are identified as the forces driving change because those factors are assumed, in advance, to be the ones that inevitably control judicial decisions"). Of course, the same could be said of many internal accounts which ignore the political context of a decision. See infra Subsection IV.B.2.a.

volve not only rival theories, but also rival disciplines, pitting economic, sociological, psychological, and philosophical explanatory paradigms against each other. Rather, the question we are concerned with is simply whether, and if so, why, either an internal or one of various external approaches would deserve special treatment.

In other words, the question is this: Assuming one's goal is to understand legal practice generally, or to explain particular features of it, is there a justification for assuming at the outset that the factors doing the explaining must be of a particular sort (for example, the participant's expressed reasons, sociological facts, or something else)? If so, what is that justification? What I hope to show is that only a commitment to quite radical epistemological or metaphysical views could justify the requirements offered under the banner of "internal" and "external" perspectives. And yet once one relaxes the requirement and allows for the possibility of explanations in other terms, it is no longer easy to see what useful work the distinction does, except to stack the deck in favor of a preferred outcome to the substantive, interpretive dispute. As we have already seen in Part II, when it comes to theorizing about law, the interpretive dispute will often be about whether the actors under study are acting as Genuine Rule Followers or Instrumental Rule Followers (Distinction (1)).

A. The Distinction(s)

Because Hart had a particular target in mind when he discussed the inadequacies of what he called the "extreme external point of view," the methodological dichotomy he drew was somewhat crude.[130] For him, the only alternative to an approach that recognizes the way that at least some participants use rules as genuine guides to action was that of the behaviorist, who limits himself to recording regularities of conduct and drawing predictions therefrom. In reality, however, there are a whole range of different methodological approaches, which not only vary in the degree to which they factor in the participants' own reasons and purposes but also in the kind of explanation offered in lieu of such reasons and purposes. For instance, as we have already seen, both sides of the debates about how to interpret law and judicial decisionmaking assume that judges act on the basis of *reasons*, but they disagree only about whether judges use the rules themselves as reasons for decisions or instead rea-

[130] Hart, Concept, supra note 13, at 89.

son on the basis of other considerations, whether political, social, or economic.[131] But in addition to such intentional accounts, there are also different versions of non-intentional explanations in which *reasons* do not figure at all.[132] Instead, these look to things like social functions or laws,[133] unconscious biases or desires,[134] or neurobiological processes.[135] Thus, in framing the distinction, it is best to leave what it means to offer a Non-Participant explanation almost entirely open, defining it purely as the negation of the Participant Perspective:

> *Distinction (2): The Participant Perspective Versus Other Perspectives:* The Participant Perspective seeks to explain or understand the behavior of participants in some social practice (for example, legal practice) in terms of the reasons and purposes that the participants under examination themselves give for their actions (whereas various Non-Participant Perspectives seek to explain that same behavior without invoking the reasons and purposes that those participants themselves give for their actions).

[131] See Gillman, supra note 111, at 494 (emphasizing the relevance of "interpretive accounts" to debates about judicial behavior, and in doing so observing that the category of scholars who are "framing empirical questions around claims about distinctive judicial motivations" includes "all contemporary scholars who consider themselves attached either to legalist accounts, attitudinal models, or strategic conceptions of decision making"); Tamanaha, Socio-Legal, supra note 124, at 1262 ("The explanation [of judicial behavior] offered by political scientists, however, is ultimately grounded in the meaningful realm as well, since it points to the personal attitudes of judges.").

[132] Philosophers typically use the term "intentional" to refer to explanations framed in terms of an actor's intentional states, typically a combination of beliefs and desires. Sometimes intentional explanations are understood to be a form of explanation distinct from, and hence not competitive with, *causal* explanations. See, e.g., Holton, supra note 91, at 603 (distinguishing between "genetic explanations," which are causal explanations, and "intentional explanations," which explain actions "by citing the beliefs and desires of the actor"). But I argue below that the two forms of explanation ought to be understood as (at least in some ways) rivals.

[133] See infra Subsection III.B.2.

[134] For a classic claim of this sort, see Jerome Frank, Law & the Modern Mind 19–23 (1930) (explaining the desire for the certainty felt by some lawyers, judges, and laypeople as a result of a psychological longing for a father figure). For a more recent example, see Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 8 Notre Dame L. Rev. 1195, 1195 (2009) (answering "yes").

[135] See, e.g., Owen D. Jones et al., Law and Neuroscience, 33 J. Neuroscience 17,624, 17,627 (2013) (observing that recent work in neuroscience has demonstrated that "transcranial magnetic stimulation to the dorsolateral prefrontal cortex disrupts punishment assignment [in subjects] while leaving blameworthiness evaluation intact . . . thereby providing neural evidence for a dissociation between the process of evaluating blame and assigning the appropriate punishment").

B. The Distinction in Action: Uses and Abuses

Below I briefly survey some of the more popular attempts to defend something like the Participant Perspective and Non-Participant Perspective methods for studying legal phenomena in terms of internal and external points of view. Again, the questions at issue are, what, if any, work is the distinction doing? And if it is doing work, does it serve to help or hinder understanding?

1. The Participant Perspective: The Case of Private Law

The claim that a proper explanation of some practice or feature of social life requires taking seriously the viewpoint of the participants in that practice comes in different versions, some of which are stronger than others.[136] Each has been deployed in debates over the meaning of private law as a basis for criticizing economic or instrumental accounts of tort or contract doctrine.

a. Strong Version

The strongest version holds that an explanation of a social practice can only be offered in the terms in which the participants themselves would explain it. In the technical vocabulary of the philosophy of social science, this requirement amounts to a demand that the *explanans* (the thing doing the explaining) be offered in the same set of terms or concepts as the *explanandum* (the thing to be explained). When it comes to common law adjudication, for instance, this requirement demands that explanations of court decisions be offered in terms of the reasons that the judges themselves offer for their decisions.[137]

Two arguments might justify that requirement. The first and more famous one has its roots in the ordinary-language philosophy discussed in Part I.[138] The idea here (to summarize rather crudely) is that it is impossible to understand a social practice in terms other than those in

[136] In the framing of this Subection, I am indebted to Stephen A. Smith, who makes a helpful three-part distinction among different strengths of this methodological requirement in much the same way I do here, though he frames his more specifically around what he calls the "morality criterion" and the "transparency criterion." See Smith, supra note 6, at 12–32. I discuss the latter below. See infra notes 160–62 and accompanying text.

[137] See Weinrib, supra note 13, at 14 ("[P]rivate law is simultaneously explanandum and explanans, both an object and a mode of understanding.").

[138] See supra Section I.A.

which the participants themselves understand them because the bodily movements of human beings only become *actions* at all when understood in the context of the meanings people ascribe to those movements. The philosopher most associated with this view is Peter Winch, who derived it from a more general skepticism about the (non-)existence of a reality beyond the language we use to make sense of our world—a skepticism he thought vindicated by Wittgenstein's analysis of rules and of language.[139] For Winch, then—or at least a common interpretation of him[140]—human actions, like language, only take on meaning insofar as they can be seen as applications of general *rules*; neither actions nor words can be understood at all except by taking the internal perspective of someone who understands the language or the "forms of life" (in Wittgenstein's terms) in which the speech or action takes place.[141]

Hart himself noted the influence of Winch on his own thought and credits him with the distinction between internal and external points of view.[142] But it is not clear that Hart intended to adopt this strong version of the methodological requirement, and interpretive charity counsels against it since it seems far too strong. This is true for primarily two reasons. First, it conflicts deeply with the common-sense judgments we make in ordinary life. If your friend's child has just died in a car accident and she calls you the next week to tell you all about the French Open, which she says she has been watching nonstop, then you may well

[139] Winch, supra note 76, at 14–15 (quoting Ludwig Wittgenstein, Philosophical Investigations 208–09 (1953), and then concluding that "[w]e cannot say then . . . that the problems of philosophy arise out of language *rather than* out of the world, because in discussing language philosophically we are in fact discussing *what counts as belonging to the world*"); Martin Hollis, The Philosophy of Social Science: An Introduction 155–57 (1994) (noting the influence of Wittgenstein's thought on Winch).

[140] I put it this way because it is a matter of debate whether this is the view Winch meant to endorse. See Hollis, supra note 139, at 157 (offering an account along these lines but qualifying it by saying that Winch's other work shows a different view, so that he "would not want to saddle Winch himself with these views untrammelled"); Charles Taylor, Understanding and Explanation in the *Geisteswissenschaften*, *in* Wittgenstein: To Follow a Rule 191, 191 (Steven H. Holtzman & Christopher M. Leich eds., 1981) (observing that "[i]t is by no means clear that Winch himself" takes the view described in the text but explaining that "this is the position which has come to be associated with his name in the discussion").

[141] See Winch, supra note 76, at 39 ("A single use of language does not stand alone; it is intelligible only within the general context in which language is used . . . ."); id. at 51–52 (observing that "all behaviour which is meaningful (therefore all specifically human behaviour) is *ipso facto* rule-governed").

[142] See Hart, supra note 13, at 289 (citing Winch's book); Lacey, supra note 23, at 230 (explaining that Hart credited Winch as the source of his inspiration for emphasizing the internal point of view).

interpret your friend's behavior as better explained by the psychological phenomenon known as "denial" than by the reasons she herself offers (for example, "Nadal's forehand is on fire!").[143] Or when the car salesman tells you that he will have to talk with his manager before agreeing to a price, you may well justifiably see it as a negotiating tactic and therefore will not believe that he really does need such authorization.[144]

Second, and relatedly, it has radically skeptical implications as to the limits of social-scientific explanations.[145] It would deny, for instance, that we might better understand radical Islamism by looking to the social, economic, political, and psychological factors that might explain its recent ascendency in the Middle East.[146] One would be limited to offer-

[143] The concept originally comes from Freud. See Sigmund Freud, Negation (1925), *reprinted in* A General Selection from the Works of Sigmund Freud 54, 55 (John Rickman ed., 1957). Winch would allow such Freudian explanations, but only on the condition that the actor herself comes to understand that concept by seeing its role in psychoanalytic theory. Under this view, when a patient undergoes psychotherapy, it is only because she eventually comes to see the plausibility of psychoanalytic theory in general that the particular explanation succeeds. See Winch, supra note 76, at 48 ("[I]n seeking explanations of this sort in the course of psychotherapy, Freudians try to get the patient himself to recognize the validity of the proffered explanation; that this indeed is almost a condition of its being accepted as the 'right' explanation."). And that requirement seems too strong in this case: We might think our friend is in denial, whether or not she has ever heard of the concept or understands psychoanalytic theory. Cf. Alasdair MacIntyre, The Idea of a Social Science, *in* The Philosophy of Social Explanation 15, 20 (Alan Ryan ed., 1973) (criticizing Winch's view and observing that "it seems quite clear that the concept of ideology can find application in a society where the concept is not available to the members of the society").

[144] A defender of Winch's approach could argue that such statements take on a different meaning in the context of negotiations and that the view does not require that all statements be taken literally. But then, of course, the same thing could be said about judges' use of doctrinal terms. This possibility is explored by Professor Jody Kraus. See infra notes 160, 169.

[145] Hollis, supra note 139, at 156–57 ("All this, when summarised so starkly, is very strong stuff. It seems to allow no appeal beyond forms of life, neither to an external reality which some or all forms of life seek to make sense of nor to independent criteria of what it is rational to believe or do."); see Taylor, supra note 140, at 191, 197 (characterizing the position attributed to Winch as "vulgar Wittgenstinianism" in part on the ground that it leads to "relativism").

[146] For just a few examples from a voluminous literature on the possible explanations of the rise of Islamism, see Jerrold M. Post, When Hatred Is Bred in the Bone: Psycho-Cultural Foundations of Contemporary Terrorism, 26 Pol. Psychol. 615, 616 (2005) (arguing that "explanations at the level of individual psychology are insufficient in trying to understand why people become involved in terrorism," and that instead "group, organizational, and social psychology, with a particular emphasis on 'collective identity,' provide the most constructive framework for understanding terrorist psychology and behavior"); Quintan Wiktorowicz & Karl Kaltenthaler, The Rationality of Radical Islam, 121 Pol. Sci. Q. 295, 295–96 (2006) (arguing that the "spiritual payoffs" of joining radical Islamic groups appear to outweigh the costs for many individuals, making their decision to join such groups ration-

ing explanations of its popularity in terms of the intrinsic appeal of the Islamist way of life.

In other words, the Winchian view not only conflicts with the common-sense judgments we make in our personal lives, but also with widely shared understandings of the nature and possibility of knowledge about social, political, and economic life more generally. Of course, such widely shared understandings may turn out to be wrong. But the point is to show what a difficult pill this view requires one to swallow.

