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Law as Experience: Theory and the Internal Aspect of Law

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LAW AS EXPERIENCE: THEORY AND THE INTERNAL ASPECT OF LAW

Thomas Morawetz*

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I. HART AND THE INTERNAL ASPECT: LAW, LANGUAGE, AND PRACTICE

A. HISTORICAL PERSPECTIVE

H.L.A. Hart is no longer our contemporary. His landmark book, *The Concept of Law*, nearly forty years old, is on its way to becoming a historical text.¹ What does it mean for a work of phi-

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1. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

losophy to lose contemporaneity? One answer is that it becomes problematic in a special way. Hart, like any philosopher, addresses primarily his contemporaries. Reading him here and now we must take account of the ways in which our assumptions, our questions, and our methods differ, often subtly, from theirs and his.

Our choice is a dilemma. If we ignore the differences attributable to the passage of time and test him as we would our own contemporaries, we risk being unfair. We may fault him for lacking clairvoyance, for not anticipating criticisms and sophistications of the last forty years. On the other hand, if we forgive or ignore such failings in light of historicity, in indulgent deference to age, we risk making him irrelevant to our present concerns.

Hart's discussion of what he calls "the internal aspect of rules" is at once one of the most important and controversial passages in *The Concept of Law*.² Here Hart foreshadows what has more recently become the pulse of methodological debate in legal theory (and more generally social/cultural theory), but he does so with understandable ambiguity and some naivete. Hermeneutical self-consciousness about the task of distinguishing internal and external aspects of social and cultural practices has become a characteristic preoccupation in the late twentieth century. Those who examine social practices from a scholarly distance and with the mantle of academic objectivity are typically also participants in such practices. The practices of language and law are obvious examples. Those who study languages also speak them; those who are jurisprudential theorists are also subject to law and have opinions about legal issues. A central question of hermeneutics is how the task of the theorist is affected by her role as practitioner.³

Hart's analysis anticipates these concerns, even as it understandably leaves much to be sorted out by later theorists. It remains a convenient and important point of origin for an inexhaustible topic.

B. DISTINGUISHING NATURAL AND SOCIAL SCIENCES

It is useful to situate Hart's discussion of the internal aspect historically and consider how it resonated with the interests of his peers. It is easy to underestimate how much the philosophical context has changed.

One of the widely discussed methodological questions at mid-century was the distinction between the natural and social sciences.⁴ Some differ-

2. *Id.* at 88-91.

3. Throughout this Article, I shall use the term "practitioner" to refer to all persons who are "inside" a practice. Thus all language users are practitioners vis-à-vis the language they share. Persons may be practitioners with regard to law as a social practice even if they are not lawyers or judges, even if their participation in the practice merely amounts to compliance with the law and attention to its mandates.

4. See, e.g., THEODOR W. ADORNO ET AL., *THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY* (Glyn Adey & David Frisby trans., 1976); RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* (1976); *THE PHILOSOPHY OF SOCIAL EXPLANATION* (Alan Ryan ed., 1973); *READINGS IN THE PHILOSOPHY OF THE SOCIAL SCI-*

ences were said to be obvious. The natural sciences seek and deal with universal laws. Chemistry and physics are paradigmatic. Falling objects obey universal laws of acceleration, light travels at a predictable speed, and all molecules of sodium chloride have the same structure and behave in the same way. Natural science flourishes through experimental testing, which involves controlled events that are inherently repeatable.⁵ Its laws are insensitive to the passage of time. The laws of falling bodies and of reflection of light are assumed to be the same in ancient times as now.

The social sciences, it was argued,⁶ have none of these characteristics. Consider the example of psychology. Psychological explanation cannot be expected to yield universal laws. Both prediction and retrospective explanation are individualistic and irreducibly idiosyncratic. We cannot produce universal laws about how abused or spoiled children develop specific pathologies or about how adults come to be sociopathic.⁷ We can, at most, describe patterns of experience, ways of growing up that predispose one to be happy, rebellious, insecure, or extroverted. But each person is unique.

