The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies

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This article analyzes the growing trend in legal and sociolegal theory to place a pivotal emphasis on the internal/external distinction. To provide a better understanding for the application of this distinction, the author elaborates on its origins in the philosophy of social sciences. Using detailed legal examples, he then develops a theory of a practice to help serve as an organizing concept for many applications of the distinction. Finally, applying this background and the notion of a practice, the author analyzes the different uses of the distinction in legal and sociolegal theory.

The internal/external distinction is gradually assuming a central position in legal theory and sociolegal studies. H. L. A. Hart introduced this distinction to legal theory when he argued (1961:55) that "a social rule has an *internal* aspect" which must be taken into account as an essential characteristic of legal rules. The distinction arose again in a dispute between Hart and Ronald Dworkin over the propriety of descriptive jurisprudence. Dworkin's "central objection seems to be that legal theory must take account of an *internal* perspective on the law which is the viewpoint of an insider or participant in a legal system, and no adequate account of this *internal* perspective can be provided by a descriptive theory whose viewpoint is not that of a participant but that of an *external* observer" (Hart 1994:241). Dworkin's opus *Law's Empire* (1986) is constructed on precisely this point: "This book takes up the *internal*, participants' point of view" (p. 14). Moreover, he argues that the internal view "must be judged *internally* by its own standards" (Moore 1989:953).

The internal/external distinction has also been invoked as an essential element that separates the scholarship of Critical Legal

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Studies (CLS) from mainstream doctrinal analysis. According to David Trubek (1984:589), "CLS follows this tradition: Analyzing the law from the *outside*, . . ." And the distinction has been identified as the core characteristic which unifies legal sociology, as well as distinguishes it from traditional legal studies. Roger Cotterrell (1983:242) described it thus: "It is implicit in the aim of empirical legal theory that law is always viewed 'from the *outside*,' from the perspective of an observer of legal institutions, doctrine and behavior, rather than that of a participant."

Thus the internal/external distinction has arisen in a variety of seemingly unrelated contexts—involving the nature and study of rules, the status of jurisprudence, the propriety of rendering evaluative judgments on the practice of law, the relation of CLS work to mainstream scholarship, and the thread which unifies and distinguishes legal sociology. Despite its appearance in these wide-ranging issues, the internal/external distinction itself remains obscure and largely unanalyzed.

This essay explicates the nature of the internal/external distinction by going back to its source of origin in the philosophy of social sciences. I describe the development of the distinction in two contexts: (1) in a dispute over the nature of social action and the methodology required to study it; and (2) in relation to what is called the "strong programme" of the sociology of science. I reveal the many complex implications which follow from the distinction, implications which range from questions of methodology to epistemology.

Following this background discussion, I articulate the notion of a practice, emphasizing legal examples like judging and legal theory. This notion provides a useful analytical tool for understanding many references to the internal/external distinction. I also indicate the differences and interconnections between practices and two other closely related contexts to which the distinction has been applied—institutions and interpretive communities. Then I articulate the essential structure of the distinction in relation to practices, focusing on the separation between Observer and Observed and between observing and participating.

Finally, I draw on the background provided to analyze each of the legal contexts mentioned at the outset, illuminating several puzzling aspects of legal usages of the distinction. One theme I draw out in the course of this analysis is that the distinction has often been used to discount the views of social actors (despite explicit claims to the contrary) or (less often) to insulate the views of social actors from criticism, when neither usage is appropriate in these contexts. This exploration will help provide guidance for future references to the internal/external distinction both in the social-scientific study of law and for legal theory.

Science and the Study of Social Life[1]

For well over a century there has been a philosophical debate over the nature of science and its knowledge claims. Until the relatively recent "interpretive turn,"[2] the "naturalistic" or "positivistic" view of science was dominant. According to this view, the natural sciences (especially physics and chemistry) were paradigmatic of science. Science entailed the causal *explanation* of phenomena by subsuming them under universally valid covering laws which allow for reliable prediction. The prevailing view was that the natural sciences were gradually progressing through the cumulative gathering of knowledge, leading to an ever more accurate and comprehensive map of, and direct correspondence with, objective reality.

The widespread view that the natural sciences were the epitome of science, combined with the ideal of the unity of science, had dire consequences for the social sciences, which have never lived up to the standards set by the natural sciences. As philosopher of science Mary Hesse (1980:193) appraised it, "On the actual present situation one can only observe what underlies complaints about the backwardness, theoretical triviality, and empirical rule-of-thumb character of most social science, in spite of limited success in establishing low-level laws in isolated areas." The historical development of the social sciences has been marked by internecine battles over competing paradigms and explanations with scant agreement over what counts as valid knowledge.

One reaction to this state of affairs was to deny that the social sciences were in fact "sciences." But the reaction of many social scientists was a determined effort to emulate the natural sciences to the extent possible. The predominant factor that kept the social sciences from meeting the requirements of positivism was the presence of human beings—seen by science as fallible, sometimes arbitrary, often irrational or deluded—in the social equation. In particular, the subjectivity of human actors was considered to be inherently inaccessible to science, especially in light of the "other minds" problem generated by the Cartesian worldview.

The solution to this problem was obvious: Social science must eliminate any reference to subjectivity and focus only on externally observable action. Durkheim's functionalism embraced this view:

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[1] This account is drawn from many sources, but the following have been especially helpful: Bohman 1991; Rosenberg 1988; Giddens & Turner 1987.

[2] For a good introduction to interpretivism, see Hiley, Bohman, & Shusterman 1991.

> I consider it extremely fruitful this idea that 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, and I think also that these causes are to be sought mainly in the manner according to which the associated individuals are grouped. Only in this way, it seems, can history become a science, and sociology itself exist. (Cited in Winch 1958:23-24)

Behavioristic social sciences were constructed on the same conclusion. "The fundamental insight of behaviorism was strategic: instead of trying to analyze consciousness and states of the mind, scholars could make more progress in psychology by looking at the actions of men and women and at the observable states of people and of their environment to which the actions could be lawfully related" (Homans 1987:58). A third prominent example was structuralism, which sought to identify invariant structures (in linguistics, personality, and cultural symbol systems) that contain an intrinsic logic or intelligibility. "As Levi-Strauss puts it, one must avoid the 'shop-girl's web of subjectivity' or the 'swamps of experience' to arrive at structure and science" (Rabinow & Sullivan 1979a:10-11).

These examples highlight two characteristics of the leading versions of positivist social science: They discounted or eliminated consideration of the meaningfully oriented human subject, and they did so for the purpose of meeting the strictures of naturalistic science. These two characteristics are internally connected. The faith that science held the key to knowledge justified the priority accorded to the scientific method, which in turn led to, and legitimated disregard for, the understandings of lay social actors. "There is an idea common to a number of different social sciences that the participants in a social practice are benighted and that the accounts they offer of their own attitudes and actions are poor and should be discounted and replaced with other, richer, more enlightened or profitable [scientific] lines of explanation" (Root 1993:74).

Max Weber was one positivist social scientist of note who took exception to this general trend. Weber recognized that social reality is largely composed of the meaningful ideas and beliefs of social actors. Without attention to these ideas and beliefs, the actions of individuals and the complexes of social action they jointly produce cannot be fully understood. Although he agreed that social science must generate law-like causal explanations of social action, Weber (1964:88) insisted that the "specific task of sociology must be the interpretation of action in terms of its subjective meaning." "Only if a sociologist can see the world from the perspective of *their* values, and appreciate what these values mean to *them*, can he explain how the behavior of his subjects is influenced by the values they hold and construct an empirical

causal explanation of the sort he seeks to provide" (Kronman 1983:16–17).

An entirely different reaction to the debate was to reject the unity of science thesis and hold instead that the natural sciences and the social sciences are fundamentally distinct and should remain so. Peter Winch's *The Idea of a Social Science and Its Relation to Philosophy* (1958) contained a widely influential argument to this effect, and is especially instructive for our purposes because it was the source cited by Hart in his touting of the internal view.

Although Winch endorsed Weber's argument that sociology should focus on interpretation, he criticized Weber for a residual positivist desire to explain action by reference to causal laws. The problem with formulating laws is that society is constructed by internally connected systems of ideas and beliefs which are constantly developing and changing, rendering them unsuitable for generalization (Winch 1958:133).[3] Thus Winch went beyond Weber to argue that positivist methods are inappropriate to the social sciences—in this domain *understanding* should be the objective. " 'Understanding'. . . is grasping the *point* or *meaning* of what is being said or done. This notion is far removed from the world of statistics and causal laws: it is closer to the realm of discourse and to the internal relations that link the parts of a realm of discourse" (ibid., p. 115; emphasis in original).

According to Winch, understanding social action involves grasping the "form of life" in which it takes place. Access to this form of life requires uncovering the operative social rules that make it intelligible for the participants involved as well as for the scientific observer. Winch made the strong claim that "all behavior which is meaningful (therefore all specifically human behavior) is *ipso facto* rule governed" (p. 52). "[I]t is only by reference to common rules that anyone can grasp what others are doing. Thus the concept of following a rule implies the anticipations, reactions, and expectation of other people in the social, intersubjective context of action in a 'form of life' " (Bohman 1991:61).

Winch's conception of the internal view is not limited to the subjective attitudes or motivations of the actors but rather more broadly encompasses the webs of meaning in which the social action takes place. This socially generated and shared context of meaning is what renders the action intelligible to those involved. Hence it is not necessary for the actors themselves to be able to articulate, or even be conscious of, the operative social rules

[3] Other analysts have pressed different arguments for the separation of the natural and social sciences. An often-cited argument can be found in Taylor 1979:25–71. Taylor's argument was that unlike the Objects studied by the natural sciences, the Objects studied by the social sciences are thinking, acting, reflecting beings who can read and react on the scientific accounts to change their behavior, all of which precludes the formulation of invariant causal laws. See also Dreyfus 1986:3–22.

identified by the scientific Observer, although they should be able to recognize these rules once they have been articulated.