These same problems plague another variant of the strong version of the internal methodological requirement, which has been used in debates over the meaning of tort and contract doctrine. Professor Ernest Weinrib has argued, for instance, that the only way one can render private law "intelligible" is by understanding the law in terms of the concepts that judges use to apply and create tort and contract doctrine.[147] Weinrib's view does not seem to derive support from the skepticism of Winch or Wittgenstein. Instead, he emphasizes the internal coherence that private law exhibits and insists that such coherence can only be seen or appreciated if one attempts to understand it "from a perspective internal to it."[148] Sometimes Weinrib suggests that this is due to particular—and particularly majestic—features of private law itself,[149] whereas other times it seems to follow necessarily from the logic of theoretical inquiry generally.[150] In either case, however, his view carries the same skeptical implications as the Wittgenstinian version of this strong Participant Perspective requirement, for it denies that we can ever better understand a

al from a utilitarian perspective); Robbert A.F.L. Woltering, The Roots of Islamist Popularity, 23 Third World Q. 1133, 1138–39 (2002) (arguing that a variety of social and economic factors have contributed to the rise of Islamism, including the economic conditions created by Western colonial powers).

[147] See Weinrib, supra note 13, at 14–15.

[148] Id. at 2.

[149] Id. at 5–6 (suggesting that private law is "just like love" in its resistance to explanations offered in terms of the "extrinsic ends" it may serve).

[150] Id. at 18 ("One understands something either through itself or through something else. If one understands something through something else, the self-understanding of private law is denied, but the infinite regress occasioned by this notion of understanding equally undermines every nonlegal mode of understanding private law. If, however, one understands something through itself, the law's self-understanding is possible, and it is sheer dogmatism to insist that other disciplines have, when applied to law, an intelligibility that law lacks on its own."). It is not clear (to me, at least) why suggesting that a particular social practice is better explained in some other terms commits one to the general principle that "one understands something through something else" and thereby puts one on the path of infinite regress.

practice or institution in terms other than those used by those who engage in it.

b. Moderate Version

For just that reason, others who have sought to employ Hart's methodological requirement have interpreted it in a less demanding way.[151] Stephen A. Smith, for instance, argues that taking account of the internal point of view is necessary for any "interpretive" theory of private law.[152] Rendering a practice like common law decisionmaking intelligible requires that the theorist "understand what the participants in the practice think they are doing. In other words, it is necessary to understand how the practice is regarded internally."[153] One feature of this "self-understanding" is what Smith calls the *transparency* of legal reasons: Judges understand the reasons they offer in their opinions to be the ones that actually explain the outcome (rather than mere "window dressing").[154] Therefore, an interpretive theory of private law should take account of the fact that judges take the reasons for their decisions to be the ones that actually explain the outcome. This does not require the theorist to assume that the reasons the judge offered for the decisions actually are the ones that explain it (as in the strong version), but it does require that a theory "explain the law in a way that shows how judges could sincerely, even if perhaps erroneously, believe that the reasons they give for deciding as they do are the real reasons."[155] In other words, it at least requires that the reasons expressed by participants be part of the *explanandum*.[156]

Smith then further argues that only an explanation offered in terms of "legal" or "recognizably legal" reasons will be capable of satisfying this

[151] Smith argues that Weinrib's methodological discussion suggests Weinrib adopts the strong version of the requirement but that his substantive theorizing suggests a looser requirement. See Smith, supra note 6, at 27 n.37.

[152] Smith distinguishes "interpretive" theories from historical, descriptive, and normative theories of law. See id. at 4. I suspect these distinctions, like methodological versions of the internal/external distinction, are also best understood as efforts to insulate a particular theory from attack, but I leave that issue aside for now.

[153] Id. at 13–14.

[154] Id. at 24–25.

[155] Id. at 28.

[156] Cf. Taylor, supra note 140, at 196 (arguing that "to give a convincing interpretation, one has to show that one has understood what the agent is doing, feeling here" and that the agent's "action/feeling/aspirations/outlook in his terms constitutes our *explanandum*").

transparency criterion. Put another way, it must be an explanation which, "once translated into concrete concepts, could be accepted by a court, even if no court has yet done so."[157] According to Smith, "efficiency-based" explanations of private law fail to satisfy the transparency criterion. Such theories "characteristically explain the law using concepts that are foreign to legal reasoning," such as by interpreting damage remedies as efforts to set incentives for efficient behavior, even though courts typically purport to issue them as a remedy for a past harm.[158] Such explanations are thus external and for that reason fail to satisfy the transparency criterion.[159]

At least one scholar, however, has argued that efficiency theories can satisfy the transparency criterion. Professor Jody Kraus maintains that Smith's interpretation of the transparency requirement wrongly assumes that the moral terms that courts use in their opinions (for example, duty, right, breach, etc.) retain their plain (deontic) meaning.[160] In fact, though, these terms may have taken on a specialized (consequentialist) meaning over time. The reason they have done so is that the specialized meanings of these terms are more determinate in their application, which would make such meanings intuitively attractive to judges.[161] And that is true even if the judges are not fully aware of how the meanings of the words have changed, and even if, were they to be made explicit, the judges themselves might reject them.[162]

The important point here is not that Kraus's interpretation of tort and contract law is a better one than Smith's. It may not be. Rather, the point is that that issue ought to be settled through interpretive argument, where the court's language is part—but only part—of the data to be interpreted.[163] Other considerations relevant to such an interpretation might include: the social and economic consequences of the decisions, the process by which judges are selected and trained, the social or political

[157] Smith, supra note 6, at 30.
[158] Id. at 31.
[159] Id.
[160] See Jody S. Kraus, Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 Va. L. Rev. 287, 299 (2007).
[161] See id. at 332.
[162] See id. at 301.
[163] Cf. R.P. Dore, Function and Cause, *in* The Philosophy of Social Explanation, supra note 143, at 65, 76 (observing that the concepts which members of a society have and use are "part of the *data* of sociology" so that "[h]aving a concept of marriage is (though normally less easily observed) as much an event in society as having a quarrel with one's wife and susceptible of the same kinds of questions and explanations").

context in which the decision was issued, and any other factor that seems relevant to an inquiry about what factors best explain why judges decide cases the way they do.

At times, Smith seems to acknowledge exactly this point. He suggests, for instance, that functionalist accounts could in principle satisfy the transparency criterion, but he nevertheless insists that any such view would be implausible on its face. "[I]t seems implausible," he asserts, "in light of their training and sophistication, that all or even many judges are in the grips of a collective false consciousness—and if it were plausible, then it seems likely that legal theorists would be in the grip of similar forces."[164] So perhaps Smith would agree that Kraus has shown that such an account can be made less implausible. If so, then Smith's demand for an internal account is shown to be less dogmatic, but only at the cost of exposing its superfluity. For if the acceptability of the account depends on its overall plausibility, rather than its fidelity to an internal perspective, then what work is the internal/external distinction doing except to stack the deck in favor of the view that the judges are Gen-Genuine Rule Followers?

c. Weak Version

An answer to that question may be suggested by yet another effort to use Hart's methodological understanding of the internal point of view to criticize instrumental or functional accounts of private law. Professors Goldberg and Zipursky suggest that if one adopts Hart's "internal point of view" (that is, the "Participant Perspective" in our terms), one will see that judges take the duties in tort law seriously as genuine duties, not as mere policy conclusions, as economists often allege.

In so doing, they at times seem to be endorsing the strong version for the distinction, criticized above.[165] At other times, and more plausibly, they argue, in effect, that one must understand the language employed by courts to properly know what requires explaining. The methodological lesson one should take from Hart, under this view, is that "the appropriate first move in an effort to theorize a subject is to work with, rather

[164] Smith, supra note 6, at 28.

[165] See, e.g., Goldberg & Zipursky, supra note 13, at 1579 (suggesting that Hart's work "encourages us to take the language of tort law at face value—to resist the common impulse among law professors to say, 'When a judicial opinion uses the legal term *X* (duty, foreseeability, cause, etc.), it is *really just* saying that, for reasons of policy or principle, liability ought or ought not to attach in this case'").

than dismiss as empty, the ways in which those acting within a practice make sense of it."[166] After all, "it is entirely possible for tort law to be what it appears to be," so that "[t]he proof of the skeptical thesis will have to be in the pudding."[167]

Notice how much weaker this claim is than the strong version we saw in Weinrib. There, the claim was that in order to understand tort law, it was *necessary* to take the Participant's Perspective of it. Now, the claim is only that it is *possible* that that perspective gives the best account of tort law. Just as Smith does, then, Goldberg and Zipursky seem to acknowledge that whether the Participant Perspective or some Non-Participant Perspective offers the best way to understand tort law ultimately depends on the success of the interpretations of the practice that each offers—the proof must be "in the pudding."

And that seems exactly right.[168] But that just shows (once again) that all the talk about the importance of the internal point of view as a *methodological* criterion is really a sideshow. What is, and ought to be, at issue is whether an interpretation which explains tort doctrine on the assumption that common law judges are Genuine Rule Followers is more or less plausible, in any particular doctrinal context, than an account that interprets them to be Instrumental Rule Followers (where what is instrumentally considered is how well the rules achieve such social and economic goals as the compensation of innocent plaintiffs or the deterrence of unreasonably risky conduct). And that is an issue that can be resolved only through substantive, interpretive argument.[169] Of course, some interpretations will rely more heavily on the consequences of the decisions than the rationales that courts have articulated for them, and some will reverse that priority. But that is true of any interpretive dispute; different interpretations emphasize the significance of different factors.

[166] Id. at 1577.

[167] Id.

[168] Goldberg and Zipursky do suggest that the skeptics "bear the burden of making that showing," but read in context, it is clear that they mean something like a burden of production, rather than a burden of persuasion. Id. at 1577. So it is not that the deck is stacked against the Non-Participant Perspective, but rather that they have just not made their case yet. This response acknowledges that the issue turns on the substantive interpretations of the relevant doctrines.

[169] I take this to be what Professor Kraus has in mind when he pleads, in response to Smith's imposition of various methodological criteria, that "the case should be decided on the merits by the jury, not summarily dismissed by philosopher judges for its failure to state a philosophically respectable claim." Kraus, supra note 160, at 359.

Indeed, perhaps the best evidence of this point is the fact that all of the theorists discussed in this section—Weinrib, Smith, and Goldberg and Zipursky—have offered (to my mind, sometimes quite persuasive) substantive criticisms of economic explanations of particular tort and contract doctrines, showing why they fail to explain particular rules or doctrines.[170] It is true that when they do so they often rely on the language that courts use, but they need not bolster in advance the significance of such language by attempting to privilege the internal perspective.[171] Rather, as the tort doctrine asserts, res ipsa loquitur.

2. Non-Participant Perspectives

Nor is such methodological tolerance and agnosticism a vacuous position. Some have held the mirror image of the strong version of the Participant Perspective approach described above, denying the possibility of offering an adequate explanation in terms of the reasons or purposes that the actors themselves put forth. They have insisted upon the need for an external perspective of legal phenomena. Meantime, others have offered a very different, and less demanding, justification for sticking to a Non-Participant Perspective. Let us first consider the stronger claim.

a. Sociological Accounts

According to a long tradition in sociology, dating back to Emile Durkheim, properly scientific explanations of social phenomena cannot be offered in terms of the reasons or purposes that individuals themselves offer for their behavior.[172] The reason is that the "social facts,"

[170] See, e.g., Smith, supra note 6, at 31; Weinrib, supra note 13, at 5; John C.P. Goldberg & Benjamin C. Zipursky, The *Restatement (Third)* and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657, 662–63 (2001).

[171] Cf. Schauer, Limited Domain, supra note 107, at 1913 n.15 ("Whether the internal point of view is necessarily a more accurate account of the nature and functions of an institution is an open question, and it is not clear that legal insiders like lawyers and judges can provide a 'better' account of law than can those who observe it from outside or who are affected by its outputs. . . . [T]here is no a priori reason to believe that an insider's account of an institution is necessarily more accurate, and thus should be more privileged, than an outsider's account.").

[172] This is not to suggest that all sociological accounts take this Durkheimian approach. Max Weber's emphasis on the importance of understanding (or *verstehen*) when engaging in sociological inquiry represents another important strain in sociological thought. See Max Weber: Selections in Translation 18–19 (W.G. Runciman ed., E. Matthews trans., 1978) [hereinafter Weber, Selections] ("In the case of 'social systems' (as opposed to 'organisms') we are in a position, not only to formulate functional interrelations and regularities (or

which form the subject matter of sociology, refer to collections of individuals and so are greater than (and hence external to) any particular individual.[173] These social facts can then only be explained by reference to the function they serve in a given society. According to Durkheim, "social life should be explained, not by the notions of those who participate in it, but by more profound causes which are unperceived by consciousness."[174] Indeed, this was precisely the kind of view that Winch was so concerned to oppose in stressing the importance of the Participant's Perspective.[175]

Although less popular today in the legal academy than it once was, such a methodology has had an influence in legal theory. Richard Abel gave expression to something like this view in an article in which he invoked a protoversion of the internal/external distinction, which distinguished between "law books" and "books about law."[176] Even more provocatively, Donald Black has offered a theory of law, which he labels "pure sociology," in which he purports to eliminate people entirely from the picture.[177] Properly understood, Black explains, the subject matter of

'laws'), but also to achieve something which must lie for ever beyond the reach of all forms of 'natural science' (in the sense of the formulation of causal laws governing events and systems and the explanation of individual events in terms of them). What we can do is to 'understand' the behaviour of the individuals involved, whereas we do *not* 'understand' the behaviour of, say, cells.") Whether the goals of understanding and scientific explanation are in fact different goals entirely is a question considered below. See infra Subsection III.B.3.