Similarly, economics, sociology, and anthropology describe patterns of behavior but do not aspire to universality.⁸ Economics must make assumptions about rationality, risk-taking propensities, and other determinants of behavior that vary unpredictably from individual to individual. Sociology may find patterns in phenomena such as suburbanization, cultural homogenization, and class divisions, but each instance is predictably and inevitably unique. Moreover, such phenomena do not lend themselves to experimental testing. Relevant variables cannot be controlled but vary over time and context. Schizophrenia and urban renewal may occur in both first-century Rome and twentieth-century New York, but a significant difference in context makes it sensible to compare such examples as analogous phenomena and not as instances of a universal law.

The analytic and descriptive effort to distinguish natural from social sciences was vulnerable to attack from two sides. On one hand, the very idea of natural sciences as a paradigm of objective knowledge came under attack. Over the last forty years, it has become commonplace to see universal laws of the natural sciences as cultural manifestations. We arrive at a particular way of describing the natural world and characterizing the objects within it because we ask certain questions, have certain criteria for what counts as knowledge, and hold fast to certain methodological

ENCES (May Brodbeck ed., 1968); PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (1958).

5. See, e.g., ERNEST NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* 1-105 (1961).

6. See generally sources cited *supra* note 4.

7. See ROBERT COLES, *THE MIND'S FATE: WAYS OF SEEING PSYCHIATRY AND PSYCHOANALYSIS* (1961) (discussing the senses in which psychology meets the criteria of a natural science). See generally HENDRIK MARINUS RUITENBEEK, *PSYCHOANALYSIS AND SOCIAL SCIENCE* (1962).

8. See READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES, *supra* note 4, at 457-667.

principles.⁹ Our questions, criteria, and principles are not universal; different cultures have different ways of deciding how the world operates. Thus, while we need not abandon the claim that the discoveries of natural sciences are, in a meaningful sense, universal, the claim must be qualified. They are universal *given the perspectives and understandings of our culture*.¹⁰

On the other hand, the similarities between the social sciences and the natural sciences seem to have been *underestimated* by those who sought to distinguish them. Over the last forty years, the very term "social sciences" has lost its descriptive coherence. Each of the so-called social sciences—economics, sociology, psychology, and anthropology—has turned into a heterogeneous collection of disciplines. In each case the collection includes some pursuits that mimic and incorporate the language and methods of natural science and others that are more discursive, quasi-humanistic, and inherently context-bound.

Psychologists, for example, have seen their discipline subdivide. Some psychologists are essentially physiologists or biochemists, and the practice of some psychologists is primarily psychopharmacology. Their theory and practice fit comfortably within the natural sciences. Other social and clinical psychologists make no pretense to such rigor; their methods are closer to those of the reconstructive biographer and historian.

The same divisions are apparent in economics. Microeconomic hypotheses and techniques typically involve mathematical modeling of phenomena and relationships as well as ahistorical hypotheses. Macroeconomists, on the other hand, often pursue historical, sociological, and political narratives; in many instances, mathematical rigor and universal generalization are either peripheral or irrelevant.¹¹

The upshot is that we no longer seek criteria to distinguish natural from social sciences because the data and assumptions on which that inquiry rested are historical artifacts that have failed the test of time. Hart's own inquiry into the internal aspect of rules was part of that context. And yet his insight, his proposed description of the distinctive character of the study of social practices, was a subtle and suggestive anticipation of modern hermeneutical theory.

9. See CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

10. What does it mean to say that a law of physics or chemistry is universal? One interpretation is to say that it must be accepted by any observer in any culture. A different interpretation is to say that it applies to all relevant objects (all falling objects, all molecules of sodium and chloride) as they are seen within our own realm of discourse, our own culture. The latter interpretation preserves the notion of universality along with an understanding of the fact that we cannot speak for observers in other realms of discourse. We can speak about them but not for them.

11. This needs to be qualified. Historical studies of economic behavior often use sophisticated mathematical tools. Any attempt to distinguish microeconomists from macroeconomists will be rough and general. Nonetheless, microeconomists do generally pursue conceptual analysis and mimic natural science insofar as they seek invariant laws of economic behavior. Macroeconomists characteristically seek to describe and understand unique economic circumstances and contexts.