In formulating the above, Weber and Winch helped found interpretive social science, today a full-blown competitor to positivism. At its most basic, interpretivism consists of two propositions: (1) for most actions we act intentionally based on our ideas and beliefs; and (2) the meaning (the content) of these ideas and beliefs is "intersubjective"—that is, derived from and shared by others in our social group. Together these propositions give rise to the thesis that reality (the sum total of our meaningful actions) is socially constructed. To study social action requires, therefore, that the social scientist interpret.[4]

Two particular responses to Winch's account are relevant to the legal context. The first response was to dispute Winch's overly rule-saturated, rule-bound view of social action. Social theorist James Bohman recounted the objections:

> The fact that some social actions follow rules does not require a distinctive or autonomous explanatory approach, nor do the rules themselves even ultimately explain most cases of rule following. . . . Winch's view belongs to the older conformist models of rule following. As Edgerton [1985] describes this conformist "normative theory," "People everywhere not only followed the rules of their societies—but also made these rules a part of themselves and became, almost literally, inseparable from them." But theorists challenged this view based upon the indeterminacy of rules—that is, the fact that people often do not follow them, do not incorporate them and frequently use them strategically to further their own interests. Under the new perspective of strategic interactionism, embodied in the works of theorists like Erving Goffman, rules are treated as flexible, negotiable and subject to exceptions. (Bohman 1991:64-65)

Given these objections, a methodology that exclusively focuses on rule following is simply inadequate.

The second response to Winch focused on the relativistic implications of his analysis. In a famous debate with anthropologist E. E. Evans-Pritchard and philosopher Alasdair MacIntyre, both of whom argued that it was permissible (or even inevitable) to pass judgments on the beliefs and rationality of primitive societies, Winch argued that the forms or modes of life studied are "*non*-logical," by which he meant that the criteria of logic are inapplicable to them (Winch 1964; emphasis in original). For Winch (1958:100), "the criteria of logic are not a direct gift of God, but arise out of, and are only intelligible in the context of, ways of living or modes of social life. It follows that one cannot

[4] There are a number of different accounts for what such interpretation actually entails. See, e.g., Schutz 1967 (1932), 1962; Geertz 1973. The basic differences between these (and other) accounts of the internal view have to do with contrasting emphases on the actor's intent and on the particular social context of action and the cultural meaning that infuses these contexts.

apply criteria of logic to modes of social life as such." Moreover, because all modes of social life—including science, religion, or a primitive society—have their own internal criteria of intelligibility, the logic internal to one mode of life cannot be applied to evaluate the logic internal to another.

Winch carefully qualified his position. He agreed (1958:110) that a scientist could describe a belief without personally adopting or endorsing or agreeing with it: "I do not mean, of course, that it is impossible to take as a datum that a certain person, or group of people, holds a certain belief—say that the earth is flat—without subscribing to it oneself." His point was rather that what this belief *means* and its logic can only be assessed within the context of its form of life. All societies have persons who hold beliefs that would be considered irrational or wrong when evaluated against the standards of judgment derived from within their own form of life (Winch 1964:309), and a correct understanding of the situation would be to see that it is irrational within that context.

Winch's argument spawned a debate on the nature of rationality which has yet to be resolved (see generally Hollis & Lukes 1982). The nuances of the debate need not be reproduced here—just two basic aspects will suffice. The first aspect is that careful analyses of the *natural* sciences have led to wide-ranging doubts about *their* claim to rationality, as summarized by philosopher Joseph Margolis (1986:234):

> Quite sensibly, Hempel (and with him, Davidson) took the hypothetico-deductive model of explanation in science to provide the most promising model . . . of rationality: a rational agent, on that view, is one who behaves (implicitly or explicitly) in accord with the most powerful cognitive model we possess. The generally admitted fact of scientific progress draws us in this direction. The trouble is that that model is in the deepest of trouble itself, because the logical status of scientific laws is in doubt, because the deductive model of explanation is in doubt, and because the conceptual connection between explanatory models and the living, historical practice of scientific inquiry is unclear. This, of course, is precisely what is associated with the difficulties unearthed by such investigators as Kuhn, Lakatos, and Feyerabend. We simply do not have a suitable model of the rationality of science, though we do have some clues.

The second aspect relates to the implications of the "holist" view of epistemology and the thesis of the underdetermination of theories, advanced by Willard Quine and Mary Hesse, among others. "Holism" involves "the claim that theoretical sentences (within either natural language or more formal theories) have their meaning and their evidence only as parts of a theory" (Roth 1987:7). One implication of holism is that theoretical statements cannot be sharply distinguished from observational (factual) statements. Theories internally consist of mutually supporting

and inseparable networks of theoretical and observational statements. "[T]here is no theoretical fact or lawlike relation whose truth or falsity can be determined in isolation from the rest of the network" (Hesse 1980:86). "Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system. . . . Conversely, by the same token, no statement is immune to revision" (Quine 1980). Truth is therefore relative to the theory.

The thesis of the underdetermination of theories holds that "there are in principle always an indefinite number of theories that fit the observed facts more or less adequately" (Hesse 1980:viii). Therefore, given an actual situation where two theories are equally adequate to the facts, resort to the facts cannot determine the correctness of one theory over another (especially since what will count as facts are partially determined within each theory). In combination, underdetermination and holism can be read to support Winch's views about the nature of rationality (Roth 1987:ch. 9). Indeed, in a manner reminiscent of Winch's claim (1964:318) that rationality is relative to forms of life as developed in actual use, Quine argued that the norms of science change as the practice of science changes and that there are no extra-scientific constraints on scientific methodology—the practice of science itself is the final determinant (although Quine differs from Winch in asserting that science is the source of true knowledge and can be applied to evaluate other knowledge claims).

Holism and the thesis of the underdetermination of theories are adhered to by many of the leading philosophers of today.[5] They have led to what is called "antifoundationalist" philosophy—the view that there is no way to get outside of theories as such (no unmediated access to the world), no Archimedean standpoint from which to evaluate theories, and no way to ground knowledge in any foundation more solid than the theory which gave rise to it. Much of the discussion in the philosophy of social sciences today revolves around a struggle to deal with the relativistic implications of this position.

One reaction was to declare the "epistemological unity of humankind," the thesis that (for various reasons, usually related to human nature and the capacity to survive and function in a hostile world) primitives and moderns share the same basic notion of rationality and perceive the world in more or less the same way, so there is no problem with rendering judgments (Roth

[5] For a list of holists see Bohman 1991:251 nn.30, 31. Among other luminaries, Bohman lists Richard Rorty, Charles Taylor, Hans Georg Gadamer, Jacques Derrida, Hubert Dreyfus, Stanley Fish, John Searle, Donald Davidson, Jürgen Habermas, Clifford Geertz, and Alasdair MacIntyre, though he points out that there are different versions of holism ("strong" and "weak") and that these theorists draw different conclusions from holism.

1987:130–51). An often cited position is Donald Davidson's (1984) "Charity Principle," which leads to basically the same outcome, though in less strong terms. Davidson argued that if beliefs and actions are to be intelligible (for the participants as well as the scientific Observer), they must be largely correct (by the participants' standards as well as the Observer's)—"interpretation is possible at all only on the background of shared and largely true beliefs" (Roth 1987:134). "Charity is forced on us; whether we like it or not, if we want to understand others, we must count them right in most matters" (Davidson 1984:197). Consequently, the more error the scientist finds in the participant's actions and beliefs, the more likely it is that the scientist's understanding is incorrect (Root 1993:175–76). Davidson's Charity Principle, in effect, softens the gulf between alternative forms of life (Davidson 1984:183–98).

There is, of course, *much* more to the philosophical issues so expediently related above, including conditions, qualifications, refinements, and competing views of the matter. But that is sufficient background for our purposes. In the preceding discussion two implications were drawn from the internal/external distinction, the first *methodological* and the second *epistemological.* The methodological component relates to the contrasting strategies applied by positivists and interpretivists to the study of social life, the latter taking the position that the internal understanding of participants must be taken into account, and the former focusing on external patterns of action. Epistemological issues arise when the scientist moves beyond description to evaluate the beliefs or knowledge by standards external to that form of life.

Finally, I will identify the moral overtones to the internal/external distinction with regard to both methodological and epistemological aspects. As is familiar to all anthropologists, the epistemological aspect has moral implications for the obvious reason that it insists on respect for the integrity of different ways of being and thinking. The methodological aspect has moral implications because it insists that social science must not abolish the thinking subject. Positivistic social sciences regularly characterize human subjects as deluded or "judgmental dopes" (Bohman 1991:76–77) or as mere pattern carriers whose existence and actions are in service of perpetuating the social system. Besides the specter of determinism raised by these characterizations, people become mere things, and things (especially deluded things) lack moral standing. Taking seriously the internal view restores this moral standing.

Some theorists would assert, as Richard Rorty has, that this moral component is *the* central reason for considering the internal view: the "need to look for *internal* explanations of people or cultures or texts takes civility as a methodological strategy. But civility is not a method, it is simply a virtue . . . [the contrast]

seems to me a contrast between fellow feeling and moralizing condescension—between treating men as moral equals and as moral inferiors" (1983:169–70 (emphasis in original); see also Rorty 1979:349).

The "Strong Programme" of the Sociology of Science

The sociology of knowledge involves the assertion that knowledge and modes of thought cannot be understood without taking into account their social origin. In a classic example of this kind of analysis, Marx argued that the ideational superstructure of society masks or distorts reality, leading to false consciousness among the economically oppressed for the benefit of the elite. "Particular ideologies, then, are held to be not only distortions of reality, but *socially induced* distortions, arising from the class interest of the proponents and victims of the ideological beliefs" (Hesse 1980:30; emphasis in original). Karl Mannheim, the "father" of the sociology of knowledge, extended Marx's partial theory of ideology to a total theory of ideology: "all beliefs about man and society are induced by social context, and have social functions" (ibid.).

But this extension to all beliefs was problematic:

> For if *all* beliefs distort, how can there be *true* beliefs about the real, and in particular how do we know there is a "real" to be distinguished from the distortion? This reflexive argument certainly hits Mannheim's own theory, for this is quite clearly a social theory of the same kind as it refers to, and must therefore itself be socially induced according to its own principles. (Ibid., p. 31; emphasis in original)

To avoid this self-refutation, Mannheim suggested that "the intelligentsia is a disinterested class whose beliefs are minimally distorted" (ibid.). Moreover, Mannheim specifically exempted mathematics and the natural sciences from his vision of total ideology. In these areas true knowledge could be distinguished from false belief because the natural world and its characteristics are unchanging and universal (Mulkay 1979).