[173] Emile Durkheim, The Rules of Sociological Method 134 (Steven Lukes ed., W.D. Halls trans., 1982) ("The determining cause of a social fact must be sought among antecedent social facts and not among the states of the individual consciousness." (emphasis omitted)).

[174] Winch, supra note 76, at 23.

[175] Id.

[176] Richard L. Abel, Law Books and Books About Law, 26 Stan. L. Rev. 175, 207 (1973) ("[W]e all find it difficult to avoid telic expression completely, for ordinary language and thought are filled with characterizations of purposive behavior. But it is vitally important to recognize that the attribution of purpose is rationalization, not scientific explanation."). Abel is careful to criticize the teleological tendencies in sociology itself as well. See id. As I note below, there is another, more plausible interpretation of Abel under which he makes a different charge against "law books." See infra note 199.

[177] Donald Black, The Epistemology of Pure Sociology, 20 Law & Soc. Inquiry 829, 849 (1995) [hereinafter Black, Pure Sociology]; see also Donald Black, The Behavior of Law 7 (1976); Tamanaha, Socio-Legal, supra note 124, at 1260 (discussing Black and characterizing him as a positivist (in the social-scientific sense of that term)). It should be noted, however, that Black's views are eccentric and well outside the mainstream of sociology—a fact which he relishes and takes as evidence of his theory's revolutionary quality. See Black, Pure Sociology, supra, at 865–68 (comparing his views to those of Darwin, Galileo, and Copernicus and observing that "[b]ecause they challenge reality, the greatest innovations in science may seem insane—'crazy' or 'wild'—when they first appear"). For a devastating cri-

sociology is social reality, which "has no thoughts, no feelings, and no attitudes. It is not located in human heads. It is *external*, beyond the individual, beyond subjectivity, beyond mind."[178]

At least two problems plague such approaches. First, as others, including Winch, have pointed out, by failing to take seriously the participant's experience as even the "first move in an effort to theorize a subject,"[179] they end up changing the subject. Thus, for instance, Black uses an understanding of "law" that is hardly recognizable to most lawyers.[180] Second, they make nearly the parallel error to the strong version of the Participant Perspective. Whereas that view ruled out other methods by denying the existence of a reality beyond the participant's own language, this view excludes any method that does not refer to a reality beyond our consciousness—a reality which we cannot see, feel, or touch.[181]

Of course, none of this is to deny that, so long as they first understand the Participant's Perspective at least enough to know what they need to explain, such sociological or functional explanations might be the most successful ones. It is only to say that the proof of their correctness, as with the Participant Perspective accounts, should be found in the substantive explanations they offer, rather than in a prior commitment to the particular social ontology underlying it.

tique of Black's overall project, see Douglas A. Marshall, The Dangers of Purity: On the Incompatibility of "Pure Sociology" and Science, 49 Soc. Q. 209, 217 (2008).

[178] Black, Pure Sociology, supra note 177, at 848 (emphasis added).

[179] Goldberg & Zipursky, supra note 13, at 1577.

[180] Marshall, supra note 177, at 217 (criticizing Black for "redefining 'law' as the amount of 'governmental social control' as measured by the number of calls to the police, etc. such that one can speak only of greater or lesser amounts of it," which has the consequence of placing "fundamental questions about it firmly beyond the reach of the theory," thereby "overlook[ing] the most significant and interesting questions in the sociology of law"). Winch made a comparable point about Durkheim, observing that it was only because Durkheim adopted a definition of "suicide" different from the one commonly used that he was able to dismiss as causal factors the "conscious deliberations" of those who commit suicide. Winch, supra note 76, at 111; see also MacIntyre, supra note 143, at 26 (making the same point).

[181] See Marshall, supra note 177, at 216 ("If Black . . . genuinely believes that 'law' and 'social location' possess an ontological status equal to that of people, it is incumbent upon him to a [sic] verify this, not just to postulate them into existence."); cf. Durkheim, supra note 173, at 129 ("[E]very time a social phenomenon is directly explained by a psychological phenomenon, we may rest assured that the explanation is false."); MacIntyre, supra note 143, at 23 (contrasting the views of Winch and Durkheim).

In short, what seems wrong with both the strong version of the internal Participant Perspective approach and this (equally strong) version of an external Non-Participant Perspective approach is the fact that neither allows for the banal possibility, which common-sense reflection and experience press upon us, that sometimes things really are as they appear, but other times they are not.

b. Intentional (Instrumental) Accounts

Another view, more common today in legal theory than the sociological methods just discussed, accepts such a common-sense premise but still defends theorizing about social phenomena using fixed assumptions about human motivations. The claim here is that, since all scientific theorizing requires making certain assumptions, there is no shame in making somewhat artificial ones, even ones known to be false.[182] The justification for relying on such assumptions lies entirely in the predictive success of the theories that incorporate them. Economists sometimes justify their assumption that individuals always rationally pursue their self-interest on this ground.[183]

This methodological defense is weaker than the sociological version just considered because it purports not to depend on controversial epistemological or metaphysical claims.[184] It does not deny the possibility that other kinds of theories resting on other assumptions may prove more successful; it just insists upon the legitimacy of relying on its own assumptions. Still, this view gives the theorist a reason to employ a particular method of analysis that makes certain assumptions about human behavior, at least insofar as the theorist purports to be applying that method.

This view might explain why Professors Posner and Vermeule see deep methodological inconsistency in the efforts of those scholars who first make use of political-scientific models that assume political actors

[182] Often the analogy employed is to the physicist's assumption of a frictionless plane. See Hollis, supra note 139, at 56.

[183] The classic article defending this view is Milton Friedman, The Methodology of Positive Economics, *in* The Philosophy of Economics: An Anthology 145, 164 (Daniel M. Hausman ed., 3d ed. 2008).

[184] Indeed, under some interpretations, it makes no ontological claims at all. See Daniel M. Hausman, Introduction *to* The Philosophy of Economics: An Anthology, supra note 183, at 1, 6 (characterizing a view like the one described as "instrumentalist" in that those who employ it "regard the goals of science as exclusively practical" and locate the importance of theories "exclusively in their role in helping people to anticipate and control phenomena").

rationally pursue their own self-interest (thereby adopting the external perspective), only to then turn around and offer advice to judges, presumably on the assumption that they will act in the public interest by following the norms of their institution (thereby adopting the internal perspective).[185] Whereas earlier we suggested that the inconsistency was merely a substantive, empirical one, now the claim would be that, for the positive political theorists who build the models on which the legal theorists are relying, it is not an empirical question at all. It is, rather, a foundational assumption for theory construction.[186]

But this response only kicks the can farther down the road. That is, *ultimately* the test of success for positive theories of political behavior must lie in their predictive power.[187] So if, as Posner and Vermeule suggest, a positive political theory assumes that judges seek to maximize their own power, then one should be able to test that assumption in different contexts. Thus, it should be an open possibility (as some political scientists have been arguing) that some more complex assumption about how judges perceive their self-interest—one which factors into it their desire to adhere to professional and institutional norms—might have greater predictive power.[188] If that is the case, then taking a rational-choice approach to studying legal actors does not commit one to the

[185] See Posner & Vermeule, supra note 10, at 1744.

[186] See id. at 1746 (comparing the fallacy they recognize to one economists have observed when economists "endogenously derive the behavior of officials from standard economic postulates, usually by assuming that officials are both rational and self-interested" but then go on to give advice to those government officials on the assumption that they will not act in their rational self-interest).

[187] See Friedman, supra note 183, at 146 (observing that positive economics "is to be judged by the precision, scope, and conformity with experience of the predictions it yields").

[188] See Fallon, Constraints, supra note 100, at 978 & n.16 (collecting sources and noting that "[a] number of political scientists, especially those described as 'new institutionalists,' acknowledge and indeed emphasize the significance of felt normative obligations—many if not most of which arise from a sense of institutional role—as an important consideration motivating judicial decisions"); Thomas M. Keck, Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?, 101 Am. Pol. Sci. Rev. 321, 321 (2007) (finding that in a category of cases in which the Supreme Court reviewed federal statutes, "much of the Court's decision making . . . was animated by four concerns that had little resonance in legislative politics during this same period," including, for example, "the Constitution's horizontal and vertical divisions of lawmaking power"); Keith E. Whittington, Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics, 25 Law & Soc. Inquiry 601, 612 (2000).

view that judges are always Instrumental Rule Followers—or at least not in the sense that we have used that term.[189]

Under this view, then, the inconsistency that Posner and Vermeule identify is indeed methodological, but it is still only prima facie—something that could be solved by simply clarifying and refining one's assumptions about the motivations of institutional actors.[190] Once again, then, it is not clear what is gained by conceptualizing it as a conflict between two different "perspectives" of the analyst. Insofar as the goal is to explain legal phenomena, the question is simply which set of assumptions about judicial motivations is most successful at predicting case outcomes.

3. Summary and Two Objections

This Part has taken up and evaluated the first of two methodological versions of the internal/external distinction. It has not denied that there are differences among the various methods considered in terms of the degree to which they rely on the participants' own understandings of

[189] See Ferejohn, supra note 30, at 284 ("[I]t seems to me that positive theory is not committed to any form of legal realism. Legal actors may well, instead, pursue visions (interpretations) of what law requires that are not rooted in social or economic facts in the reductive way that most versions of realism envision."). For an example of such a study, see Michael D. Gilbert, Does Law Matter? Theory and Evidence from Single-Subject Adjudication, 40 J. Legal Stud. 333, 355–56 (2011) (concluding, on the basis of an empirical study conducted within a broadly rational-choice framework, that in cases involving the "single-subject rule," measures of law strongly predicted judicial votes). I include the qualification at the end of the sentence in the text because we have used the term "instrumental" to describe the external point of view typified by Holmes's Bad Man, who is indifferent to the intrinsic value of obeying the law. See Cooter, supra note 124, at 1275, 1281 (explaining that in economic terms the external point of view describes "[a] person who is indifferent to a legal obligation" and who "takes a purely instrumental approach towards obedience—he obeys only when doing so secures something else of value"). But one might argue that, insofar as rational-choice theories assume that people make decisions that balance costs and benefits, they may necessarily characterize even Genuine Rule Followers as instrumental reasoners in a deeper sense. In either case, it is clear that Hart did not rule out the possibility that those who adopt the internal point of view do so for ultimately instrumental reasons. See Hart, Concept, supra note 13, at 203 (explaining that those who "accept the system voluntarily" may do so for a variety of reasons, including "calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do").

[190] Posner and Vermeule acknowledge something like this point but then insist that this possibility is empirically implausible—a response which suggests, once again, that the underlying disagreement is ultimately an empirical one—a possibility discussed supra Part II. See Posner & Vermeule, supra note 10, at 1757.

their actions. But it has argued that efforts to privilege one perspective to the exclusion of others come at the high cost of demanding acceptance of some deeply controversial philosophical assumptions. Therefore, the better approach is to judge the various methods by their fruits, namely, the explanations they produce. Nor is it the case, I have suggested, that taking an economic or rational-choice method of analysis necessarily entails a conclusion that judges are Instrumental Rule Followers. At best, then, this version of the internal/external distinction does little work and is thus rendered superfluous; at worst, it loads the dice in favor of particular substantive conclusions.

Still, my analysis prompts two objections, each of which suggests that the methodological internal/external distinction may be justified as one that usefully distinguishes between different scholarly *goals*. The first objection sees the kinds of theories just considered as having quite different (but not necessarily incompatible) *theoretical* ambitions[191]: The first (internal) approach seeks a kind of self-understanding or *verstehen*.[192] The goal of those who employ this approach is to "make sense" of the practice by offering an explanation in terms of *reasons*, thereby rendering it "intelligible."[193] They thus deploy a philosophical or hermeneutical form of inquiry, which focuses on interpreting the concepts that figure in the practice. The second and third (Non-Participant) Perspectives, meanwhile, pursue more traditionally "scientific" aims in that they seek to offer explanations in terms of *causes*; or, at the very least, they use empirical methods to make predictions about the world so that we might improve our ability to control the natural and social

[191] See Tamanaha, Internal/External, supra note 13, at 166–68 (describing the internal/external distinction in the context of long-running debate between interpretive and positivistic theories of social science).

[192] *Verstehen* is simply the German word for "understanding," but it has come to be used to describe the aim of interpretive theories of social science, at least since Weber discussed it in those terms. See Weber, Selections, supra note 172; see also Hollis, supra note 139, at 147 (distinguishing between explaining (*erklären*) and understanding (*verstehen*) and crediting the distinction to himself).