On Hart's account, social phenomena involve the behavior of self-conscious beings. To do justice to these phenomena, to understand them, it is necessary to make reference to the ways in which the actors understand their own practices.¹² Thus, while an ornithologist may describe swallows without assuming their point of view or a chemist may analyze isotopes without putting herself in their place, one who seeks to understand a social practice must take account of what the practitioners think and feel.

Once one puts aside other and more problematic ways of distinguishing natural from social sciences, the fact remains that the latter deals with self-conscious and self-interpretive behavior. The subjects of study are participants in social practices. They have been inducted into these practices through social and cultural conventions, and they themselves have some kind of understanding of their behavior and roles. Moreover, the social scientist herself is likely to be a participant in such practices and to be familiar with the relevant thoughts and attitudes from the inside.

C. THE CONCEPT OF A SOCIAL PRACTICE: LAW AND LANGUAGE

The concept of a social practice is most closely identified with the later work of Wittgenstein, for whom language was a paradigmatic practice in the following ways.¹³ The fact that we understand the speech of others and participate in discourse implies that the practice is shared. The fact that certain utterances seem to be nonsense and others, by general consensus, violate grammar, syntax, semantics, or common sense implies that language is subject to shared rules. The fact that we disagree about linguistic matters on occasion—for example, about the status of neologisms and the acceptability of slang—implies that we are not perfectly congruent in our understanding of the use and rules of our shared language.¹⁴

Language, for Wittgenstein, is not simply a clear example of social practice. It merits special examination because what we say is normally a measure of what we believe and know, individually and collectively. Wittgenstein shows how problematic philosophical analysis can be when it is not grounded in what people ordinarily say and do.¹⁵ For example,

12. See HART, *supra* note 1, at 89-91.

13. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953). This was the only work in the later part of his career that Wittgenstein prepared for publication. His *nachlass* is voluminous and widely influential.

14. See generally Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371 (1992).

15. Wittgenstein famously uses the metaphor of the fly and the fly-bottle to allude to the plight of philosophy. See WITTGENSTEIN, *supra* note 13, pt. I, ¶ 309 ("What is your aim in philosophy?—To sh[o]w the fly the way out of the fly-bottle."). The point is that we fly unencumbered when we engage in ordinary discourse. We use terms ("good," "know," "certain") unproblematically and with easy familiarity with criteria for meaningful use. Conceptual analysis, however, may trap us into unnatural ways of using terms in posing skeptical and other conundrums (Do we really know we are awake? Do we have objective criteria for goodness?) and may thus make us uncertain in finding our way about in discourse. For Wittgenstein, this situation is analogous to the fly being trapped in a fly-bottle and bumping its head against artificial barriers.

discussions of the nature of knowledge must be informed by an inquiry into the everyday use of notions such as certainty and justification.¹⁶ Under what circumstances do persons regard knowledge as *certain*, adhering to knowledge claims in the face of counterevidence and using them as a measure of the correctness of such counterevidence? Under what circumstances do persons regard claims-to-know as standing in need of further justification, and what kinds of justification are treated as appropriate or sufficient?

The answers to such questions are not merely about language. They clarify not only the linguistic rules for using the word "know" but the boundaries and complexity (that is, the nature) of knowledge. It is not clear whether there is any work left for a general epistemological inquiry into the nature of knowledge once the internal aspect of the language-games involving "know" are fully explored and described.¹⁷ The same can be said about other philosophical inquiries as well: the nature of value and goodness, the nature of being, the meaning of life, and so on.¹⁸

When Hart suggests that an adequate account of the concept of law must embrace the internal aspect, it is clear that he has in mind an analogy between law and language. His example is the distinction between habitual behavior that occurs with regularity and rule-governed behavior (stopping at red lights).¹⁹ Our capacity to distinguish between the two kinds of phenomena requires access and attention to the internal aspect. Analogous to this is the distinction between regularly emitted inarticulate sounds and speech. One's ability to distinguish between these kinds of utterances presupposes the *internal* understanding that the latter are intentional and governed by shared rules of communication.