The "strong programme" of the sociology of science is a school of thought that extends the sociology of knowledge to the areas previously excluded by Mannheim.[6] According to the strong program, all knowledge, including that produced by mathematics and the natural sciences, has underlying social causes. Strong programmers distinguish internal *reasons* from external social *causes* and assign determinative efficacy to the latter. Internal reasons are the rational-teleological explanations given by scientists themselves for their discoveries and beliefs, reasons that focus on logical analysis, testing, fitting the evidence, coher-

[6] The leading works in the strong program are Barnes 1974; Bloor 1976. For a collection of articles on the subject, see Brown 1984.

ence, simplicity, and other commonly cited norms for science; "external" causes are social factors like class interests or professional interests. The strong program postulates that external (social) factors are the causes of true as well as false beliefs in science, whereas the standard view of the matter is that scientific rationality is the source of true beliefs.

Proponents present the strong program in strongly positivist terms, insisting that they provide explanations of beliefs through causal laws (Bohman 1991:40; Bloor 1976:4–5). Like most positivist accounts, the strong program discounts the explanations given by the scientists for their own actions, substituting external causes for these internal reasons. The key to their argument is the way in which strong programmers—citing Kuhn, Feyerabend, and Wittgenstein—justify discounting the participants' explanations: by arguing from indeterminacy. Holism implies one kind of indeterminacy—which suggests that the question of when contrary evidence will disconfirm a theory—as opposed to result in an internal adjustment of theoretical statements—is not determined by the theory or the facts; underdetermination of theories implies another kind of indeterminacy—that objective reality cannot be used to select between empirically equivalent competing theories. Thus, the strong program concludes, social interests must be the decisive factor.

Opponents have argued that neither kind of indeterminacy gets the strong program very far. Holism is a philosophical doctrine that specifies the nature of theories as such but does not specify how in a given instance the choice between making an adjustment in the theory or discarding the theory is determined. Kuhn's study of normal science and paradigm revolution suggests that the ultimate pressure for an overthrow of accepted theory comes from internal considerations.[7] Kuhn "perceives the motivation for change as arising within the context of the testing of a theory against experience and in the face of competitors" (Roth 1987:178).

Similarly, the underdetermination of theory argument is an *in principle* argument, that is, in principle there are an indefinite number of theories that could fit the facts equally adequately. While there may have been historical instances where the available competing theories fit the facts equally well,[8] that does not of itself indicate that social influences (as opposed to adherence to internal norms like a preference for simplicity) were the deter-

[7] Writes Kuhn 1977:119: "The problems on which such specialists work are no longer presented by the external society but by an internal challenge to increase the scope and precision of the fit between existing theory and nature. . . . In short, compared with other professional and creative pursuits, the practitioners of a mature science are effectively insulated from the cultural milieu in which they live their extraprofessional lives."

[8] Quine (1975) has indicated that it is an open question whether there have been actual instances of two logically incompatible but empirically equivalent theories.

minative factor in a given instance of theory choice;[9] and anyway in most cases competing theories do not fit the facts equally well, especially with regard to the more mature sciences.

The strong program has one more version of indeterminacy to fall back on—the indeterminacy of the scientific norms themselves. Strong programmers cite Wittgenstein to argue that adherence to norms (or rules) cannot explain behavior. Wittgenstein (1958:201) held: "no course of action could be determined by a rule, because every course of action can be made out to accord with the rule." "For this reason, every rule and every explanation is, in the end, grounded in routine, habit and custom" (Bloor 1984:305). What people *do* determines what the norm means, which implies that the norms are unavoidably open to change brought on by a new course of action that (in effect) alters the meaning of the rule. David Bloor, a leading strong programmer, uses this behavioristic theory of meaning ("meaning is created by use, not by meaning," ibid., p. 309) to argue that internal factors *are* external (p. 303). According to this analysis, the content of scientific norms, including theoretical coherence, logical consistency and satisfying the evidence, is itself determined by social convention, and is therefore social.

However, since *all meaning* is conventionally determined in the sense conveyed by Wittgenstein, to claim that scientific norms are social in this sense is true but trivial; strong programmers are claiming much more—that specific social interests, like those of the elite, are served by and determine the nature of scientific knowledge. To establish this thesis, adherents of the strong program must show that the (social) conventions of science are in turn themselves determined by external (nonscientific) social interests.

The above objections to the strong program emphasize the point that one cannot argue from a demonstration of indeterminacy alone to the conclusion that social influences are the causal factors. First the causal mechanism must be specified to show how the social influences are translated into the specific theories selected or generated (Bohman 1991:43). Strong programmers have acknowledged that establishing causal links is essential to their case, and that doing so has been problematic: "There is simply not, at the present time, any explicit, objective set of rules or procedures by which the influence of concealed social interest upon thought and belief can be established" (Barnes 1977:4–35). Furthermore, because they argue from indeterminacy, and indeterminacy is ubiquitous, strong programmers cannot evade the sting of their own argument. They "are unable to determine, on their own principles [holism and underdetermination], if the co-

[9] For a discussion of this issue see Laudan 1984:68-70.

incidences noted are a function of the interests of those under study or of those doing the study" (Roth 1987:62).

Some theorists have tried to defuse the entire debate by denying that the internal/external distinction can intelligibly be drawn. According to Ian Jarvie (1984:170–71), the institution of science includes:

> science lessons in school, people in white coats in laboratories, shelves of books and journals in libraries, conferences like the AAAS, historical traditions of endeavor, the invisible college, university departments and degrees, Nobel prizewinners, expert witnesses in court, medical researchers, and so on. . . . To even conceive of this highly abstract social institution as having an inside and outside strikes me as ludicrous.

Jarvie's position, shared by many, is that scientific knowledge is developed through the influence of both scientific norms and social interests. Hesse (1980:52) offered a weak interpretation of the strong program: "The strong thesis as I have explicated it requires only that all aspects of social structure, including its cultural manifestations in ideas, beliefs, religions, art forms and knowledge, constitute interlocking systems of causation." Sometimes social interests are the primary causal factor; sometimes it is the influence of local rational rules. "Every historical case has to be examined on its individual merits" (ibid., p. 52). And Hesse identified a characteristic distinctive to the natural sciences which explains its progress over time: "the pragmatic criterion of predictive success" (p. 190). The natural sciences are based on the gathering of instrumental knowledge, which makes correct prediction a necessity. As these predictions accumulate, the pragmatic criterion effectively filters out value judgments.

To conclude this discussion I will show how the strong programmer's use of the internal/external distinction relates to the usage urged by Winch. In short, although they rely on the same basic internal (actor's understandings)/external (disregard actor's understandings) distinction, and they both draw on holism and Wittgenstein's views about rule following and meaning, the strong program directly violates the spirit of Winch's approach.

Winch's advocacy of taking into account the internal dimension of social action led to the epistemological point of respect for the internal coherence of forms of life. Davidson's Charity Principle suggests that for such forms of life to be intelligible, the knowledge and beliefs of participants must be largely correct, and the greater the proportion of error the scientist attributes to actors, the more likely it is that the scientist's understanding is wrong. In contrast, the strong program accepts the internal/external distinction for the purposes of identifying the internal beliefs but then proceeds to almost entirely discount these beliefs. The strong program thus transgresses the Charity Principle. Or

as social theorist Stephen Turner (1981:141) put it, their "interpretations [of the internal view] are remarkably uncharitable."

Despite their lack of charity, nothing prohibits the argument of the strong programmers; whether or not they are correct is an empirical question. The epistemological issues raised earlier regarding the propriety of rendering judgments on alternative forms of life do not even arise in this context. Strong programmers are avowedly scientists applying the scientific method to science itself. Thus at all times they are pressing a critique of science through the application of norms internal to science.

The Notion of a Practice

Although the internal/external distinction has been extensively elaborated in social science, and is increasingly referred to in law, neither discussion has sufficiently focused on what, specifically, the distinction hinges on. For Winch it hinged on a "form of life." Jarvie assumed it hinges on institutions. It may also hinge on interpretive communities or cultures. Or it may hinge on any given social situation, like a trial, or social event, like the convention at which the U.S. Constitution was drafted. All that is required to invoke the distinction is the presence of meaningfully oriented social actors who can be understood and analyzed in terms of some discreet group or whole. Herein I develop another possibility—a practice—which will help make sense of many references to the internal/external distinction in the legal discussion. There are several variations of the notion of a practice. I will draw from and reformulate the versions articulated by Alasdair MacIntyre and Stanley Fish, then provide a detailed development of the notion through application to the practice of judging and the practice of legal theory in the U.S. legal tradition.

A. Practices, Institutions, and Interpretive Communities

Alasdair MacIntyre (1984:187–88) defined a practice as follows:

> By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music. . . .

> Thus the range of practices is wide: arts, sciences, games, politics in the Aristotelian sense, the making and sustaining of families, all fall under the concept.

MacIntyre's definition shows the variable nature of practices, large and small, general and specific, trivial and momentous, and it shows that practices can be nested within other practices and can overlap with other practices. It also shows the difficulty of pinning down precisely what a practice is beyond the broad statement that it involves a coherent form of socially established cooperative activity which has its own standards of excellence. What that actually means can best be filled in by examples.[10] MacIntyre's examples and his references to excellence should not, however, give the impression that practices are limited to positively oriented social endeavors, at least not in my construction of the notion. Professional drug dealing or terrorism (both of which involve complex and coherent forms of socially established cooperative activities) involve practices, each with its own internal standards of excellence and goods, perverse as these might seem from a societal standpoint.

MacIntyre (p. 194) further clarifies: "Practices must not be confused with institutions. Chess, physics and medicine are practices; chess clubs, laboratories, universities and hospitals are institutions." He is quick to add, however, that practices cannot survive for long without institutions—"institutions and practices characteristically form a single causal order" (ibid.). MacIntyre thus counters Jarvie's dismissal of the internal/external distinction. Jarvie's view was premised on characterizing the distinction as connected to science as an institution. Institutions, however, are distinct from practices. Judging is a practice; the court is an institution. Doing legal theory is a practice; the philosophy department or law school is an institution. Practicing law is a practice; the legal system is an institution. Practicing law takes place within a legal system, but the two are nonetheless distinct.