[193] See, e.g., Smith, supra note 6, at 13–14 ("To understand a human practice—to make it intelligible—it is necessary to understand what the participants in the practice think they are doing. In other words, it is necessary to understand how the practice is regarded internally."); Weinrib, supra note 13, at 2–3 (explaining that his approach treats law as an "internally intelligible phenomenon by drawing on what is salient in juristic experience and by trying to make sense of legal thinking and discourse in their own terms").

world.[194] Other Non-Participant Perspectives, not surveyed above, such as those that offer explanations either in terms of unconscious biases or in neurobiological terms, use comparable empirical methods to pursue traditionally scientific goals. Under this view, then, the methodological version of the internal/external distinction captures and describes these quite different theoretical ambitions and divergent understandings of what it means to "explain" something.[195]

There are two responses to this objection. The first is just to observe that those engaged in the debates in which this version of the internal/external distinction arises see themselves as engaged in genuine disagreement with those who take the opposing view. They seem to be disagreeing, for instance, about what a court is doing when it issues a damages remedy, or why courts decide constitutional cases the way they do. Nor is this point undermined by the fact that the participants in these debates sometimes disagree about the proper criteria for evaluating the success of a theory.[196]

The second, deeper response is a possible explanation of the first one. I suggested earlier that the Participant Perspective theorists are right to insist that one must at least understand the participant's perspective enough to take it as something requiring explanation, even if the expla-

[194] See Abel, supra note 176, at 192 ("Both narrative history and functional contextualism aim at description, not explanation. They depict the unique event or phenomenon; they do not seek to subsume it as an instance of a more general law."). In lumping together the Non-Participant Perspectives above, I am ignoring an important distinction between realist and anti-realist understandings of scientific (including social-scientific) theories. See Daniel M. Hausman, Introduction *to* The Philosophy of Economics: An Anthology, supra note 183, at 1, 6 (characterizing Friedman's understanding of science as an instrumental, anti-realist one); Ernest Nagel, Assumptions in Economic Theory, *in* The Philosophy of Social Explanation, supra note 143, at 130, 130 (criticizing Friedman's essay for its apparently skeptical implications about the (in)capacity of economic theory to describe the world).

[195] Hollis, supra note 139, at 259 (suggesting, after reviewing the hermeneutic and empiricist traditions in social science, that "[w]e seem left only with narratives, causal or interpretative, which belong to local, historically particular discourses and defy all prospect of finding a meta-narrative to judge them by," but then ultimately rejecting that conclusion); cf. Moore, Causation, supra note 31, at 1124 (explaining that "[a]ccording to the linguistic dualism of the 1950's and 1960's, there are two different categories of concepts: (1) concepts of intention, choice, and action; and (2) concepts of motion and mechanistic cause," so that, under this view, there was "no contradiction" between explanations offered in terms of mechanistic causes and those offered in terms of intentions and human actions).

[196] Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model: The Authors Respond, 4 Law & Courts no. 1, 1994, at 10, 10 (criticizing proponents of the "legal model" of judicial behavior for offering theories of judicial decisionmaking that cannot predict outcomes and for that reason "explain nothing" (emphasis omitted)).

nation ends up showing that that perspective is a result of deception or self-deception. But *all* of the theories that could plausibly be put on one side of the internal/external divide or the other—whether conceptual or "interpretive" theories about the nature of law in general (or private law in particular); rational-choice models of political behavior; historical explanations of past decisions; sociological theories about the social function that particular rules or institutions serve; psychological theories about the role of unconscious biases in decisionmaking; and even neuroscientific theories that explain certain kinds of judgments in neurobiological terms—have the possibility of themselves *affecting* that self-understanding (that is, the Participant Perspective).[197] In other words, people may come to think of their own behavior in sociological, game-theoretical, or neurobiological terms. And if such self-understandings are possible, then to assume at the outset that offering causal explanation is a theoretical aim different in kind from that of seeking self-understanding is to beg the question as to whether a particular form of inquiry will lead to increased self-understanding.[198]

[197] See Hollis, supra note 139, at 128 (discussing how game theory was used to understand Cold War nuclear policy and observing that "[h]ere is a case where the ideas which social scientists put into the heads of agents shape the very world which the social scientists are trying to analyse" and suggesting that such examples "give[] reason for thinking not only that the agents' understanding is relevant to the social scientists' explanations but also that, being the stuff of the social world, it sets them a profound methodological challenge"); 2 Charles Taylor, Social Theory as Practice (1983), *reprinted in* Philosophy and the Human Sciences: Philosophical Papers at 91, 98 (1985) (distinguishing between social science and natural science on the ground that "the alternation in our understanding which theory brings about can alter these practices"); cf. Alan Ryan, Introduction *to* The Philosophy of Social Explanation, supra note 143, at 1, 9 (observing that a problem plaguing social science, but not natural science, is that its predictions may become either self-defeating or self-confirming).

[198] Cf. Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions, 4 Harv. L. & Pol'y. Rev. 149, 149–50 (2010) (stating that although the author had thought he was free of implicit racial bias he concluded from an online test that he suffered from it, and making doctrinal recommendations on the basis of the conclusion that such bias is indeed widespread in jurors, lawyers, and judges). Of course, this possibility is particularly likely if the findings of social science are used to change institutional structures. See Patricia M. Wald, Last Thoughts, 99 Colum. L. Rev. 270, 270 (1999) (criticizing a proposal to require that all appellate panels include at least one Republican and one Democrat on the ground that judges are sensitive to the expectations of their role: "Emphasize to a judge that she must act independently and she will likely try to do that; tell her she is two-thirds or one-third of a bipartisan panel and has been selected to fill that role, it is far likelier that politics will bleed into her decisionmaking").

The second objection asserts that the difference between the two perspectives is not that between seeking distinct *theoretical* goals at all, but rather the difference between seeking theoretical goals (whether understanding or explanation) and pursuing *practical* goals. Precisely because the stakes are so high when it comes to theorizing about law, we may better characterize the internal perspective as one that is committed to, or invested in, legal practice in a way that external theories are not. Their goal is thus to advance, rationalize, or legitimize legal practice, not to understand or explain it.[199]

This suggestion offers a very different way of drawing the internal/external distinction. It also happens to be the most common way scholars invoke the distinction these days. The contrast drawn is one between the *practical* aims and methods of law and the more genuinely *theoretical* or scholarly goals of disciplines. So it is to that last version we now turn.

IV. DISTINCTION (3): PARTICIPANT VERSUS SCHOLAR

The third and final version of the internal/external distinction distinguishes between, on the one hand, forms of scholarly inquiry that rely on and endorse norms and values of legal practice in order to make practical arguments (internal) and, on the other hand, those forms of scholarly inquiry whose aims are primarily theoretical, explanatory, or critical (external). The difference is sometimes analogized to the contrasting ways that Christian dogma would be treated in a divinity school as compared to a Religious Studies department.[200] The use of this version of distinc-

[199] Both Friedman and Abel, for instance, suggest this contrast in the distinctions they draw. Friedman suggests that he and Herzog may be at cross-purposes, because "we come out of different intellectual traditions and are engaged in different enterprises." Friedman, supra note 127, at 163. He is not writing a book, he explains, "on legal doctrine, or legal philosophy, or an assessment of legal rules and behaviors from a normative standpoint." Id. Meantime, Abel defines "law books" as efforts to organize and rationalize legal doctrine, whereas "books about law" adopt methods from the humanities and social sciences and have "objectives . . . outside the legal system." Abel, supra note 176, at 175–76; see also id. at 176 ("Neither legal training nor professional competence is adequate qualification to write about the legal system . . . . This is not to deny that practice of a professional skill permits unique insight into the skill, but understanding is a different matter.").

[200] Balkin & Levinson, supra note 6, at 162 ("The division between internalist and externalist attitudes about law is analogous, in some respects, to the question whether a law school is more like a divinity school, on the one hand, or a department of religion on the other."); Trubek, supra note at 587 ("The distinction is similar to that between theology and the sociology of religion. Theologians develop ideas about the world and humanity from within

tion, like the previous one, encourages scholars to assume at the outset what should properly be the conclusion of substantive argument. Here, though, the questions raised are not about how to best understand legal practice but rather what its proper ends or purposes include.

A. The Distinction(s)

This last distinction takes its inspiration from Dworkin, rather than from Hart. Whereas Hart's methodological target was the behaviorism of the realists, Dworkin's methodological targets were the CLS theorists who sought to use history, social theory, and doctrinal analysis to challenge the legitimacy of American legal institutions. As we saw, Dworkin contrasted the internal point of view of the participant in a social practice—which in the case of law, meant a *judge*—with that of an historian or sociologist who offers causal explanations of, rather than arguments for, legal practice.[201]

Once again, though, the basic distinction Dworkin drew can be, and has been, drawn in different ways and broadened in both directions.[202] Not only has what counts as an external approach been broadened to include virtually any other discipline, not just sociology or history, but which participant is taken as paradigmatically internal varies as well. Thus, this distinction is best stated in fairly broad terms:

> *Distinction (3): The Participant Versus the Scholar*. The Participant is the theorist who adopts the posture of a participant in legal practice who seeks to advance or defend legal practice, either by making practical arguments to improve it or by legitimizing its procedures or institutions (whereas the Scholar is the theorist who adopts the posture of an observer concerned with understanding or explaining, not endorsing or defending, legal practice).

an authoritative tradition. Sociologists of religion look at theological production from the outside, attempt to account for it, and try to trace its impact on society.").

[201] Dworkin, supra note 6, at 13.

[202] See, e.g., Posner, supra note 13, at 1314–15 (observing that before 1970 "the perspective from which academic legal scholars conducted their research and wrote up their findings was an internal perspective, and it was the internal perspective of the legal profession rather than that of the university").

B. The Distinction in Action: Uses and Abuses

In distinguishing between Participants and Scholars, those invoking this version of the internal/external distinction have had different understandings of both sides of the pairs. For some, Participants are legal advocates, for others they are judges, and for still others, they are law teachers. At the same time, the "Scholars" who have been distinguished from the Participants include political scientists, historians, philosophers, and neuroscientists. In each variation, though, the rhetorical function the distinction serves is to insulate controversial views about the nature and purposes of legal practice from challenge and to cabin scholarly debate generally.

1. Scholar Versus Advocate

The first variation characterizes the Participant as the legal advocate who strategically marshals evidence to support a conclusion already reached on other grounds. Something like this concern is what historians have in mind when they complain of "law-office history."[203] Dworkin, of course, would almost certainly *not* have endorsed this version, since for him the internal perspective is that of a judge who tries in good faith to understand what the legal materials require him to do. Nevertheless, some seem to have embraced it as a virtue of legal scholarship. Professors Goldsmith and Vermeule, for instance, defend "internal" legal scholarship from an attack by "external" political scientists on the ground that, even if individual articles are tendentious and poorly reasoned, in the aggregate, they may result in approximations to truth—for much the same reason that the adversarial method is thought (by some) to produce just judicial outcomes.[204] In their view, because such scholars are "playing a different game" than are empiricist political scientists, they remain immune from the latter's methodological criticisms.[205]

Whether this characterization of legal scholarship is an accurate one is at least in part an empirical question that I am in no position to disprove. Suffice it to say, however, that it is a characterization of legal scholar-

[203] Balkin & Levinson, supra note 6, at 165 (observing that "a familiar criticism of lawyers, whether or not they are originalists, is that they engage all too often in what is called 'law-office history'—mining the historical record to support their favored legal conclusions").

[204] Goldsmith & Vermeule, supra note 6, at 153–56.

[205] Id. at 153.

ship that I suspect few legal scholars would endorse. It is precisely because most recognize a tension between the roles of lawyer and scholar that some have recently debated the ethical questions involved in joining and writing amicus briefs, where the two roles seem to be blurred.[206] And although Professors Goldsmith and Vermeule defend the "tendentiousness" of much legal scholarship in principle, I suspect that each of them tries hard to use evidence honestly and reliably and to employ sound reasoning in his own work. Finally, even to the extent the charge is accurate in some cases, legal scholars hardly have a monopoly on results-driven research.[207]

In short, to accuse a scholar of acting as an Advocate, rather than a Scholar, amounts to attacking that person's scholarly integrity. That does not mean such an accusation is never justified, but it does mean that showing that it is justified requires careful argument based on the particular work at issue. When employed in this way, it is a (particularly incendiary) substantive conclusion, not a conceptual tool for explaining methodological disputes.

2. Scholar Versus Judge

More commonly, the "internal" perspective is understood to describe a scholar who adopts the posture of the (typically appellate) *Judge*. As we have seen, this was Dworkin's understanding, and it can be intuitively grasped by seeing it as one that describes the kinds of arguments that a lawyer would plausibly include in a legal brief. Here the claim is that certain legal assumptions or conventions render particular kinds of evidence or arguments "external" to judicial concerns, so that courts—or those who argue or testify before them—should properly ignore such ev-

[206] Compare Richard H. Fallon, Jr., Scholars' Briefs and the Vocation of a Law Professor, 4 J. Legal Analysis 223, 227 (2012) (suggesting that law professors sometimes compromise their scholarly integrity when they lend their names to amicus briefs that do not meet traditional scholarly standards), with Amanda Frost, In Defense of Scholars' Briefs: A Response to Richard Fallon, 16 Green Bag 2d 135, 147 (2013) (arguing that signing onto amicus briefs which make "reasonable arguments" that move the law in a direction closer to a scholar's own policy views is an "ethically defensible goal for any law professor seeking to influence a court," even if "there are competing arguments that are a better fit with existing precedent and other authorities").