The analogy between rules of law and language is especially evident when Hart refers to uncertainty in the law, saying that rules characteristically have a core (in which their meaning and application is certain) and a penumbra (in which both meaning and application are uncertain and potentially controversial).²⁰ His example bridges law and language. He

Note that the term "philosophy" can be used in two ways. Although philosophy (in the sense Wittgenstein is criticizing) is in the business of generating these conundrums, these bumps, philosophy (in the way he commends and practices it) exposes the snares, the artificial obstacles, for what they are. It is, therefore, a form of conceptual therapy.

16. Directing our attention to ordinary discourse, to what he calls "language-games," Wittgenstein would decline to dignify such an investigation as a discussion of the nature of knowledge. To do so would be misleadingly essentialist and therefore an invitation into the fly-bottle. See THOMAS MORAWETZ, *WITTGENSTEIN AND KNOWLEDGE: THE IMPORTANCE OF On Certainty* (1978).

17. See *supra* note 15. In other words, "philosophy" in the criticized sense is fully displaced by philosophy as conceptual and linguistic therapy.

18. All of these essentialist inquiries are variants of the fly-bottle trap. See *supra* note 15.

19. See HART, *supra* note 1, at 89-90.

20. Hart makes this distinction most clearly in *Positivism and the Separation of Law and Morals*:

A legal rule forbids you to take a vehicle into the public park. . . . If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regu-

says that a prohibition on bringing "vehicles into the park" is uncertain to the extent that the scope of "vehicles" has "open texture."²¹ Does the term include toy cars, bicycles, or ambulances? The clear implication of Hart's analysis is that because the rules of law are framed in language, whatever uncertainty inheres in legal rules is due to the uncertainty of meaning that characterizes words-in-context.²²

D. HART ON THE INTERNAL ASPECT OF LAW: FOUR VARIATIONS

Hart offers two different ways of conceiving the distinction between the internal and external aspect of rules. On one hand, he says that

[w]hen a social group has certain rules of conduct, . . . 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.'²³

An external 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."²⁴

On the other hand, Hart conceives of a different observer "who does not even refer in this way to the internal point of view of the group."²⁵ "[C]ontent merely to record the regularities of observable behaviour," such an observer will offer a "description of their life [that] cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty."²⁶ Understandably, Hart refers to this as the "extreme external point of view."²⁷

lated by rules, then the general words we use—like "vehicle" in the case I consider—must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. . . . Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge.

H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); see also HART, *supra* note 1, at 124-36.

21. HART, *supra* note 1, at 127-28.

22. Hart's discussion of the "vehicles in the park" example has different nuances in THE CONCEPT OF LAW and in *Positivism and the Separation of Law and Morals*. In the former, the emphasis of the discussion is on the relevance of policy considerations in resolving uncertain applications of the rule. See generally HART, *supra* note 1. In the latter, however, the focus is not on how uncertainty may be resolved, but on the linguistic nature of the uncertainty, the relationship between the open texture of rules, and the penumbral character of terms. See generally Hart, *supra* note 20.

23. HART, *supra* note 1, at 89.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

The distinction between the two external points of view is straightforward. The first is exemplified by cross-cultural analyses. Consider a French scholar of the American legal system. She is entirely at home with the concept of legal rules and obligations and has the internal point of view toward the French system. She assumes that Americans have a comparable set of attitudes toward their own system and use the rules to guide their own behavior, observe others, and so on.

The second point of view, altogether different, is that of the natural scientist who makes no assumption that observed behavior instantiates a learned and ongoing practice. Her stance mirrors that of an entomologist toward a colony of ants or a geologist toward tectonic plates. She observes and notes regularities of behavior. The internal consciousness and understanding of the observed subjects plays no role in her interpretation or her account. The distinction between the two external points of view is easily transposed to the practice of language: the first point of view is that of the speaker of one language to the discourse of those who speak a different language; the second point of view is that of the observer for whom language is indistinguishable from inarticulate sounds. A scream may, functionally, serve the same role as words of warning.²⁸

Having identified these two senses in which one may speak of an external point of view, that of the cross-culturalist and the natural scientist, Hart muddies his account. He says that "[t]he external point of view may very nearly reproduce the way in which the rules [of law] function in the lives of . . . those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation."²⁹ And further,

the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce . . . the way in which the rules function as rules in the lives of those who normally are the majority of society[,] . . . the officials, lawyers, or private persons who use them . . . as guides to the conduct of social life. . . . For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.³⁰

We can interpret this new characterization of the external point of view as the contrast between the outlaw and the citizen. Hart seems to be saying that the external point of view is that of the outlaw,³¹ but not the

28. The reactive behavior of the person warned is accessible even to the extreme external observer. But the distinction between rule-governed uses of language and emotive non-verbal (but intentional) sounds is not.