MacIntyre also describes (p. 190) the process by which a person is initiated into a practice:

> A practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice. Practices of course . . . have a history: games, sciences and arts all have histories. Thus the standards are not themselves immune from criticism, but nonetheless we cannot be initiated

[10] We need not, of course, agree with his examples. There is no obvious reason why bricklaying cannot constitute a practice, especially if one observes the care and skill which bricklayers bring to their work.

into a practice without accepting the authority of the best standards realized so far.

MacIntyre's description evokes the image that to become a participant in a practice involves giving oneself over to that practice. Interpretive theorist Stanley Fish (1989) used even stronger terms in relation to practices generally, and specifically in relation to law:

> [Y]ou will always be guided by the rules or rules of thumb that are the content of any settled practice, by the assumed definitions, distinctions, criteria of evidence, measures of adequacy, and such, which not only define the practice but structure the understanding of the agent who thinks of himself as a "competent member." The agent cannot distance himself from these rules, because it is only within them that he can think about alternative courses of action or, indeed, think at all. (P. 323)
>
> . . . [T]o think within a practice is to have one's very perception and sense of possible and appropriate action issue "naturally"—without further reflection—from one's position as a deeply situated agent. (Pp. 386–87)
>
> . . . [T]he initiated student who has thoroughly internalized the distinctions, categories, and notions of relevance and irrelevance that comprise "thinking like a lawyer," cannot see anything *but* the practice (nor can he remember what it was like to not see it) and along with it, because it is inseparable from the practice, he sees the set of principles of whose unfolding the practice is the story. (P. 364; emphasis in original)

By Fish's description, a participant in a practice virtually becomes a living embodiment of that practice.

But MacIntyre's and Fish's descriptions raise a serious question that neither adequately answers. Both theorists see practices in overly monolithic terms, as if they were internally homogeneous, unified, and coherent in pursuit of the common enterprise of which the practice consists. To be a participant in that practice, one must conform to the norms of that practice (MacIntyre) or even have the norms of that practice colonize your mind (Fish). The question is this: How do practices change? Since both theorists emphasize that practices have histories, they must change.

In an essay (1989:141–60) dedicated to the question of change in relation to practices and interpretive communities—concepts that he does not sharply distinguish—Fish faces it head on:

> [T]here would not seem to be enough room . . . to make change a possibility. In the preceding pages this impasse has been negotiated by a demonstration that neither interpretive communities nor the minds of community members are stable and fixed, but are, rather, moving projects—engines of change—whose work is at the same time assimilative and self-

> transforming. The conclusion, therefore, is that change is not a problem . . . .
>
> The answer to the question "what can cause change?" is "anything." (Pp. 152–53)

Fish's answer, in the final analysis, appears to be that it is in the nature of practices to change, so they do. While there is truth in this answer, there is more to say.

The fuller answer has to do with the nonuniform nature of practices and their participants and with the relation of practices to their environment. While practices are based on a shared set of organizing rules and standards, they are nonetheless internally heterogeneous. Some practices are more internally coherent than others, but all practices contain norms that potentially conflict or lean in differing directions. Participants in the practice of chess or football, for example, will share many of the norms internal to the practice yet differ on such matters as whether conservativeness or risk taking (alternative norms available within the practice) is the best way to succeed. More complex and general practices, like the practice of judging, are even more internally heterogeneous. The practice of judging contains norms oriented toward the application of rules but also norms oriented toward doing justice, demands which sometimes clash. Beyond the minimum necessary to constitute a practice as such, there is no reason to postulate or assume that the entire body of norms contained within that practice is internally consistent. To believe in such unity and coherence is an analytical imposition on an otherwise unruly reality, in much the same way anthropologists in the past projected tightly knit, unchanging sameness onto primitive societies.

The other source of change is the heterogeneity of the participants themselves. At least in highly differentiated societies, every individual participates in more than one practice and is a member of more than one interpretive community. People do not enter practices *tabula rasa*. The influence of other practices and interpretive communities shapes the manner in which participants take up aspects of the practice at hand, leading them to adopt certain interpretations of norms over others (within the range allowed by the indeterminacy of rules). That is why two people engaged in the same practice of law, or the practice of judging, can sincerely understand the selfsame legal norm differently.

In short, practices can change because no practice is perfectly homogeneous or internally consistent, either in its body of norms (and their range of interpretations) or in the pool of participants. Added to these internal factors are the influences exerted on a practice by its environment, especially its relationship to the institution that supports the practice and to other closely connected or interacting practices. Given this more nuanced pic-

ture of the nature of practices, which softens the overly unified and conformist characterizations of MacIntyre and Fish, change is no longer a mystery.

The last aspect to be clarified is the relationship between interpretive communities and practices. These two notions are distinct and must be understood as such. Interpretive communities are groups of people bound together by socially generated and shared clusters of *meaning*—complexes of ideas, beliefs, knowledge, symbols, and terminology that characterize discrete groups. A practice as such is not limited to the realm of meaning—it involves an *activity*, it involves doing, and contains integrated aspects of both meaning and behavior. Similar to the close relationship between practices and institutions, practices are accompanied by, supported by, indeed constituted by the shared meaning that comprises a given interpretive community. Like practices, interpretive communities are internally heterogenous, and members pick up and internalize different internal clusters of meaning, though all members share a baseline of knowledge and beliefs and basic facility with the language or terminology characterizing a given interpretive community. Finally, a cautionary note: While it is possible to separate analytically the dimension of activity from that of meaning, in reality the two are inseverable, since the meaning is what informs the activity, and the activity can be understood only by attending to the meaning.

B. The Practices of Judging and Legal Theory

Many of the above points can best be understood through legal examples. The practice of judging is separate from a legal institution. However, one cannot participate in judging unless one holds the position of judge within a legal institution. Thus the nature of a given practice of judging is strongly influenced by the legal institution to which it is connected, because the nature of judging is shaped by the mix of people who actually participate in that practice; the legal system determines (according to its own criteria) who gets to participate, and it specifies their institutional roles.

Doing legal theory is a practice separate from judging—the former is usually connected with academic institutions and the latter with legal institutions—and their internal norms are quite distinct, but the two are often closely related and exert reciprocal influence. That is because many influential participants in one practice have been participants in the other (like Benjamin Cardozo and Oliver Wendell Holmes) and because the Anglo-American practice of legal theory takes judging to be a central concern. This close interaction is made possible by the fact that both of these practices are informed by the broader interpretive community that consists of all persons trained in law. They substantially

share a baseline of ideas, beliefs, and general knowledge about law, much of which was inculcated in the course of legal education, and through their participation in the respective practices they entered (or moved in and out of).

While there has been an essential continuity to the historical practice of judging in the U.S. legal tradition, it is widely recognized that the nature of this practice has gone through several fundamental changes over the past 200 years, in response to surrounding social pressures and in response to changing theories about law and the judicial role—which in turn were influenced by changes in the practice of judging itself—thus forming a circle of mutually influencing factors. In broad terms, the practice of judging has gone from the Grand style, to the formalist style, to an uncertain mix of rule and policy considerations (Mensch 1990). Because all practices change in piecemeal fashion—altering only one part, holding the rest more or less constant—with different aspects changed or held constant over time—the original form of a practice may well be quite unlike the selfsame continuous practice 200 years later. It is, nonetheless, the same historical practice.

Continuing with the example of legal theory helps illustrate two further aspects of practices: practices can be nested within other practices at higher levels of generality; and the best way to distinguish among practices and to locate the levels at which they exist is to identify the set of shared norms that constitute the practice.

Reflecting the close relations between the practice of judging and the practice of legal theory, the Legal Realists had a major influence on the aforementioned shift in the practice of judging from the formalist style to the current mix of rule and policy consideration. By demonstrating the indeterminacy of legal categories, rules, and principles, they exposed the reality that judges were constantly faced with choices in the interpretation of law (Singer 1988). From our standpoint today, it is obvious that the Realists were involved in the practice of legal theory; but the same point can be established by attending to the then prevailing norms about what it meant to be doing legal theory, including, *inter alia*, thematizing law itself, conducting doctrinal analysis, exhibiting rigorous reasoning, publishing in legal journals according to the highest standards of the day, and engaging in polemical discussions with theory-oriented opponents. To a significant extent the Realists altered the theoretical discussion by using arguments that did not previously exist and were not previously recognized as valid or relevant, but this change was effectuated only by adhering to most of the norms that defined the practice while challenging certain others. Otherwise their work would never have been recognized as a part of the same theoretical con-

versation about law, and would not have succeeded to the extent that it did.

Nested within the practice of legal theory, the Realists formed their own subpractice—as defined by the loosely associated cluster of norms, beliefs, attitudes, and strategies that allow us (as well as the Realists themselves) to see Legal Realism as a discrete complex of common endeavor. This example demonstrates that more inclusive practices—practices at higher levels of generality—require less in the way of shared norms defining that practice and thus are more internally heterogenous than lower-level practices. Theoretical practices in particular are often highly heterogeneous, because they are held together by the very general normative requirements that they be "theoretical" and concern the same subject matter (broadly defined, and always changing), neither of which imposes any restrictions about conformity to any particular view about the subject itself. Indeed just the opposite is true—theoretical practices thrive on disagreement about the subject. Moreover, because theoretical practices in particular have a well-developed capacity to be reflexive—to thematize themselves—they have a built-in openness to change.

Now I will briefly apply the above distinctions to the situation today. The current practice of U.S. legal theory is one and the same historical practice described above. Within this general practice, a number of discrete subpractices exist, including the CLS practice, the liberal practice, the economic practice, the feminist practice, the critical race practice, the natural law practice, and the sociolegal practice.[11] Although each of these subpractices is internally heterogenous, they are nonetheless defined by the shared norms, attitudes, and strategies that make them what they are, and set them apart from the other subpractices. The fact that these subpractices exist on the same level of generality (all nested within the practice of legal theory) can be demonstrated through a comparative analysis; along with adhering to the general requirements of being "theoretical" in relation to the subject "law," each offers prescriptive as well as descriptive claims about law, about the relationship between law and society, and about legal theory. Regardless of the very different look each of these subpractices presents, they are all participating in the same practice: legal theory.