[207] Robert J. MacCoun, Biases in the Interpretation and Use of Research Results, 49 Ann. Rev. Psychol. 259, 261 (1998) (observing that "there is no shortage of politicized research topics [in the empirical social sciences], where the motives of researchers and the interpretation of their findings are fiercely disputed").

idence and argument. The problem with this approach is that it ends up assuming, rather than arguing for, conclusions about what is and what is not properly something of judicial concern. Two examples illustrate this point.

a. Precedential Authority and "External History"

The first example comes from an exchange between Justices of the Supreme Court.[208] In the 1996 case of *Seminole Tribe v. Florida*, Justice Souter wrote a dissent that the majority considered outside the bounds of appropriate judicial conduct.[209] The case required the Court to decide whether the Eleventh Amendment barred Congress from abrogating state sovereign immunity. In holding that the Eleventh Amendment did provide states with such protection from suit, the Court defended its holding largely by deferring to the Court's previous interpretation of the Amendment in the 1890 decision of *Hans v. Louisiana* on the ground that the *Hans* Court had a "much closer vantage point" with which to determine the meaning of the Amendment.[210] In dissent, Souter, citing the work of legal historians, argued that *Hans* lacked authority because the *Hans* Court's decision was best explained as a result of the political pressure being exerted on the Court at the time and its own desire to preserve its institutional power in the face of that pressure.[211] Hence, Souter offered an (external) historical explanation in order to undermine the (internal) legal rationale for treating a particular past decision as authoritative.

In doing so, Justice Souter seemed to be engaging in precisely the kind of external inquiry appropriate for the Scholar but not the Judge. Chief Justice Rehnquist, writing for the majority in that case, lambasted Souter for his "extralegal explanation" of the Court's decision in *Hans*, which did a "disservice to the Court's traditional method of adjudication."[212] This reaction tracks perfectly the distinction Dworkin himself drew. Recall Dworkin's insistence that the historical critiques of CLS historians "reflect a serious misunderstanding of the kind of argument

[208] I have developed the critique below in a fuller, but slightly different, way, in Charles L. Barzun, Impeaching Precedent, 80 U. Chi. L. Rev. 1625 (2013) [hereinafter Barzun, Impeaching].

[209] Seminole Tribe v. Florida, 517 U.S. 44, 68–71 (1996).

[210] Id. at 69.

[211] Id. at 121 (Souter, J., dissenting).

[212] Id. at 68–69.

necessary to establish a skeptical position: *the argument must be interpretive rather than historical*."[213] What the Judge wants, he insisted, are arguments about how they should determine people's legal rights and duties.[214]

But Justice Souter clearly considered the history surrounding *Hans* to be relevant to how he should determine legal rights and duties, so it is worth asking why he might have thought so. Here the contrast we have drawn among the various internal/external distinctions proves helpful. The political explanation of the *Hans* decision is indeed an external account insofar as it interprets that Court as being Instrumental Rule Followers, rather than Genuine Rule Followers (Distinction (1)).[215] But that fact does not imply that Souter's *use* of that historical explanation as a form of argument is relevant only to the Scholar and not the Judge (Distinction (3)).

The idea that such historical explanations are literally irrelevant to the decisions courts make may appear to derive support from the comparison to moral argument, where offering the genealogy of a moral view as a way to refute it is sometimes dubbed the "genetic fallacy" because of its inability to engage with the merits of the position.[216] What this view ignores, however, is that legal argument typically involves reliance on *authoritative* sources in a way moral argument does not. This feature of legal argument means that, when a court must decide whether or in what way it ought to give authoritative weight to a legal source, it might rationally be concerned with the circumstances under which the authority issued the relevant rule or directive.[217] If, for instance, one had reason to think that the authority's judgment was clouded or corrupted in some

[213] Dworkin, supra note 1, at 273 (emphasis added).

[214] Id. at 13.

[215] See supra Part II.

[216] Dworkin devotes substantial attention to defending this view in his later work. See Ronald Dworkin, Justice for Hedgehogs 69–87 (2011). But even in the moral context this view is controversial. See, e.g., Richard Joyce, Irrealism and the Genealogy of Morals, 26 Ratio 351 (2013) (surveying various "debunking" arguments that purport to undermine morality by tracing moral judgments to their evolutionary arguments, and endorsing one such debunking argument).

[217] In *Seminole Tribe*, this point was demonstrated by the Chief Justice's suggestion that the *Hans* Court had a "much closer vantage point" from which to interpret the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 69.

way, that would be a reason not to defer to it.[218] Indeed, for just that reason, when a judge has a pecuniary interest in the outcome of some case, her refusal to recuse herself can amount to a due process violation.[219]

In other words, there are good "internal" reasons to be concerned with such "external" history. Insofar as a legal question requires a decision about the degree of deference properly attributable to an authority's directive, historical explanations about what motivated an authority to issue the directive it did may be directly relevant to the "merits" of the legal question.[220] Presumably in part because of this logic, Souter was not the first to have made an argument of this sort.[221]

True, for a court to use such historical arguments to "impeach" past decisions in this way is very rare.[222] But what kinds of inquiries courts are willing to take on can and do change, sometimes rapidly so.[223] For instance, for much of American history courts were reluctant to engage in inquiries about the motivations of a legislature in determining the constitutionality of a statute—even when those motivations were under-

[218] Joseph Raz, The Morality of Freedom 42 (1986) (using an arbitrator as an example of an authority and explaining that if "the arbitrator was bribed, or was drunk while considering the case . . . each party may ignore the decision").

[219] See, e.g., Tumey v. Ohio, 273 U.S. 510, 514–15, 523 (1927) (concluding that a defendant's due process rights were violated when he was convicted under the state's Prohibition Act by a mayor who presided over the case and who only received payment for his services if the defendant was convicted); see also Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872–73, 885 (2009) (holding that a judge's refusal to recuse himself from a case in which one of the parties had spent over $1 million more than either of the campaign committees on behalf of the judge's electoral campaign, and thus had "a significant and disproportionate influence on the [election]," constituted a violation of due process of law).

[220] I say "may be" relevant because if the reasons for treating past decisions as authoritative are exhausted by rule-of-law values, then such historical evidence is not relevant to the court's decision. But as I argue elsewhere, that is not a persuasive interpretation of the practice of constitutional precedential practice. See Barzun, Impeaching, supra note 208, at 1667–72.

[221] See id. at 1639–43 (discussing two other examples of this kind of argument aside from the one discussed in the text).

[222] I have used the word "impeach" to describe this kind of historical argument because of its structural similarity to the arguments that trial lawyers make when they try to show, through cross-examination, that a particular witness is biased or interested in some way. See id. at 1639.

[223] Dworkin himself acknowledges this fact. See Dworkin, supra note 6, at 89–90; see also Smith, supra note 6, at 29–30 (observing that legal practice is "an ever-changing practice: the concept of what counts as a possible legal argument evolves over time. Ideas that were once discussed only in law schools often eventually find their way into legal judgments").

stood to be relevant to the constitutional analysis.[224] Yet now that practice is viewed as uncontroversial.[225]

The point is not that courts should or should not look at historical evidence about either legislative or judicial motivations. There may be good reasons to cabin both inquiries. They may waste time because they require judges to consider sources of evidence which are sometimes not particularly probative on the issue one way or the other; or they may weaken respect for the legal institution whose motivations become the focus of judicial scrutiny.[226] And even if such historical explanations of decisions are considered relevant to a decision, they do not necessarily provide a *sufficient* basis for refusing to treat a past decision as authoritative. Ultimately, what matters is whether the past decision is likely to be correct, and making that judgment also requires looking at the past court's reasoning.[227] The quality of such reasoning serves as its own kind of evidence of whether the past court was doing its job properly.

Rather, the point is twofold: first, that the arguments for excluding or cabining such historical evidence require substantive normative (and perhaps empirical) arguments about how using such evidence would bear on the fairness, predictability, and administrability of adjudication;[228] and second, that our failure to even see the possibility of, or need for, such arguments stems from a similar kind of bootstrapping, earlier identified, that the internal/external distinction facilitates.[229] Once a historical explanation is deemed "external" in the substantive sense, it is

[224] Caleb Nelson, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1784, 1798–99 (2008).

[225] Id. at 1784; see, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (holding, in the context of Equal Protection Clause analysis, that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"). Nor does Dworkin seem to think such an inquiry is problematic. Dworkin, supra note 6, at 14 (using the circumstance where the constitutionality of a statute depends on the motivations of the legislators as one example where "the participant's point of view envelops the historian's").

[226] See Barzun, Impeaching, supra note 208, at 1672–78 (discussing these various objections to the use of such evidence in the context of arguments like Souter's).

[227] Indeed, for the reasons discussed in Part III, such an analysis is necessary in order to know what it is that the historical account is offered to explain.

[228] Or any other considerations relevant to an evaluation of our dispute-settlement procedures.

[229] As I have noted elsewhere, this question has gotten surprisingly little attention—surprising, that is, given how much attention legal scholars have devoted to studying "external" legal history. See Barzun, Impeaching, supra note 208, at 1626–33.

understood to be "external" in this latter methodological sense, and thus something with which courts need not concern themselves.

b. Criminal Law Excuses and "External" Critiques

The same problem recurs in an otherwise very different context. Here, too, the internal/external distinction has been used to encourage courts to treat as external to their proper concern a set of considerations that philosophical reflection (not to mention neuroscientific evidence) might suggest is indeed relevant to the issues courts face. The particular question at issue here is about what facts undermine criminal responsibility. More specifically, the issue is whether or when the fact that something beyond an actor's control *caused* her to engage in criminal conduct is sufficient to excuse her of legal responsibility for such conduct. Under one view—dubbed the "causal theory" of excuses—if a defendant can show that her actions were beyond her control, then she is not morally blameworthy and thus should not be held criminally liable.[230] This view conforms to many people's common-sense intuitions about the circumstances in which it is appropriate to blame someone for conduct—a fact even its critics sometimes recognize.[231]

One of the most vocal critics of the causal theory of excuses is Professor Stephen Morse. He has argued over several decades that the theory rests on what he calls the "fundamental psycholegal error," which refers to the claim that showing an otherwise criminal action to be caused by something other than the defendant's choice is per se an excusing condition.[232] In attacking the causal theory, Morse has made (at least) two sorts of arguments.[233] First, he has analyzed the particular excuses

[230] See, e.g., Michael Corrado, Addiction and Causation, 37 San Diego L. Rev. 913, 915 (2000); Anders Kaye, Resurrecting the Causal Theory of Excuses, 83 Neb. L. Rev. 1116, 1117 (2005). For arguments criticizing the theory, see Moore, Causation, supra note 31; Stephen J. Morse, Culpability and Control, 142 U. Pa. L. Rev. 1587 (1994) [hereinafter Morse, Culpability].

[231] See Moore, Causation, supra note 31, at 1092 (observing that "common sense urges that we should excuse whenever we come to know the causes of behavior and that to do so is the mark of a civilized being").

[232] Stephen J. Morse, Brain and Blame, 84 Geo. L.J. 527, 531 (1996) [hereinafter Morse, Brain] (describing the psycholegal legal error as "the mistaken belief that if science or common sense identifies a cause for human action, including mental or physical disorders, then the conduct is necessarily excused").

[233] Michael Moore, Stephen Morse on the Fundamental Psycho-Legal Error, Crim. L. & Phil. 1, 2 (2014) [hereinafter Moore, Morse], available at http://link.springer.com.proxy.its.virginia.edu/article/10.1007/s11572-014-9299-0 (observing that the following two arguments are the ones Morse has relied on most).

the law already recognizes—duress, involuntary intoxication, etc.—in order to show that they exculpate only when the defendant's rational capacity for decisionmaking is affected; even showing that the actor's conduct was caused entirely by something other than his own choice is not sufficient.[234] Second, he has argued that it cannot be the case that causation itself excuses because if it did, then, assuming universal causal determinism is true (as a modern scientific worldview would seem to entail), all criminal conduct would be excused, and there would be no room for criminal responsibility at all.[235] The conclusion of both of Morse's arguments is that the criminal law takes a *compatibilist* position on the question of free will. That is, in the eyes of the law, criminal responsibility is compatible with universal causal determinism.[236]

In arguing that the criminal law itself takes a particular stand on the issue of free will—one that enjoys popular, but far from universal, support among philosophers[237]—Morse seems to be acknowledging the relevance of such philosophical debates to legal interpretation. And indeed,

[234] See, e.g., Morse, Culpability, supra note 230, at 1611–34 (analyzing duress and "internal compulsion" excuses).

[235] Morse, Brain, supra note 232, at 532 ("All phenomena of the universe are presumably caused by the necessary and sufficient conditions that produce them. If causation were an excuse, no one would be responsible for any conduct, and society would not be concerned with moral and legal responsibility and excuse.").