29. HART, *supra* note 1, at 90.

30. *Id.*

31. I am using this term in the sense in which Holmes referred to the "bad man" in explaining his theory of legal positivism:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

citizen. In proposing this, he introduces a new sense of the external standpoint. Neither of the first two senses can explain the difference between the outlaw and the citizen.

According to the first sense of externality (the external observer as cross-cultural), both the outlaw and the citizen are internal. Both have learned and incorporated the rules of their legal system. Both understand that they are likely to incur sanctions and criticism for violating the rules and that the rules are intended to be used as guides. The foreign observer, noting the conduct of outlaw and citizen, is external to their system; notwithstanding the difference in their *attitude*, the outlaw and the citizen are both internal.

Similarly, according to the second sense of externality, that of the natural scientist, both the outlaw and citizen are again internal since they are observed rather than observers. It is surely wrong for Hart to analogize outlaws to natural scientists as behaviorists (externalists in the second sense) in saying that outlaws "are only concerned with [rules] when and because they judge that unpleasant consequences are likely to follow violation."³² Outlaws, like all other members of the social practice, are aware of rules as standing prohibitions and act in light of that awareness. Their attitudes toward such rules and consequent behavior may differ from those of other members, but it is a mistake to suggest that they are not aware of rules at all and merely observe inductively that certain conduct produces certain kinds of pain.³³

How, then, can we characterize this *third* kind of externality? Hart's own explanation is ambiguous. The distinction between putative outlaws and "the majority of society . . . the officials, lawyers, or private persons who use [rules of law] . . . as guides to the conduct of social life"³⁴ can be understood in two ways. One way is by reference to acceptance and moral attitude. On this understanding, one is internal if one thinks that the rules of law, by and large, are justified and deserve support. One accedes to the purposes that the law seems to embody. On this account, one is external if one disfavors the law in general, sees it as lacking moral justification, and would ideally replace it with a significantly different system.

Note, incidentally, that lawyers and judges can readily be external in this sense. They may go through the motions of using, applying, and interpreting the law—emulating the moves of its supporters—and covertly harbor anarchistic or revolutionary attitudes. Indeed, they may become more adept and creative at mimicking the moves of insiders than the in-

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

32. HART, *supra* note 1, at 90.

33. Even outlaws are aware that punishment has an expressive function and reflects community values. Most contemporary writers agree that punishment has both utilitarian and retributive aspects. See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95-118 (1970); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 234 (1968).

34. HART, *supra* note 1, at 90.

siders themselves.³⁵

A different understanding of the contrast between the "majority of society" and those who do not guide their conduct through law is conceptual. While both citizens and the latter persons understand that they are subject to rules, only the latter take the rules piecemeal as standing orders or commands. Laws, whether obeyed or not, are seen as lacking formal or substantive validity. For the citizen as insider, however, the rules of law form a coherent order. There are formal processes by which rules become valid laws, and there are procedures that judges, lawyers, and ordinary citizens can and do follow to determine the pedigree of such laws.³⁶ Thus the insider, but not the outsider, sees the law as an ordered system. In this sense, the judge or lawyer *cannot* be external to the law. The nature of her occupation *entails* that she will recognize the law as an ordered system.³⁷ Non-officials (ordinary citizens) may or may not have that degree of sophistication vis-à-vis the rules of law; they may or may not in this sense be internal rather than external.

Note that the two variations of the internal/external distinction we have just considered, our two understandings of what Hart means by saying that some persons do and others do not use the law as a guide to conduct, apply to law as a social practice, but *not* to language. (Recall that the first two versions of that distinction—the externality of the cross-cultural observer and the externality of the natural scientist—referred equally well to external observers of law-related behavior and of language use.) The social practice of language does not, for the most part, allow room for variant attitudes of moral adherence and moral dissent. One cannot *morally* be an outlaw with regard to language. One may, perhaps, insist on using offensive language, may use neologisms excessively and puzzlingly, or may even opt to become mute and forego language, but none of these alternatives quite captures the sense of being a linguistic outlaw. The person who uses offensive language is following rules, not breaking them, insofar as we have rules for the effective use of such words as communicative tools. The addict of neologisms may break rules, but the only sanction she incurs is a failure to communicate. And the volitional mute merely drops out of the practice.