For some time the basic tool used to analyze law has been the institution. Now there are two additional concepts—practices and interpretive communities—which help open up new dimensions and draw different lines. Practices add an *activity*-related dimension that cuts across the institution at many different levels. Operating within legal institutions there are many practices:

[11] I should emphasize that one can participate in more than one subpractice, and one can participate in the practice of legal theory without being a participant in any particular subpractice.

judging, policing, legislating, lawyering, and nested subpractices, like prosecuting, defending, tax advising, appellate judging, trial judging, and so forth. Each has its own complex of norms and standards that define a given practice, although nested subpractices also share a substantial body of norms and standards with parallel level subpractices and the higher level practice which encompasses them. There are also practices unconnected to legal institutions—like legal theory and law teaching (usually connected to academic institutions)—that influence the practices attached to legal institutions.

Interpretive communities add a *meaning*-related dimension that rises above institutions as well as practices. Judges, lawyers, legal theorists, law professors, retired legal practitioners, law students near graduation, all those who have undergone the scholastic indoctrination necessary to obtain a grasp of legal language and basic knowledge and beliefs about law—thereby gaining access to legal discourse—are members of the interpretive community of a given legal tradition (or the "intersubjective legal community"[12]), regardless of what practice they participate in or whether or not they are connected to a legal institution. And while practices require a shared interpretive community to function, institutions do not. People occupying different positions in a single institution need not be members of the same interpretive community, as evidenced by the fact that police have an important role in legal institutions but most are not members of the intersubjective legal community.

Despite their close and overlapping connections, institutions, practices, and interpretive communities are distinct and must be understood as such for analytical purposes.

C. The Structure of the Internal/External Distinction in Relation to a Practice

The structure of the internal/external distinction consists of two fundamental elements: *Observed* and *Observer*. While social action can be studied by social scientists in a variety of ways and from many angles, when an investigator specifically intends to examine the internal view of an *activity*, the methodological starting point is to identify the practice that activity embodies—that practice becomes the Observed. Taking an internal view of the practice means viewing that activity in consideration of the understandings of the participants involved (interpretivism); taking an external view means ignoring these understandings and instead focusing on the patterns reflected in the activity (positivism).

[12] A number of these ideas, except the notion of a practice, are elaborated in greater detail in Tamanaha 1993:ch. 4.

In contrast to the Observed element, which has been extensively addressed, in the scientific discussion of the internal/external distinction there is virtually no mention of the status of the *Observer*. The Observer is presumed to be a scientist, because the subject of the discussion is how social science should be conducted, and the unstated assumption is that science necessarily entails a scientist in the position of Observer. One must, after all, have substantial training and specialized knowledge to qualify as a truly scientific Observer. Furthermore, one of the most cherished norms of science—impartiality—has the effect of automatically disqualifying participants. Scientists assume that a participant in a practice cannot be impartial—to participate is to be biased. Although scientists have begun to emphasize participant observation, rather than recognizing true participants as Observers, "participant observation" invariably means that *scientific* Observers should see things "as if" they were participants, a kind of pseudo participation. This denial of Observer status to actual participants helps preserve the authority of scientists vis-à-vis participants.

There are indications that this failure of science to accord true Observer status to actual participants will change (Root 1993:39–49). Increasing attention to the understandings of participants, combined with recognition of the value-laden nature of the social sciences and growing skepticism about their knowledge claims, generates pressure in this direction. Law, however, is already there. Many of the most influential Observers about law have been participants. To accommodate the legal context, the Observer element must be further subdivided into *Participant Observer* and *Nonparticipant Observer*. The line which separates the two is solely based on experience. A Participant Observer has at some time participated in the practice observed; a Nonparticipant Observer has not participated in the practice observed.

The core of what actual participation means is obvious—either the Observer has done it or has not. But the distinction is not always clear cut. To use a familiar legal example, Justice Cardozo's book *The Nature of the Judicial Process* (1921) is the product of a Participant Observer. He was a judge who reflected on and wrote about the nature of judging. Ronald Dworkin's *Law's Empire* (1986) and Duncan Kennedy's "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986), to the extent that they offer observations about judging, are not the products of Participant Observers. Both Dworkin and Kennedy have never been judges. Their experience as judicial law clerks gave them intimate access to judging and allowed them to experience aspects of it, but they have not been participants.

Other difficult questions arise. How much participation is enough? (When the person feels "comfortable" in the practice, is able to engage in it "without thinking.") Or does participation

long ago still qualify one as a participant? (Yes, if the practice has not substantially changed.) These and similar questions at the borders must be determined in each context. But the general distinction is evident.

Distinguishing Participant Observers from Nonparticipant Observers has the effect of creating a second internal/external distinction, one regularly made in the legal discussion but mostly ignored in the scientific discussion. Recall that the focus of the scientific discussion involved taking an internal or external view of the *Observed*. This second distinction specifies whether the *Observer* is someone internal or external to the practice observed. By this analysis, there is an inseverable tie between Observer and Observed. In each case it is necessary to identify what is being observed *before* the status of the Observer can be specified.

In summary, the two basic elements at issue—Observer and Observed—each have their own variation of the internal/external divide. For the Observed element, one can take an internal view of the practice or an external view of the practice; for the Observer element, there are Participant Observers (internal) and Nonparticipant Observers (external). Legal scholars have mixed and matched these various senses of the internal and external without recognition that different analytical categories are involved.

There are four possible combinations, shown in Figure 1, filled in with examples related to the practice of judging. I have already mentioned the examples in the top row. For an example of the External/External category, I have listed Donald Black's *Behavior of Law* (1976). Black is a legal sociologist who strictly applies the behavioristic view to the legal system (the above reference is limited to those aspects of the book that refer to judging); that is, he focuses solely on the patterns of activities of legal actors and postulates causal laws based on these patterns. No examples are provided for the Internal/External box because it is unusual (not impossible, though self-alienating) for participants in an activity to observe that activity externally, though Judge Richard Posner's (inconsistently) behavioristic views of judging arguably qualify (Posner 1990).

The final point which must be emphasized is that the figure relates exclusively to *observing* and has nothing to do with actually *doing* or *participating* in a practice. That is because the internal/external distinction arose in the context of a scientific discussion over how to study social actions or practices, not about actually participating. The distinction between observing and participating tends to get lost in the legal discussion because many legal observers have been participants, and because of the close relationship between the cluster of practices that make up law, especially judging and theorizing about law. For example, when writing *The Nature of the Judicial Process*, Cardozo was making

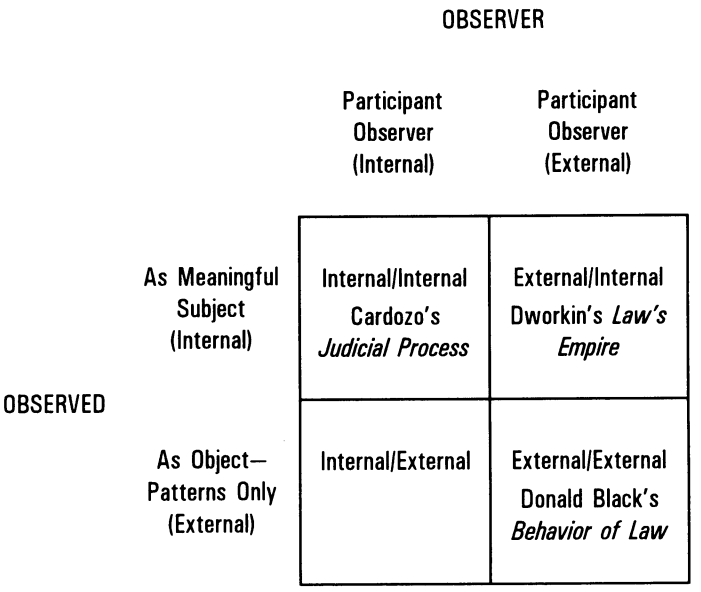

Fig. 1. The practice of judging

observations about judging (not engaging in judging) and he was doing legal theory (the practice engaged in). In relation to reflexive practices like theorizing, it is possible for a work to make observations about a practice while at the same time participating in that practice, but as a general matter observing and doing are distinct orientations with different intentional objects, though the transition between the two is easily accomplished—each time a person reflects on his or her own activities.

The Internal/External Distinction in the Legal Context

A. Hart's Internal View of Social Rules

Hart's introduction to law of the internal view of social rules has, almost in the same breath, been praised as a major contribution to jurisprudence and criticized as confused and inadequate. To set up the distinction, Hart wrote (1961:86–87):

> The following contrast again in terms of the "internal" and "external" aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of law but of the structure of any society. When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertions; *for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively, the "external" and the "internal" points of view.* Statements made from the external point of view may themselves be of different kinds.

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> For the observer 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. But whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the group. Such an observer is content merely to record the regularities of observable behavior in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. (Emphasis added)

Hart's two crucial (and flawed) observations came in the italicized sentences: first, in identifying external with nonacceptance and internal with acceptance; and second, in associating external with observer and internal with participant. Hart ended up with the external view representing that of nonparticipant observers who do not accept and the internal view representing that of participants who do accept.

Hart then went on to distinguish two different external stances: (1) that of Observers who do not themselves accept the rules but recognize and take into account that the participants themselves do; and (2) that of an Observer who, like behavioristically oriented scientists, completely ignores the internal views of the participants and just records their patterns of action. This latter perspective was Hart's intended target, which he equated with Austin's argument that the existence of rules could be determined through habits of obedience to commands. Hart felt that a focus on habit alone obscured the normative aspect of rules, which could only be recognized through consideration of the "critical reflective" acceptance which, according to Hart, characterizes the internal view.

Hart recognized that there was a problem with his identification of the internal view with acceptance. As he admitted on the following page (p. 88), there are participants in a practice who can function quite well without entirely "accepting" the norms of that practice. Instead of taking this possibility as a cue to disassociate internal from acceptance and external from nonacceptance, Hart worsened matters by declaring that this nonaccepting internal view "very nearly reproduces" the external view.