[236] Morse, Non-Problem, supra note 6, at 204 (arguing that compatibilism "provides a secure foundation for current practice"). For an overview of the various positions in the philosophical debates over free will, see Free Will (Gary Watson ed., 2d ed. 2003) [hereinafter Free Will]. I should note that although this debate is typically framed as one about the truth and consequences of "determinism," most scientists these days do not think the universe is fully determined but rather that, at least at the quantum level, there is an ineliminable *in*determinacy. The determinist position might thus be better described as one that endorses a "mechanistic" view of human behavior—one that sees it as the consequences of laws of cause and effect. Nevertheless, I follow conventional usage here by referring to the mechanistic position in the debate as a "determinist" one. I thank Professor Adam Kolber for emphasizing the significance of this distinction. See Adam J. Kolber, Will There Be a Neurolaw Revolution?, 89 Ind. L.J. 807 (2014) (making just this point)..

[237] Joshua Greene & Jonathan Cohen, For the Law, Neuroscience Changes Nothing and Everything, 359 Phil. Transactions B 1775, 1777 (2004) (referring to compatibilism as the "dominant view among philosophers and legal theorists"). The other two main positions in the debate are libertarians, who believe in the existence of free will and reject determinism, and "hard determinists," who accept determinism and hold that its truth implies that no one is morally responsible for their actions. See id. at 1776. But as with many ancient philosophical debates, each of these positions now comes in a variety of different forms. See Free Will, supra note 236.

Morse himself has engaged in such debates.[238] But Morse has also made a different sort of argument—one that distinguishes between internal and external critiques of law.[239] In Morse's view, when so-called "hard determinists" argue that universal causal determinism implies criminal responsibility *tout court* is impossible, they are making an argument "external" to law insofar as it denies one of law's foundational assumptions.[240] A compatibilist reading of the law, however, does not carry such broadly skeptical implications and so qualifies as an internal interpretation of it. Morse suggests that this fact counts as a reason for "all participants in the legal system, including forensic psychiatrists and psychologists," to embrace a compatibilist reading of the law and then to ignore the philosophical debate about free will entirely.[241] He thus encourages forensic practitioners to "avoid all mention of free will in their reports, testimony, and scholarship. They should not even think about free will as an issue in forensic work."[242]

Morse's argument has been met with immediate criticism. First, some deny that Morse's compatibilist interpretation of the criminal law is the most natural or plausible one.[243] To the extent that Morse is really offering a *re*-interpretation of current doctrine—even if a morally attractive one—it requires him to offer a full-throated defense of compatibilism itself, rather than simply suggesting that current doctrine settles the matter.[244]

More relevant to our purposes, scholars have pointed out the way in which Morse's characterization of the hard determinist's argument as "external" misleads more than it clarifies the nature of the issue in dispute. That is because the hard determinist's worry that universal causal determinism poses a problem for the very idea of moral (and therefore

[238] See, e.g., Stephen J. Morse, Criminal Responsibility and the Disappearing Person, 28 Cardozo L. Rev. 2545 (2007); Morse, Culpability, supra note 230, at 1599.

[239] Morse, Non-Problem, supra note 6, at 204.

[240] Id. (defining an "internal" critique as one that "accepts that the practice or doctrine is coherent and uses the other variable to explain or to reform the practice or doctrine," and an "external" critique as one that "uses the other variable to demonstrate that the practice or doctrine is incoherent *tout court*").

[241] Id. at 216.

[242] Id. at 220.

[243] Kaye, supra note 230, at 1119–35; Adam J. Kolber, Free Will as a Matter of Law 3, 14–15 (June 30, 2014) (unpublished manuscript, on file with the author).

[244] Kolber, supra note 243, at 14–15 (arguing, against Morse, that "to convince us to adopt a compatibilist interpretation of criminal law, you have to convince us to believe in compatibilism").

legal) responsibility arises from the traditional (internal) excuses for criminal responsibility that already exist.[245] For example, it is precisely because we think that a person acting under an addiction, or some other form of compulsion, is not wholly morally responsible for her actions that we worry that, if our actions are always caused by something beyond our control, then no one really deserves to be blamed for any of his actions.[246]

Morse, of course, rejects this interpretation of the excuses, which is the target of his attack on the causal theory.[247] But even Professor Michael Moore, who agrees with Morse's other criticisms of the causal theory, recognizes that defending a compatibilist interpretation of the law requires substantive philosophical argument.[248] For one thing, it requires defending compatibilism itself by showing that moral responsibility is consistent with determinism.[249] Equally important, in order to engage in the (internal) task of offering compatibilist interpretations of the particular excuses the law recognizes, one will inevitably have to make judgments about the conditions under which a person has the freedom of action necessary for moral responsibility to attach to such action. This is precisely what the philosophers are debating.[250]

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[245] See Moore, Morse, supra note 233, at 5–6 & n.10 (making this point, which he calls the "beach-head" argument); Derk Pereboom, Free Will Skepticism and Criminal Punishment, *in* The Future of Punishment 49, 60 (Thomas A. Nadelhoffer ed., 2013) (referring to this as the "generalization" argument and citing R. Jay Wallace, Responsibility and the Moral Sentiments 118–94 (1994)); see also Thomas Nagel, The View from Nowhere 125 (1986) ("The problem of free will . . . does not arise because of a philosophically imposed demand for external justification of the entire system of ordinary judgments and attitudes. It arises because there is a continuity between familiar 'internal' criticism of the reactive attitudes on the basis of specific facts, and philosophical criticisms on the basis of supposed general facts."). Of course, one could also deny that moral responsibility is a necessary condition for holding people criminally liable. Hard determinists sometimes take this position. See, e.g., Greene & Cohen, supra note 237, at 1783.

[246] Cf. Nagel, supra note 245, at 125 ("When we first consider the possibility that all human actions may be determined by heredity and environment, it threatens to defuse our reactive attitudes as effectively as does the information that a particular action was caused by the effects of a drug—despite all the differences between the two suppositions.").

[247] He does so primarily by distinguishing between causation and compulsion. See, e.g., Morse, Culpability, supra note 230, at 1592–93.

[248] See Moore, Morse, supra note 233, at 6–7.

[249] See id. at 12.

[250] Id. at 7. Interestingly, though, Moore does not follow through the implications of his own argument. At the outset of his critique of Morse's use of the internal/external distinction, he says, "I come not to bury such a use of the external/internal distinction" and insists that he just wishes to point out the way in which the two kinds of inquiries affect each other. Id. at 4–5. But Moore fails to see the way in which Morse's invocation of the inter-

Notice how Morse invokes the internal/external distinction in a manner similar to how we saw Dworkin invoke it against historical accounts of judicial decisions. Just as Dworkin relegated questions of "history and sociology" to an external perspective with which the internal perspective need not concern itself, so, too, does Morse dismiss as external *philosophical* arguments (and the neuroscientific evidence that purports to support them[251]) that causation is relevant to moral responsibility. In one area, arguments about the actual cause of a court decision are perceived to undermine the law's commitment to precedential authority; in the other area, arguments about the actual cause of a person's conduct are perceived to undermine the law's concept of criminal responsibility. In both cases, though, the rhetorical move is the same: Theoretical investigation (whether historical or philosophical) undertaken by Scholars, which naturally prompts moral questions about our legal practices—does someone who could not have done otherwise deserve criminal punishment? Does a politically motivated decision deserve to be treated as authoritative?—are cast aside on the ground that they are external to legal practice. In our terms, they are arguments fit for Scholars, but not Judges.

Furthermore, just as we saw that occasionally judges and lawyers draw precisely those inferences about precedential authority that common-sense reflection invites (but which the Judge versus Scholar distinction purports to bar), we see the same thing happening here. For instance, in its Eighth Amendment jurisprudence dealing with the constitutionality of certain forms of punishment for defendants who committed crimes when they were minors, the Supreme Court has drawn on neuroscientific findings to support its conclusion that minors are less

nal/external distinction (along with the other uses we have seen) serves as another version of the "fictionalist" strategy for coping with the free will problem, which he criticizes and (correctly, in my view) ascribes to Herbert Packer, ordinary language theorists, Peter Strawson, Daniel Dennett, and others. He describes this strategy as one that attempts "to weaken what we mean by 'responsibility' so that in some weakened sense, 'responsibility' can exist even though determinism is true." Id. at 16. Moore even suggests at the end of his article that he suspects Morse might be "tempted by some of the fictionalist moves depicted earlier," id. at 45, but he does not connect the dots to show that the internal/external distinction is the vehicle through which Morse makes that fictionalist move.

[251] See Morse, NeuroLaw, supra note 13, at 610 (concluding that "legal actors concerned with criminal law policy, doctrine, and adjudication must always keep the folk- psychological view present in their minds when considering claims or evidence from neuroscience, and must always question how the science is legally relevant to the law's action and mental states criteria").

morally responsible for their actions than adults.[252] And in a recent Florida case, a jury decided not to sentence to death a man who had stabbed his wife sixty-one times, killing her.[253] Two jurors cited as crucial to their decision the neuroscientific evidence the defense had presented showing the condition of the defendant's brain.[254] Both of these are instances of what Morse calls the "psycholegal error" in that they implicitly depend for their force on concerns raised from an external perspective.[255]

Now let me clarify what such examples do and do not show. They do *not* show that the Florida jury or the Supreme Court's majority were necessarily justified in drawing the inferences they did from the neuroscientific evidence with which they were presented. After all, the mere

[252] See Miller v. Alabama, 132 S. Ct. 2455, 2464 n.5 (2012) (noting that "an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions" in *Roper* and *Graham* (quoting Brief for the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 3, Miller v. Alabama, 132 S. Ct. 2455 (Nos. 10–9646, 10-9647)) (internal quotation marks omitted)); Graham v. Florida, 130 S. Ct 2011, 2026 (2010) (concluding that juveniles have diminished criminal culpability partly on the ground that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); Roper v. Simmons, 543 U.S. 551, 569 (2005) (concluding that the Eighth Amendment barred the execution of a defendant who was a minor at the time he committed a murder partly on the ground that, "as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . ." (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted)).

[253] Jones et al., supra note 135, at 17,625.

[254] Id. The defendant had submitted a QEEG (Quantitative electroencephalography) that purported to show that the he suffered brain abnormalities. See id.

[255] I should clarify here that the Psycholegal Error in the *Roper* line of cases involves not just the suggestion that there are differences between minors and adults that are relevant to moral responsibility and criminal culpability. Morse would have no problem with that. The hallmark of the Psycholegal Error is the suggestion that because neuroscience has identified some cause of the behavior, that fact alone exonerates or partially exonerates the defendant for his or her conduct. See Morse, Non-Problem, supra note 6, at 217 (observing, in the context of discussing the defendant's presentation of neuroscience evidence in his brief to the Supreme Court, that "[a]t most, the neuroscientific evidence provides a partial causal explanation of why the observed behavioral differences exist and thus some further evidence of the validity of the behavioral differences" and that such evidence is therefore "only of limited and indirect relevance to responsibility assessment, which is based on behavioral criteria concerning rationality"). Similarly, in the Florida case *Nelson*, the jurors' alleged psycholegal error lay in the fact that they appeared to infer from the fact that a particular condition of the defendant's brain may have *caused* him to act in a particular way the conclusion that his responsibility was, for that very reason, partially diminished. See Jones et al., supra note 135, at 17,625.

apparent presence or absence of certain brain states in a particular defendant does not itself show what *caused* the defendant's behavior, which is what is really at issue.[256] But it may well be the case that, combined with either genetic evidence or evidence about a defendant's childhood or life experience, such evidence could make people less inclined to consider the defendant morally blameworthy.[257] What the examples do show, then, is that such neuroscientific findings—and the philosophical view of human nature they purport to confirm—may be influencing people's moral intuitions about blame and responsibility, which is just what philosophers and neuroscientists have been arguing.[258] To dismiss such evidence and argument as external to law, and thus of no concern to judges and lawyers, therefore amounts to short-circuiting precisely the debate about the nature of moral responsibility—and hence criminal culpability—that citizens, courts, and policymakers ought to be having.[259]

c. Objection: Pragmatic Incoherence?

To both of the examples just discussed, the same objection might be raised. The problem with using either of these kinds of argument is that their underlying rationales are inconsistent with the (internal) assump-

[256] It seems to me that Greene and Cohen make this mistake when they suggest that in the future one might be able to "trace the cause-and-effect relationships between individual neurons," which would allow one to see the causal path that results in a person's decision. Greene & Cohen, supra note 237, at 1781. As has long been recognized, causation is not itself observable. See Thomas Reid, Essays on the Active Powers of the Human Mind 274, 278 (M.I.T. Press 1969) (1815) ("[A]s to the real causes of the phenomena of nature, how little do we know? All our knowledge of things external, must be grounded upon the information of our senses; but causation and active power are not objects of sense; nor is that always the cause of a phenomena which is prior to it, and constantly conjoined with it; otherwise night would be the cause of day, and day the cause of the following night.").

[257] See Greene & Cohen, supra note 237, at 1784 ("[W]e maintain that advances in neuroscience are likely to change the way people think about human action and criminal responsibility by vividly illustrating lessons that some people appreciated long ago."). Indeed, already, evidence of childhood abuse can be submitted as mitigating evidence in the sentencing portion of death penalty cases. See Kolber, supra note 243, at 11 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989)).