Hart's analysis led Joseph Raz to conclude (1979:154): "Internal statements are thus full-blooded normative statements. Making internal statements is thus a sign of endorsement of the rules concerned." Raz argued that Hart's internal/external distinction tends "to obscure from sight the existence of a *third category* of statements" (p. 155). This third category, according to Raz, consists of participants (like lawyers and legal scholars) who "can use normative language without thereby endorsing the law's moral

authority" (p. 156). Neil MacCormick (1981:39) also argued that there are "*three* distinct points of view, not a simple internal/external dichotomy" (emphasis in original). But MacCormick's third view was not the same as the third view suggested by Raz. MacCormick labeled his third view the "hermeneutic" perspective (pp. 34–40). According to MacCormick, the hermeneutic perspective is that of the external Observer who recognizes that the participants themselves accept the rules, without the Observer himself or herself accepting or endorsing the rules.

Raz and MacCormick thus both argued that there is a third perspective to add to the internal/external distinction, though each identifies a *different* third perspective: Raz focused on uncommitted participants, whereas MacCormick focused on uncommitted Observers. As indicated above, Hart actually mentioned both possibilities. Thus it is not surprising that Hart (1983:14) later concurred with both critiques, though he implicitly merged the two into a single third perspective:

> In terms of Raz's distinction . . . such statements of legal obligation or duties are "detached," whereas the same statements made by those who accept the relevant rule are "committed." Of course those who make such "detached" statements must understand the point of view of one who accepts the rule, and so their point of view might well be called "hermeneutic." Such detached statements constitute a third kind of statement to add to the two (internal and external statements) which I distinguish.

And that is the state of matters today. We have an internal category and an external category in some uncertain relation to a third category representing committed versus detached. Besides being confusing, the inadequacy of this solution can be demonstrated by raising yet another possibility. An Observer may describe the internal norm-oriented action of participants and (1) withhold any judgment about the norms themselves (detached); (2) endorse or accept these norms (committed); or (3) criticize these norms (critical).

Rather than account for this last possibility by grafting yet another addition onto Hart's original internal/external distinction, I will now entirely reconstruct the distinction, drawing on the earlier discussion of Winch (who was the original source cited by Hart). Assume that the practice at issue is judging and that the Observer is a legal sociologist or a legal theorist like Hart. Neither the sociologist nor Hart is a judge, so their position is that of a Nonparticipant Observer—a person outside the practice making observations about the practice. As a *methodological* matter, they each have two perfectly legitimate alternatives. They can apply the *internal* view to take into account the understandings of judges and the complex of rules and meaning that constitute the practice of judging; or they can instead just observe the

patterns of actions judges engage in—for example, matching statistics on acquittals and convictions to the social background of the judge or the income level of the defendants—and draw conclusions about these patterns, thereby taking an *external* view. This, in a nutshell, is the internal/external distinction in the sense developed in the social sciences.

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.* These are the questions which led to the epistemological debate I mentioned earlier. Winch argued that we need not and should not render any evaluative judgment, that we should remain detached. And that is the stance Hart (1961:v) assumes when he describes his work as "descriptive sociology." But this is a matter for the Observer to decide, as a function of the interests and concerns of the Observer, entirely separate from the methodological decision.

Everything I have just said also applies to a Participant Observer like Judge Cardozo. Although he articulated an internal view of judging in *The Nature of the Judicial Process*, Cardozo could have viewed judging in an external way. Moreover, Cardozo could have stopped after the description of the internal view and not rendered any judgment on the practice of judging. Or he could have gone on to endorse it, or be critical of it, or provide prescriptions for it, or even do a mix of all three, as he did. There are serious questions about whether Cardozo (as a participant) could render nonevaluative (purely descriptive) observations to begin with, but these questions raise complex philosophical and psychological issues that apply equally to Nonparticipant Observers like Hart.[13]

That is all there is to the internal/external distinction. However, a final issue must be addressed. A great deal of confusion in the discussion was caused by the fact that Hart, Raz, and MacCormick kept talking about what the participants were *doing*, not just about how to *observe* the participants doing what they were doing. They were sent on this wrong track by Hart's initial assertion that an internal statement is from one who accepts the rule. Yes, many participants accept the rules that infuse their practices,

[13] Some theorists would argue that description cannot be separated from evaluation—that "all types of interpretation are necessarily evaluative." Bohman 1991:137. (Bohman criticizes this view, which he attributes to Habermas.) While this raises very serious theoretical questions, most of the legal theorists discussed herein (and indeed most everyone else) would undoubtedly accept that the distinction between description and evaluation is valid (through sometimes problematic), since their arguments presuppose it. The distinction is as simple (and indispensable) as the difference between describing someone's theory and saying whether you agree with it, or describing someone's attire and saying whether you find it attractive.

but the range of possible attitudes of participants toward a rule or complex of rules runs from detached, to committed, to critical, to contemplative, to instrumental, to manipulative, to playful, to distant, to living so deeply in the rule that it is not even thought about but routinely done, and more. Which attitude is held depends on the social action at issue—a particular instance of judging or context of social behavior—and the particular complex of norms involved. 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. When borrowing from Winch, Hart carried over the overly rule-bound view of social action for which Winch has been soundly criticized.

To function as a judge, the judge certainly must internalize (and therefore accept, though not necessarily consciously) a great deal of the norms applicable to the practice of judging. Many of these norms are trivial (like referring to oneself in the third person object form—"The Court finds that . . ."), though most are not (like norms related to fairness, the proper judicial temperament, following the law, the style of writing judicial decisions, judicial ethics, and so forth). A judge can be cynical about some of these norms—and flout them or follow them while laughing on the inside—and a judge can have no opinion about them, or even embrace them, or have any one of many possible attitudes toward them, but most often judges don't even think about them, they just do them. A judge can thematize some of these norms and question them, but to be recognizably functioning as a judge—to engage in the practice of judging (to be doing)—the judge will adhere to most of these norms, and will do so without thinking about it. That is what participating in a practice means. None of this, however, specifies the attitude a judge must have toward any particular subset of these norms at any given time. Nor does it rule out the possibility of an entirely corrupt judiciary that functions quite effectively even though the majority of judges take a cynical (detached or critical) view toward the rules they apply.

All these observations apply full force to primary and secondary rules as well, which on this level are norms simply (though prominent ones to be sure) like any others that are part of and contribute to shaping the practice of judging. Hart's narrow focus on only primary and secondary rules was fundamental to his positivist project of providing a way to reduce the law to a system of norms. But the interpretive view opens up a whole realm of norms operative in the practice of judging that he left out. Many of the norms which define the practice of judging are neither secondary rules (rules about primary rules) nor primary rules (rules about society). Moreover, aspects of the practice of judging go beyond norms or rules (or at least are not easily character-

ized as such), like attitudes or dispositions or the situational logic involved in decisionmaking.

The practice of judging forms the norm-laden meaning context within which judges do judging. Attending to that in its entirety is what taking the internal view means. The notion of a practice, because it consists of both specifically legal norms (primary and secondary rules) as well as of social norms and psychological factors that influence the interpretation and application of legal norms, is potentially a concept in which the interests of legal theory and sociolegal studies converge.

B. Dworkin's Internal/External View of Legal Theory

In his recent Postscript to *The Concept of Law*, Hart vigorously defended his approach (1994:239–44) against what he saw as Dworkin's "imperialistic" view of legal theory. In *Law's Empire* and elsewhere, "Dworkin appears to rule out general and descriptive legal theory as misguided or at best useless" (p. 242). Significantly, both theorists assert that legal theory must take account of the internal view. Hart says it is essential to describe the internal view but insists he need not go further. Dworkin argues that legal theory is an evaluative interpretive project which cannot stop at description. Moreover, when Dworkin says "evaluative," what he actually means is positive rationalization—legal theory should make law the best that it can be.

As Hart notes, it is "hard to follow Dworkin's precise reasons for rejecting descriptive legal theory." Dworkin's reasoning, set out in the introductory chapter to *Law's Empire*, appears to be as follows: (1) the practice of law is a normative activity based upon sense (meaning); (2) this practice can be studied externally or internally; (3) external legal theories have not been useful for the participants; (4) so legal theory must be internal; and (5) taking the internal view means making the law the best it can be (Dworkin 1986:13–14; see also Dworkin 1987:9–20).

The earlier elaboration of the notion of a practice established that legal theory is a practice at a high level of generality with a great deal of internal heterogeneity. The norms that shape this practice require, at a minimum, that one be "theoretical" and that the subject be "law" (with both elements loosely defined), along with additional requirements like displaying rigorous reasoning, making arguments other theorists can recognize, publishing in the same journals and engaging in debates, and so forth. Within the practice of legal theory today there are many different varieties (subpractices), including the critical approach, the economic approach, and Dworkin's liberal approach, among others.

Dworkin's point, therefore, cannot be that these competitors are not a part of legal theory. His argument is the more limited

one that these other legal theories are not helpful to the practice of judging, and legal theory should provide that service. Dworkin's view represents what is called a "perfectionist" approach to theory, which takes an openly value-committed stance toward the subject at hand. But perfectionist approaches can be critical or rationalizing (or a combination of both) in relation to the practice at issue. Which stance one adopts depends on one's values and the nature of the legal system involved. Without this freedom, legal theory would be beholden to the legal system even if it were evil. Many Critical scholars, for example, are sincerely trying to make law better, and believe that doing so requires wholesale critique. Practices develop positively in relation to criticism as well as rationalization. There is no way to declare in advance that rationalization is the most useful or best for the practice, because only the passage of time, only the historical development of the practice of judging, can determine what shape the practice takes and what was the most influential factor in leading to that state.[14]

Perhaps Dworkin was led to "imperialism" by his belief that *law is a practice.* He asserts (1986:90) that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice." There is a clear dividing line between jurisprudence (legal theory) and adjudication (judging)—they are different practices attached to different institutions with different internal norms and standards of excellence.[15] The more fundamental point is that there is no such practice as "legal practice as a whole" (ibid.) within which adjudication and legal theory are situated.

The practice of law as I have used the term is what lawyers (practitioners) do, their activities and the norms and standards they follow in pursuit thereof (norms and standards regarding good and bad lawyering which are to be found in the actual practice of law, not in the Code of Professional Responsibility). Judges, lawyers, and legal theorists in a given legal tradition are all members of the same overarching intersubjective legal community (which enables them to communicate), but they nevertheless participate in different practices. These practices can be viewed as a cluster and can be added together with other practices like policing and legislating (whose participants need not be members of the intersubjective legal community) to be viewed as

[14] Indeed, a prominent federal judge recently declared that "Dworkinian scholarship, like legal nihilism, has little direct utility for practitioners, judges, administrators, or legislators" (Edwards 1992:47).

[15] It might be said that every time a judge decides a difficult case, that judge is theorizing about law and thus in a sense doing legal theory. That would misapprehend what is involved in the practice of legal theory, which is a specific practice that goes beyond just thinking about law in a theoretical way. The practices of judging and legal theory I have elaborated herein do not have a monopoly on "judging" and "theorizing about law," which occur in a multitude of contexts across a wide variety of practices.

the cluster of practices associated with a given society's legal institution. But these practices added together do not amount to an overarching practice called "legal practice" for the reason that there is no single practice—defined as a socially established coherent activity with its own standards of excellence—which encompasses all these divergent practices.

Unlike science as a whole, which arguably consists of a coherent set of broadly stated standards, like the pursuit of knowledge and attention to the facts, the many practices that cluster around law cannot be joined under any single set of defining norms or standards of excellence. The most plausible candidate in law is the dated theoretical view that law involves subjecting society to the governance of rules. That defines law from a societal standpoint and arguably describes a norm common to the practices of judging, legislating, prosecuting, and policing, but it is not a norm or standard which characterizes either legal practice generally (lawyering involves a strategically oriented instrumental view of rules) or the practice of legal theory (which takes a multitude of views toward rules and the legal system).

Dworkin has made another extraordinary assertion based upon the internal/external distinction. Legal theorist Michael Moore (1989:953) summarized it as follows:

> Thus Dworkin tells us that each interpretive practice must be judged internally by its own standards of validity, objectivity, independence from convention, and even truth, meaning and reality. For Dworkin, it is impossible to judge the propositions central to any interpretive practice by the (external) standards of science. Rather, we should "proceed more empirically" by ascertaining what counts as a good reason within each such enterprise and judge the objectivity of the practice accordingly.

Dworkin in effect claims that law as a practice is unto itself, insulated from the application of externally generated standards. Setting aside the objection that this is an extremely dangerous position (as Moore argues), and ignoring my objection that there is no overarching "law practice" as such, I limit my response to demonstrating that Dworkin's claim is not supported by the philosophical doctrines surrounding the internal/external distinction.

Winch argued that the standards taken from one *form of life* should not be drawn on to evaluate another form of life, and the example he used was that the knowledge produced by modern science should not be used to judge the beliefs of primitive societies, historical societies, or religion. Two characteristics should be noted about these examples. First, they refer to total, all-encompassing cultures or cosmologies, not to individual practices within these cosmologies. Second, these cosmologies were at a great distance from modern science, so great that there were few

apparent commonalities on which evaluative judgment could be based.

Even if we grant the first point that law comprises a total cosmology in the same way that religion or the culture of a primitive society does (which seems highly contestable), the second point is patently inapplicable. Science and law in modern society are very close, with shared knowledge, and many shared beliefs and standards of rationality. Both science and law understand inductive, deductive, and analogical reasoning in much the same way, as well as attending to the evidence, the attitude of impartiality, what truth means, and much more. Law has many of its own tradition-based peculiarities (such as legal fictions) as does science. But they have so much in common—because both are grounded in our culture, *our form of life*—that there is absolutely no problem with rendering evaluative judgments on the law from the perspective of science (or morality): the standards are substantially the same. Dworkin is correct that to truly understand law one should examine the activities of legal actors from the internal view (methodology), but he is wrong to raise any epistemological barriers to a critical evaluation of this view.

Finally, I question Dworkin's (1986:14) central methodological assertion:

> This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining the practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint, not because only judges are important or because we understand everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice.

That is how Dworkin characterized his exercise at the beginning of the book.

Consistent with the internal approach set out in this article, what one would expect to follow is a detailed anthropological or sociological account of the practice of judging or at least references to such accounts. What instead follows are a series of theoretical arguments against his polemical opponents, then arguments that "integrity" should be the overarching guide for adjudication. Only then is there any discussion about the practice of judging, but that discussion is mostly in relation to an imaginary judge (Hercules) who proceeds to reason using the abstractly derived suggestions Dworkin produced about how judging *should* be practiced. And on the penultimate page of the book, that is precisely how Dworkin characterizes what he has accomplished: "I described the nested interpretive questions a judge should put to himself and also the answers I now believe he should give to the more abstract and basic of these" (p. 412).

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. Calling his Herculean account of judging the internal view of actual participants is therefore misleading. The actual practice of judging is much more complicated, and mundane, than Dworkin's suggestion that judges make the law "the best that it can be." It involves a mix, among other factors, of trying to be fair, doing the right thing, following the law, satisfying the parties before them, looking good among colleagues, acting judicially, moving the cases along, and not making any serious or obvious mistakes. A legal theory built on this reality would be interesting indeed.

Dworkin laid claim to the internal view mostly to legitimate his account. This claim allowed him to assume the mantle of spokesman for the practice of judging without first demonstrating what that practice actually entails. The normative complex that shapes the practice of judging cannot be derived by any idealizing technique. It must be shown through a detailed investigation of the practice itself.

C. CLS as Interpretivists on the Outside

CLS scholars have made a great deal of the internal/external distinction, though in a highly questionable way. They are vehemently against scientific positivism, and have endorsed the basic tenets of interpretivism, especially the view that social reality is socially constructed through ideas and beliefs, and therefore these ideas and beliefs—the internal view—must be taken seriously (Trubek 1984:600–605; Gordon 1990:413–25). At the same time, Critical scholars have constructed their identity on the claim that they study law from the "outside."

This claim is not offered lightly. Critical theorist David Trubek explicitly associated the CLS outside view with that of empirical legal science: "Both groups look at law from the outside, as it were, questioning its own self-understanding" (1984:615). "While Critical legal scholars take doctrine seriously, they also think they are examining the social role of law. The Critical scholars clearly believe that when they conduct a critique of legal thought, they are not doing doctrinal research, but rather are looking at law from the outside and tracing relationships between law and social action" (p. 589). The difficulty Critical scholars face in making this claim of looking "from the outside" and "not doing doctrinal research" is that, as Trubek admits, "much of the writing produced by CLS focuses on the ideas in legal doctrine or legal scholarship" (p. 588).

Beyond the repeated insistence that it is so, it is difficult to find a clear articulation of precisely why or how it is that CLS is on the "outside." Again Trubek (pp. 588–89):

> Unlike the judges and scholars whose work they study, those who *critique* legal thought do not try to determine, for example, the appropriate rules for wildcat strikes or whether it is necessary to prove discriminatory intent as a condition of liability under antidiscrimination laws. Rather, the Critical scholars seek to expose the assumptions that underlie judicial and scholarly resolution of such issues, to question the presuppositions about law and society of those whose intellectual product is being analyzed, and to examine the subtle effects these products have in shaping legal and social consciousness. (Emphasis in original)

The bulk of law review articles are aimed at assisting practitioners and judges understand and deal with particular social problems or legal regimes, concerns that do not occupy most Critical scholars. Many of these practice-oriented articles include a dose of critical analysis and end with constructive suggestions. Critique, at least to some extent, is an expected aspect of legal scholarship. Moreover, other schools of legal theory, including law and economics, are just as critical of law and legal understandings as CLS, as reflected by Richard Posner's (1990) highly skeptical jurisprudence. Thus the fact of criticism itself does not set CLS apart in any way. The most that can be said is that CLS articles differ in precisely the same way that all theory-oriented articles differ from practice-oriented articles.

In the end, the basis for the distinction appears to be in the last sentence in the Trubek quote above, regarding their focus on legal consciousness: they are on the outside because "CLS reads doctrine as ideology, thus distancing itself from mainstream scholarship" (p. 619). CLS adherents assert that their largely doctrinal analysis is "nondoctrinal" because their objective is to get beneath the doctrine itself, to reveal its ideological source in external social interests. As Robert Gordon put it (1990:419; see also Trubek 1984:606), "The [legal meaning] systems, of course, have been built by elites who have thought that they had some stake in rationalizing their dominant power positions, so they have tended to define rights in such a way as to reinforce existing hierarchies of wealth and privilege." This claim is similar to that made by the strong program of the sociology of science; indeed in many respects, the strong program stands in relation to science as CLS does to law, despite the fact that the former are avowed positivists and the latter avowed interpretivists. The difference is that the strong programmers were social scientists who focused on producing case studies to demonstrate the existence of the connections between scientific knowledge and the social interests which purportedly shaped them. In con-

trast, CLS has produced few such studies,[16] which cannot be conducted through exclusively doctrinal analysis. Doctrinal analysis can demonstrate indeterminacy and contradiction, but only by going outside the text can they demonstrate relationships of causation.

What CLS scholars are doing is legal theory from a leftist, purely critical standpoint, just one of many subpractices currently nested within the general practice of legal theory. Neither their critical stance nor the objectives and beliefs which motivate this stance places them on the "outside" in any way. The claim to being on the outside is a rhetorical feint, a stylized way of declaring an oppositional stance which situates them apart and above, while placing everyone else inside. The imagery of "outside" is powerful: you can hold the Observed, see the whole of it inside and out, get behind it, subject it to your penetrating gaze. False consciousness arguments often work from the claim to being on the "outside," because that move licenses a wholesale dismissal of the knowledge and beliefs of those being examined.