[258] See Greene & Cohen, supra note 237, at 1781.

[259] I should note that Professor Morse in conversation has insisted that he does not mean at all to use the distinction to foreclose or short-circuit the philosophical debate in the way I describe. Instead, he merely invokes it in a commonsensical and nontechnical way to make certain claims about positive legal doctrine. That may very well be true, but the points I make in the text are about the rhetorical function I believe the distinction serves, which may differ from the intentions of those who invoke it.

tions of legal practice itself, so that when courts invoke them, they commit another version of Posner and Vermeule's "inside/outside fallacy."[260] If a court concludes that a past decision was decided on political grounds, it acknowledges that *all* decisions could be impeached in that way; if we excuse otherwise criminal conduct because it was caused by something other than a person's choice, then we must acknowledge that, (assuming determinism is true) *all* otherwise-criminal conduct is excused.[261] The result is that when the Judge makes an argument suited for the Scholar, she involves herself in a kind of "pragmatic[] incoheren[ce]."[262]

There are two different ways one might interpret this objection, but neither is persuasive. The first argues that such arguments are pragmatically incoherent because they will be self-defeating as a factual matter—they will fail to persuade those they need to, so that the rationale will be practically ineffectual over time. That is an empirical question that it is impossible to disprove, but experience offers good reason to doubt it. Consider legal fictions, for instance. Courts continue to rely on legal fictions, which enable them to assert propositions, which they openly acknowledge to be false, even though such use has been the subject of criticism for literally centuries.[263] And there is a prudentialist strand of legal thought that has long encouraged courts to use procedural devices

[260] See Posner & Vermeule, supra note 10, at 1796.

[261] Indeed, this just is Morse's reductio argument, discussed above. See Moore, supra note 233, at 6.

[262] Posner & Vermeule, supra note 10, at 1773. Professors Posner and Vermeule refer to such arguments as "noble lie" arguments. Id. An example of such an argument is the suggestion, made by Professors Issacharoff and Pildes, that even if courts do not actually enforce limits on executive authority during emergencies more strictly when the President is acting without Congressional authorization, it is a "beneficial illusion" to suggest that they do. Id. at 1772–73. According to Posner and Vermeule, this rationale is

> theoretically interesting because it is not one that can be offered from *within* the system. It would be pragmatically incoherent, even self-defeating, for judges to adopt the Professors Issacharoff and Pildes approach to presidential emergency powers and to publicly justify it by saying that the approach, although a rationalization of decisions on other grounds, produces beneficial illusions.

Id. at 1773.

[263] See, e.g., Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 174 N.E. 229, 300 (N.Y. 1931) ("The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them."); 1 Jeremy Bentham, A Fragment on Government, *in* The Works of Jeremy Bentham 221, 235 (John Bowring ed., Edinburg, William Tait 1843) ("[T]he pestilential breath of Fiction poisons the sense of every instrument it comes near.").

to avoid deciding difficult political questions.[264] So the extent to which the public will tolerate courts openly acknowledging the ways in which their justifications for decisions are incomplete or artificial is an empirical question whose answer is far from obvious.

But this answer hardly satisfies. For one might respond that, regardless of what the public will tolerate, courts *ought* not render judgments based on rationales that, when consistently applied, rationally undermine their own judgments—and that is the problem with a Judge relying on a Scholar's argument. But the causal-explanatory arguments at issue here only undermine other rationales for decisions if they are *universalized* across all cases: Because some decisions have political explanations, *all* decisions do; because some acts are caused by something other than the actor's choice, *all* actions are. But why must we generalize in that way? Indeed, there is a long tradition of legal thought that cautions against such generalization in the context of adjudication.[265]

Consider, for instance, the various political and moral principles on which courts standardly rely when making decisions—things like the importance of finality in settling disputes, the need to protect individual

[264] See, e.g., Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111–12, 115–118, 122–29 (1962) (suggesting that the Court display the "passive virtues" of knowing when not to get involved in politically heated disputes); see Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1122–23 (1995) (identifying a "neo-prudential[ist]" strain of legal thought and endorsing it only insofar as it attempts "to mediate between what [Bickel] describes as principle and expediency, and others have described as the ideal and the real" (citations omitted)).

[265] See, e.g., Oliver Wendell Holmes, Jr., Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870) ("In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts."); Cass R. Sunstein, Commentary, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733, 1735–36 (1995) (arguing that, for reasons of social stability and democratic legitimacy, judges should, and often do, seek agreement on "relatively narrow or low-level explanations" for case outcomes rather than "larger or more abstract explanations than are necessary to decide" cases). A similar discomfort with relying on generalizations (though one motivated, superficially at least, by quite different concerns) may explain courts' hostility to so-called "naked statistical evidence" in the context of fact finding. See, e.g., Alex Stein, Foundations of Evidence Law 100 (2005) (criticizing the use of statistical evidence insofar as it violates what Professor Stein calls the "principle of maximal individualization," which forbids fact finders from making "any finding against a litigant, unless the argument generating this finding and the evidence upon which this argument rests were exposed to and survived maximal individualized examination" (emphasis omitted)). But see Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 890–901 (2006) (arguing that judges may be prone to cognitive errors when making policy decisions based on a set of concrete facts before them).

rights against majority rule, the value of having clear legal rules for the sake of planning. Such political values could hardly be universalized into exception-less general rules because they all confront opposing values: the importance of providing fair procedures, the value of vindicating democratic will, and the need to decide cases in a substantively just way, based on the particular facts. Even though theorists and philosophers may (and do) argue for the general priority of one of these principles over the others, when faced with actual disputes, judges must attempt to reconcile these competing demands in each particular case, deciding when a particular value outweighs or trumps the other.[266]

Precisely the same thing is true in the explanatory context. Scholars argue about whether judges are Genuine Rule Followers or Instrumental Rule Followers, and they often do so in quite general terms. But the more general the claim is, the less helpful it is for any judge considering whether a decision should be impeached.[267] The same is true when it comes to the criminal law excuses. Philosophers debate whether all human conduct is determined or not, but when faced with a particular case, under a causal theory of excuse, the judge or jury must decide whether, *in this particular case*, the defense has adequately shown that the defendant was not the cause of his behavior.[268]

Of course, one could deny that judges or juries can *rationally* balance these competing demands. In the context of competing moral or political principles, critics have alleged that the existence such competing values render large areas of legal doctrine in a state of fundamental contradic-

[266] See Benjamin N. Cardozo, The Paradoxes of Legal Science (1928), *reprinted in* Selected Writings of Benjamin Nathan Cardozo 251, 254 (Margaret E. Hall ed., Matthew Bender & Co. 1947) ("The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. . . . We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order. The property rights of the individual we are to respect, yet we are not to press them to the point at which they threaten the welfare or the security of the many. We must preserve to justice its universal quality, and yet leave to it the capacity to be individual and particular.").

[267] I take Dworkin to be making something like this point when he complains that skeptical accounts of legal practice have grown "steadily more programmatic and less substantive." See Dworkin, supra note 6, at 14.

[268] Professor Kaye nicely makes this point in the context of defending a causal theory of excuses, which he calls "provisional determinism." See Kaye, supra note 230, at 1135–36 ("By saying that we take a provisional attitude toward determinism, I mean that, while we acknowledge that acts can be caused, we resist absolute determinism and evaluate causal accounts as they come to us, one by one. Justifiable prudence makes us provisional—and thus partial—determinists.").

tion or incoherence.[269] The same inference is possible in the explanatory context.[270] But the point is that such skeptical objections require substantive argument on the facts and are thus better understood as simply rival interpretations of the relevant law. There is no reason to conceive of them as any more "external" than more sanguine accounts of legal practice.[271]

3. Scholar Versus Law Teacher

The final variation on the Scholar versus Legal Participant version of the internal/external distinction imagines that legal scholars are at cross-purposes with scholars in other disciplines because they are in the role of a Law Teacher, who must advance the legal profession by inculcating its newest members with the methods and values of the trade.[272] The problem with this variation is that it assumes a particular (and particularly narrow) understanding both of the professional demands of a lawyer and, therefore, the relevance of the Scholar's work to legal education. The result is that efforts to challenge conventional assumptions about

[269] See, e.g., Kennedy, supra note 73, at 1764–66.

[270] See, e.g., Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 591–93 (1981) (arguing that courts engage in a process of "interpretive construction" of the factual scenarios with which they are presented and that such a process is (1) "outside of our rational discourse," (2) really determines how cases come out, and (3) results in a "unresolved and unresolvable inconsistency" in how courts interpret the actions of criminal defendants).

[271] Dworkin refers to arguments that purport to reveal legal doctrine to be incoherent because of the existence of contradictory normative principles as "global internal skepticism," though (somewhat confusingly) in doing so, he is here invoking an internal/external distinction different from the one discussed in Part I. Dworkin, supra note 6, at 272–75. Here, "external" theories are not those of historians or sociologists, but rather metaphysicians who deny that moral claims map onto anything real in the natural world. One way of putting my point in the text is to say that Dworkin was right to see that such skeptical claims require substantive, doctrinal argument to show such contradiction, but that he was wrong to dismiss comparably skeptical arguments in the explanatory context as an impotent form of "external" critique (now in the historical or sociological sense). If one accepts that causal explanations bear on legal analysis in the way that I have argued in this Section—either of a decision's precedential authority or of a defendant's criminal responsibility—then such arguments are just as internal to law as are the disputes about the relative determinacy of moral principles.

[272] See, e.g., Balkin & Levinson, supra note 6, at 165–66 (arguing that the "gravitational force" that attracts legal scholars to the internal point of view is "professionalism—the fact that, unlike most other members of the humanities, legal scholars teach in professional schools designed to turn out practicing lawyers who are thoroughly enmeshed in the enterprise of law"); Gordon, supra note 109, at 43–44 (criticizing a particular tradition of legal thought on the ground that "everything gets filtered through the lens of professional working concerns and categories," and for that reason distorts historical materials).

such matters get excluded from view. Two examples of such efforts help demonstrate the point.

a. Jerome Frank

Consider, first, the writer and judge Jerome Frank (1889–1957). Frank was a member of the legal realist movement of the 1930s who later became a judge on the Second Circuit Court of Appeals. Frank is most famous for his 1930 book, *Law and the Modern Mind*, in which he suggested that the common but inaccurate perception that law consists of a determinate set of rules that always dictate outcomes in cases was best explained as the consequence of a deeply rooted psychological need for security. Drawing on the work of the child psychologist Professor Jean Piaget, he argued that the demand for certainty in the law had its origins in the psychological craving for an all-knowing and all-powerful father figure.[273] In reality, Frank argued, the law was anything but clear or predictable because its application depended not only on a judge's interpretation of often ambiguous, vague, or conflicting rules but also on a judge or jury's factual judgments about which witnesses were telling the truth and which were not. For these reasons, Frank endorsed Holmes's conclusion that law was nothing more than a prediction of what courts will do.[274]

In today's terms, Frank would be understood as offering a quintessentially external critique of law. He endorsed the Holmesian view of rules that ignores Genuine Rule Followers, and he seems to have adopted the Scholar's task of explaining, rather than advancing or legitimating, legal practice.[275] Thus, Frank would seem to fit in well with today's legal theorists who, according to Judge Richard Posner, pursue "the study of the law not as a means of acquiring conventional professional competence but '*from the outside*,' using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system."[276]

Or would he? In fact, Frank, who was a practicing lawyer until he became a judge in 1941, was deeply concerned with how lawyers could develop "professional competence." And he argued repeatedly that the law schools of his day did a lousy job of it—for precisely the same rea-

[273] Frank, supra note 134, at 19–22.
[274] Id. at 133–38.
[275] This is so even though Frank was not himself a legal scholar by profession.
[276] Posner, Decline, supra note 67, at 779 (emphasis added).

sons that drove his systemic critique of law in *Law and the Modern Mind*. According to Frank, the primary problem with law schools was that in their obsessive focus on the "so-called legal rules and principles" that appellate judges included in their opinions, they ignored what practicing lawyers really needed to know, which was how to predict what courts were likely to do in certain situations and how to persuade them to issue rulings on behalf of their clients.[277] To better prepare lawyers for these tasks, Frank offered a host of reform proposals, including that most law professors in law schools have at least five years of practice experience;[278] that students observe actual trials to see how the law operates in practice;[279] that students participate in clinics run by practitioners in order that they may better understand what really motivates judges to decide cases;[280] and, crucially for our purposes, that legal training should be integrated with research in the social sciences so that students could "see the inter-actions of the conduct of society and the work of the courts and lawyers."[281] All of these, Frank argued, would make law schools better at training future legal professionals.

Frank's proposals are of interest not because they would necessarily improve legal training—though critics of law school still voice some of his same concerns.[282] They matter because they demonstrate that Frank leveled his criticisms of the legal system as an effort to transform the profession's understanding of what lawyerly competence entailed, rather than as an effort to criticize law from a scholarly perspective "outside" of the legal profession.