This conclusion raises doubts about another assertion made by CLS scholars, that they are interpretivists who take the internal view seriously. "Critical studies research seeks to discover the false but legitimating world views hidden in complex bodies of rules and doctrines and in legal consciousness in general" (Trubek 1984:579). Again, the close parallel between CLS and the strong program is evident. Like the strong program, CLS claims to take the internal view seriously, but mostly for the purpose of asserting that much of it represents false consciousness. Not only does this violate the spirit of the interpretive approach—which is to strive to *understand* the internal view—it runs afoul of the Charity Principle. This does not necessarily imply that CLS is wrong, only that we have reason to be suspicious of *their* understanding. Perhaps CLS is wrong about the facts of the matter, or perhaps the internal view is much more realistic than they portray. Ironically, despite their hostility to positivism and declared allegiance to interpretivism, CLS scholars discount a body of shared beliefs held by a group in precisely the morally condescending way positivists (like the strong programmers) have traditionally done in the past. This does not mean the inter-

[16] One outstanding exception to this the work of Morton Horwitz. His detailed historical analysis is combined with doctrinal analysis in an integrated and powerful way, although like the strong programmers, the most he has been able to establish are interesting parallels. More important, the progression of his work suggests that CLS may have given up its strong association of legal rules with ideology. His first major work, *The Transformation of American Law, 1780–1860* (1977), is a straight Marxist analysis that links the development of the content of law to class interests in society. In contrast, his recently published second volume, *The Transformation of American Law, 1870–1960* (1992), is a much more nuanced account, which speculates on the influence of all sorts of factors, from social to psychological, and draws fewer links between the content of the law and external interests. While this second account is much more persuasive than the first, the cost of this persuasiveness is, it seems, giving up the claim that law is ideology.

nal view cannot be criticized; only that there must first be a sincere effort at understanding.

Critical scholars simultaneously assert an odd combination of positions: they hold to the interpretive view that ideas and beliefs construct social reality, yet insist that entire swaths of prevailing ideas and beliefs about law are false, which means that at least *these* ideas and beliefs are not in fact constructing social reality. Interpretive tenets do not easily coexist with claims about wholesale false consciousness (which imply positivist notions of truth); the CLS joinder of these two suggests that a deeply problematic internal tension exists in the theoretical underpinnings of CLS.

D. Legal Sociology on the Outside; Not Sociolegal Theory

Roger Cotterrell (1983:242) described the sociological position:

> The numerous approaches to legal analysis which can be categorized sociological in the broadest sense are unified only by their deliberate self-distancing from the professional viewpoint of the lawyer. It is implicit in the aim of *empirical legal theory* that law is always viewed "from the outside," from the perspective of an observer of legal institutions, doctrine and behavior, rather than that of a participant, although participants' perspectives may be taken into account as data for the observer. Indeed from a phenomenological standpoint the interpretation of participants' perceptions may be of primary importance. Yet that interpretation becomes possible only through a scientific distancing as determined and thoroughgoing as the empathy which the observer (or better, encounterer) may seek with the observed (or encountered). Sociological analysis of law has as its sole unifying objective the attempt to remedy the assumed inadequacy of lawyers' doctrinal analysis of law. (Emphasis in original)

Cotterrell's description is presented in classic interpretive science form, up until the last sentence. His final sentence openly defines the legal scientific community in terms of an empirical and political precommitment: to demonstrate and remedy the assumed inadequacy of lawyers' doctrinal analysis of law.

Cotterrell means "inadequacy" in two senses. The first sense is the uncontroversial assertion that there is much more to know about law and its relation to society than can be found in legal doctrine alone; the second sense is that legal doctrine itself is not what it purports to be, that legal actors are deluded or have a mistaken understanding of the nature of their own activities. This second sense is similar to the stance assumed by Critical scholars,[17] though as I indicated earlier it is also a relatively com-

[17] The work of Critical/Sociological theorist Alan Hunt (1987) epitomizes this close connection. Hunt writes (p. 10): "Internal theories exhibit a predisposition to adopt the self-description of judges or lawyers as primary empirical material; their stated views on

mon attitude taken by social scientists generally toward their Object (or Subjects) of study. Once again, this is not in the spirit of the internal approach or the Charity Principle. Apparently, like CLS, legal sociologists often claim to take the internal view mostly for the purpose of discounting it.

However, closer examination renders questionable whether most social scientists who study law are even capable of taking the internal view. Anthropologists would scoff at the suggestion that a scientist could take the internal view of a culture without first learning the language of that culture; but few legal anthropologists and sociologists have made the effort to learn legal language or how that language is used to construct law in actual practice. CLS scholars can take the internal view because they have access to this internal understanding and indeed participate in shaping it through their involvement in legal discourse. Most legal sociologists and anthropologists are Nonparticipant Observers looking at law from within their own scientific practice, truly "outside" law in the way CLS is not. But also for this reason, in the absence of attempts to learn the legal language and how it works, the claim of taking the inside view rings hollow, as if it were a perfunctory nod to current scientific views about the proper methodology which is then all but ignored. Perhaps that explains why there are few sociological or anthropological accounts of how judges and lawyers understand their own activities.

Cotterrell's formulation is instructive in another way. Contained within it is the implication that participants themselves cannot be Observers, at least not scientific ones. That is the thrust of his twice-repeated reference to the necessity for "scientific distancing," language which in a single swoop discounts the view of participants (not objective because not enough distance) and boosts the authority of the scientific Observer (more objective because distant). Distance is especially important when you believe the subjects you study are suffering from delusion, for that is the only way to escape the delusion.

As I illustrated in Figure 1 on Judging, a fully complemented set of Observers would include Participant Observers, Nonparticipant Observers taking the internal view (interpretive scientist), and Nonparticipant Observers taking the external view (positivist scientist). For a long time science allowed only the last alternative; the middle alternative has recently gained popularity;[18] if interpretivism takes itself seriously, there will be greater

what they do and why they do it are treated as direct evidence about the nature of legal practices. There is thus a naive acceptance of legal ideology as reality."

[18] I should note that branches of both anthropology and history have long espoused the necessity for taking the internal view, so the internal view is not new, although in the past both fields have also been denied social science status by positivists for precisely this reason. The difference now is that interpretivism has gained philosophical respectability on equal terms with positivism and has become an accepted mode for the social sciences generally.

recognition of the value of the first alternative. An understanding of the nature of social life requires attention to all three. Social scientists have yet to come to grips with one of the more threatening implications of interpretivism: there is "no a priori ground for the superiority of a sociological over a 'lay' interpretation" (Bauman 1989:51).

The final revealing aspect of Cotterrell's description is that while it is a correct characterization of the external nature of most work in legal sociology, *what he says does not apply to himself* or to most of the body of works that fall under the label "sociolegal theory." Unlike most legal sociologists who actually engage in empirical studies, Cotterrell is trained in law and his work is largely theoretical.[19] He takes the information produced by sociologists and anthropologists and applies that within the theoretical discussion of law. Cotterrell—along with many other legally trained academics (often teaching in law schools) who identify themselves as sociolegal scholars—does sociolegal theory, and this is a practice nested within legal theory generally.

It's not just that sociolegal theory satisfies all the norms for participating in the practice of legal theory—publishing in the same journals, talking about the same subjects, engaging in polemical debates with other legal theorists. The reality is that the practice of legal theory has changed to include discussions of and resort to sociological material; consider, for example, the work of Hart, Dworkin, and Posner. This change in the practice of legal theory is partly due to the success of the Realists. And it is also a credit to the past 20 or so years of CLS and sociolegal studies. But the broader reason is that theory itself, as a general practice in many fields, has become increasingly sociological, as reflected in the fact that academic "Philosophy" is gradually metamorphosing into "Social Theory." There are still works in legal theory that do not include resort to sociological insights, but they are diminishing, and anyway this is only a reflection of the internal heterogeneity of the practice of legal theory.

Cotterrell is standing on the cusp of a sea change in the nature of the practice of legal theory, claiming to be outside when that practice has already expanded to encompass him. Cotterrell is thus very much an "insider" despite his claim to "outsider" status. That makes him a highly qualified Participant Observer who resorts to sociological arguments to lend insight into legal arguments, but he is in no way an externally situated scientist Observing legal theory from a distance (though he is an outsider to the

[19] There are sociolegal scholars who both do sociological studies and write about the application of these studies to legal theory. That is just a reflection of the fact that people can and often do participate in more than one practice. But that does not erase the distinction. The practice of the empirical study of legal phenomenon consists of a set of norms dramatically different from those required for the practice of applying these studies to legal theory.

practice of law—lawyering—and to the practice of judging),[20] as he repeatedly claims; the same holds true for sociolegal theorists generally.

The broader point is that theoretical practices in particular, because of their self-reflective capacity, have a relentless ability to absorb whatever begins as external to the practice when first introduced. Nothing can confine a practice to its original borders, which explains the futility of attempts to begin theoretical discussions by parsing and distinguishing among, for example, legal philosophy, legal theory, and jurisprudence, as if these practices stood still. Consistent with the trend in other theoretical disciplines, a large part of legal theory today consists of sociolegal theory.

Conclusion

The objective of this article goes beyond just providing criteria by which to evaluate internal/external claims. Increasing references to the internal/external distinction are part of a broader change in the way we see and talk about social reality. Interpretive analysis and the logic of holism inexorably lead to the internal/external distinction because they link all meaning and knowledge to social groups. Being inside or outside a group used to be seen mostly as a matter of one's identity; now it is the very grounds from which one generates and assesses knowledge.

Keeping up with this change will require a new set of orienting concepts. Seeing activities in terms of discrete practices allows us to draw a border analytically that helps us study them internally, as well as observe their interrelations with their environment. The notion of a practice is a valuable concept because it joins behavior (activity) with interpretation (the meaning which informs that activity) within a single analytical unit. Practices are, to be sure, just another abstraction, a heuristic device, a way of organizing the subject for the purposes of analysis and observation. There are limits to the application of this notion and it contains a number of weaknesses, but it nevertheless provides an useful analytical tool as we move onto the unfamiliar terrain of speaking about and analyzing law through the interpretive perspective.

[20] It might be argued in Cotterrell's defense that he has claimed only to be outside legal practice, not outside legal theory. However, in his text, *The Politics of Jurisprudence* (1989), he explicitly claims that he is on the outside, applying sociology to legal theory itself. The problem with this claim is that his thought-provoking book is indistinguishable from most works in legal theory today.

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