[277] Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Pa. L. Rev. 907, 910–11 (1933).

[278] Id. at 914. I would fail to meet this requirement.

[279] Id. at 916.

[280] Id. at 917–18.

[281] Id. at 921.

[282] See, e.g., William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 13–14, 194–95 (2007) (calling for more clinical training in legal education); David Segal, What They Don't Teach Law Students: Lawyering, N.Y. Times, Nov. 20, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html (highlighting the need to focus on practical-legal-skill building, including through clinic training); see also A. Benjamin Spencer, The Law School Critique in Historical Perspective, 69 Wash. & Lee L. Rev. 1949, 2054–56 & n.420 (2012) (discussing Frank in the context of today's criticisms of law schools as being insufficiently practically focused).

b. John Henry Schlegel

Consider a more recent proposal. In a symposium on the state of legal scholarship in the early 1990s, Professor John Henry Schlegel offered a sketch of a curriculum for a "law school for the new scholarship"—that is, precisely the kind of CLS scholarship that Dworkin classifies as external.[283] In this imaginary law school, Schlegel explains, there would be one first-year course on legal practice that would "emphasize the regularities in what lawyers do across practice specialties and . . . legal regimes."[284] This course would include discussions of the practical realities of doing legal work on behalf of clients. Another first-year course would focus on "the nature and operation of rule systems."[285] There might be other courses on things like "the structure of the legal profession or on the economic and social system in which it is embedded."[286]

Schlegel was primarily concerned to make two points: first, that CLS scholarship would not succeed in the long run unless its proponents practiced what they preached by teaching what they wrote;[287] and second, that such an education would do a better job of training lawyers than the present doctrinal approach because students would learn the law in a *theoretical* way (rather than just the trial-and-error approach of the case method) and would thus be better positioned to adapt when the law changed.[288] Part of the reason it would do a better job was that it would allow those students for whom the norms that law school typically imbues do not come naturally to understand those norms in a more detached, intellectual way.[289] According to Professor Schlegel, such a law school would provide an education superior to that of current law schools "because it aims to provide, and is more likely to succeed in providing, the tools with which to work for the duration of an honorable professional life."[290]

If it is not clear which point of view of legal practice Schlegel is adopting here, that is precisely the point Professor Robert Post made in a

[283] John Henry Schlegel, A Certain Narcissism; A Slight Unseemliness, 63 U. Colo. L. Rev. 595, 601 (1992).
[284] Id. at 604.
[285] Id.
[286] Id.
[287] See id. at 596–97.
[288] Id. at 607.
[289] See id. at 606.
[290] Id. at 607.

response to Schlegel's piece in the same symposium. Quoting Dworkin's description of legal practice as "argumentative" and his distinction between two points of view of that practice, Professor Post explained that internal scholarship must be devoted to the purposes of the practice, "which traditionally have been understood in terms of the realization of the rule of law."[291] Since Schlegel was critical of law school's predominant focus on rules, he must therefore stand outside it. At the same time, though, Schlegel said his goal was to help law students live an "honorable professional life," which seems a quintessentially internal ambition.[292] Thus, Post concluded that Schlegel's proposal resulted in a "self-defeating tension" in that he was "paralyzed, half in and half out of the traditional legal academy."[293]

Again, the point is not to argue that Professor Schlegel's curricular vision is an attractive one or that it would accomplish the goals he says it would. Rather, it is simply to call attention to the way in which imposing the internal/external distinction muzzles creative thinking about the relationship between legal practice and legal theory. For it hardly follows from Schlegel's criticism of the tendency to equate "the law" with particular legal rules that he rejects the fundamental purposes of law and therefore cannot be understood as making an internal critique.[294] Indeed, the meaning and value of "the rule of law" remains a topic of considerable and longstanding debate.[295] But rather than engage in such debate, perhaps by taking issue with Schlegel's assertion that formal doctrine plays such a marginal role in the actual workings of the legal system, Post's invocation of the internal/external dichotomy simply condemns Schlegel's thought experiment as conceptually confused, and hence self-defeating, from the outset.

And that is the final disservice that the Scholar versus Legal Participant version of the internal/external distinction does for us. It blinds us

[291] Post, supra note 13, at 617, 624.

[292] Id. at 621.

[293] Id. at 622.

[294] Insisting that such a rejection does follow from that statement seems to me akin to saying that a person who criticizes the U.S. government for its "War on Terror" on the ground that some of its efforts to execute that war undermine the country's founding ideals is "paralyzed, half in and half out" of the American community because she expresses patriotic aspirations but is nonetheless deeply critical of the administration's policies.

[295] See, e.g., David Dyzenhaus, Recrafting the Rule of Law, *in* Recrafting the Rule of Law: The Limits of Legal Order 1, 1 (David Dyzenhaus ed., 1999); Raz, supra note 51, at 210–29; Jeremy Waldron, The Concept and the Rule of Law, 43 Ga. L. Rev. 1 (2008).

to novel and provocative ways of understanding the relationship between legal practice and legal theory. Indeed, various other examples could have been used in lieu of the two I selected. For there have been many efforts by legal scholars to reconcile legal practice with, rather than close it off from, the aims and methods of those disciplines tasked with understanding the social and natural world.[296] And it is precisely that ambition that this version of the internal/external dichotomy blocks from view.

CONCLUSION

The internal/external distinction has outlived its utility. Its earliest incarnations within legal theory sprouted in academic cultures that, for various intellectual and institutional reasons, sought to seal off the values, methods, and assumptions of certain disciplines—primarily, law and philosophy—from perceived threats posed by the social and natural sciences. Both the linguistic philosophical approach Hart embraced and the traditional form of legal analysis Dworkin defended and articulated have strong *rationalizing* tendencies. Hart's purported goal was the theoretical one of understanding law as a social phenomenon, whereas Dworkin viewed his task as partly theoretical and partly practical. But both sought to bracket as irrelevant to their concerns scientific and social-scientific arguments about human nature and social life. They did so in part by distinguishing between internal and external perspectives or forms of argument.[297]

Those efforts to bracket and rationalize may have once served a useful function. At the very least, the distinction has allowed interdisciplinary legal scholarship to flourish alongside, rather than in zero-sum competition with, more traditional forms of scholarship. But from the beginning, its invocation has tended to dodge more questions than it has helped answer. And these days it mischaracterizes more often than it

[296] The mid-century law professors Willard Hurst and Lon Fuller are two others that come to mind.

[297] Professor Priel has made a very similar kind of criticism of contemporary analytic jurisprudence. In particular, he has argued that modern positivists should abandon their narrow concern with the internal point of view by looking to the work of Hobbes and Bentham, both of whose understandings of law depended in essential ways on their views of human nature. Indeed, Professor Priel considers Hart's concern with the topic of "legal validity" in the first place to be symptomatic of his excessive focus on the concerns of lawyers, who are the only people for whom the concept of "validity" much matters. See Dan Priel, Toward Classical Legal Positivism, 101 Va. L. Rev. 987 (2015).

clarifies the issues at stake; and it stifles, more than it stimulates, novel thinking about those issues. Even worse, the distinction breeds complacency by encouraging scholars to assume the existence of fixed boundaries of law and legal argument without examining why the boundaries are drawn where they are.[298]

The solution to the problem identified is therefore straightforward. However one frames the substantive version of the distinction, at the very least, the two methodological versions of it should be retired. The distinction was a once-useful prop that has become less an aid to analysis than a rhetorical crutch. As we have seen, it often does little real work in the disputes in which it is invoked, and when it does do work it cuts short, rather than deepens, the relevant debates.

Abandoning the distinction would mean focusing instead on what almost all works of legal scholarship have in common. Most works of legal scholarship, even interpretive, doctrinal analyses, constitute efforts to "learn about the world."[299] In that sense, they are all "external." At the same time, most studies, arguments, and analyses purport to be at least *relevant* to how legal practice goes forward, whether in the near term or long term.[300] And any judgment of relevance implies some normative criterion as to what *matters*. Thus, in that sense, they are all "internal."

[298] Cf. Kaye, supra note 230, at 1170–71 (criticizing Morse's compatibilist theory of criminal law on the grounds that such judgments about whether conduct should be excused "call for deep moral engagement, but the compatibilist criminal law chooses the path that entails less engagement—less labor, and less angst—over the one that entails more" and that "[t]his complacency should give us pause"). Lest one doubts Kaye's point about complacency, see Morse, Non-Problem, supra note 6, at 216 (concluding that his interpretation of the criminal law means that "[f]orensic practitioners can comfortably continue to play a crucial role in helping legal decision makers assess responsibility in all civil and criminal law contexts without being distracted by the irrelevant issue of free will"). Professor Seana Shiffrin makes a similar point about the use of rules, as opposed to standards. She argues that what has traditionally been seen as a defect of standards—their vagueness and hence the uncertainty they foster—actually counts as a virtue insofar as the application of standards encourages citizens to deliberate morally about whether, for instance, they are treating each other fairly or are acting in good faith. See Seana Valentine Shiffrin, Inducing Moral Deliberation: On the Occasional Virtues of Fog, 123 Harv. L. Rev. 1214, 1217 (2010).

[299] Cf. Lee Epstein & Gary King, A Reply, 69 U. Chi. L. Rev. 191, 192 (2002) (contrasting the purpose of legal scholarship, as articulated by Goldsmith, Vermeule, and others, with that of empirical research, which aims to "learn about the world"). Epstein and King use the phrase "learn about the world" to describe the ambitions of empirically minded scholars seventeen times in their twenty-one page reply to critics. See generally id.

[300] See Gordon, supra note 72, at 1050, 1056 (acknowledging that much critical scholarship does not yield any "immediately useful policy proposal," but also endorsing one line of critical theory on the ground that it "expands the range of possible forms of social organiza-

In stressing such commonality of purpose, I hope not to be misunderstood as encouraging scholarly consensus. Quite the opposite, the point is to highlight the clashes that are skirted by imputing to scholars different purposes or "perspectives." Interpretive doctrinal scholarship should be considered vulnerable to the charge that its concepts, even if internally coherent, do little work in how judges actually decide cases. And empirical scholars ought to be susceptible to the charge that what they are counting is not relevant to what matters for legal practice or theory.[301]

Of course, it may be objected that law has always had a rationalizing, even "artificial" quality to it.[302] Lawyers are trained to narrow the scope of issues in dispute, to lead with procedural and jurisdictional objections, and to cite authorities rather than build arguments from the ground up. These strategies are suited primarily (though hardly exclusively) for *appellate* argument, which for so long has been the model of legal education and scholarship. And in this arena, the internal/external distinction, which brackets, rather than takes on, fundamental questions, finds a natural home.

But there is another, and somewhat countervailing, tendency in law more on display in *trial* argument. There, too, lawyerly argument is cabined and constrained in a number of ways, but its underlying theory encourages lawyers to engage in wide-open argument and to challenge proffered authorities. [303] It requires fact finders to make global judgments about the relative persuasiveness of sometimes quite different and always-competing theories, explanations, and narratives of a series of human events.[304] They must do so by drawing inferences from particular

tion and at the same time explains why the possibilities have gone unrealized"); Tamanaha, Internal/External, supra note 13, at 192 ("Many Critical scholars . . . are sincerely trying to make law better, and believe that doing so requires wholesale critique.").

[301] For a recent criticism of the tendency of empirically oriented scholars, including Professors Epstein and King, cited above at note 287, to discount the importance of making empirical scholarship relevant to legal practice, see Joshua B. Fischman, Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship, 162 U. Pa. L. Rev. 117, 158–60 (2013) (arguing that "[e]mpirical legal methodology needs to be more closely tethered to the motivating questions in legal scholarship").

[302] See Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35, 57 (1981).

[303] I once argued that fact finding should be more structured and rule-governed. See Charles L. Barzun, Rules of Weight, 83 Notre Dame L. Rev. 1957 (2008). I am no longer so sure.

[304] See Old Chief v. United States, 519 U.S. 172, 187 (1997) ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains

facts and by constantly testing what they see and hear against their own common sense, no matter how authoritative the source. And the presiding judge is to let all evidence in unless not relevant or excluded by a particular rule.[305]

In that argumentative context, it makes no sense to say that a particular party's claim is made from an internal or an external point of view. The fact finder must simply consider all of the evidence and reach a verdict one way or the other about guilt or innocence, liability or no liability. My suggestion is that this kind of debate offers a better model for understanding the various and competing claims—whether doctrinal, philosophical, historical, economic, psychological, sociological, or neurobiological—made either about particular doctrines, or the legal system in general, because it focuses attention on the various conflicts and tensions that call for resolution, or at least attempts at reconciliation. Evaluating such claims requires trying to answer a host of moral and empirical questions—questions which are already being taken up every day in courts and by legal scholars. The suggestion of this Article merely has been that we might get a better grip on such questions, and offer better answers to them, if we face them directly, rather than turning ourselves inside-out attemtpting to place them on one side of a crude and false dichotomy.

momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.").

[305] Fed. R. Evid. 402 (providing that relevant evidence is admissible unless the Constitution, a statute, the rules of evidence, or a rule of the Supreme Court provides otherwise).