Similarly, there is no room in language for the opportunity, as an insider, to see rules cohere into an ordered system of valid rules.³⁸ Language is by nature less orderly than law. There are no language courts

35. Hart suggests that in a healthy and viable legal system this attitude will prevail only among a minority of citizens. If a majority loses faith in this way, the system is jeopardized. See HART, *supra* note 1, at 117-23 ("The Pathology of a Legal System").

36. Hart refers to these rules and procedures collectively as "the rule of recognition." The concept of a rule of recognition plays a central role in his version of legal positivism. See *id.* at 100-10.

37. This point should be evident to anyone who knows about the formal role of legal texts. The nature of legal research, involving attention to relevant statutes, legal precedents, and so on, pervasively reflects this recognition.

38. In other words, there is no rule of recognition and no formal criterion of validity for language.

charged with instructing us how to use language, and there is no legislature charged with setting down the rules of correct usage. Dictionaries and manuals of usage tend to chase fashions in language rather than dictate it.³⁹ In this sense, the insider in the practice of language is likely to appreciate its incoherence, its openness to change, and the inevitability of misunderstanding.

We have now identified *four* senses of the distinction between an internal and external point of view: (1) the externality of the cross-cultural observer, (2) the externality of the natural scientist, (3) the externality of the outlaw, and (4) the externality of the participant who fails to apprehend the coherence and systemic nature of law. Hart explicitly addresses the first two senses. And, it seems, he stumbles upon the third and fourth senses without making clear (perhaps without seeing) that they *are* altogether different from the first two senses and without distinguishing them from each other. One explanation is that he was seduced by the model of language as a social practice and failed to see the ways in which the social practice of law is distinctively different.

E. LAW AND LANGUAGE: SOME DIFFERENCES

We can identify at least three ways in which language is a misleading model for law. First, the point of language is, for the most part, taken for granted. It is a banal truism to say that language makes possible and facilitates communication. Of course, it arguably does other things as well, such as facilitating and channeling creativity, cultivating individuality and a unique style, making self-consciousness possible, and so on.⁴⁰ But all are secondary effects of its use for communication.

The point of law, by contrast, is inherently controversial. It seems natural to say that law, at a minimum, exists to secure order and predictability in social lives.⁴¹ Even this modest proposal merits scrutiny. Is order the overriding purpose of law? A system of rules that achieves order through radical regimentation, curtailment of civil liberties, and even enslavement of the underlying citizenry forfeits its claim to be called a *legal* system in the eyes of many observers and theorists.⁴² Indeed, according to various accounts, the nature of a legal system is to embrace not only

39. It is arguable that law, as well as language, has customary and formal aspects. Legal positivists, such as Hart and Joseph Raz, take for granted the centrality of formal criteria for law. Natural law theorists, on the other hand, typically deny that law is identified exclusively through formal criteria and tend to find law in such resources as custom, tradition, and human nature. See *generally* NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992).

40. The role of language in facilitating or making possible self-awareness is a controversial matter among philosophers, psychologists, and anthropologists. See *generally* JEROME BRUNER, ACTS OF MEANING (1990); RODNEY NEEDHAM, BELIEF, LANGUAGE, AND EXPERIENCE (1972); SELECTED WRITINGS IN LANGUAGE, CULTURE AND PERSONALITY (David G. Mandelbaum ed., 1949).

41. See HART, *supra* note 1, at 185-93.

42. This view is often identified with some forms of natural law theory. See, e.g., LON L. FULLER, THE MORALITY OF LAW (1964).

order, but some kinds of disorder, the kinds of disorder (or non-order) that are compatible with individual self-expression, creativity, and political innovation.⁴³ If so modest and minimal a characterization of the point of law stirs debate, more ambitious proposals are likely to be even more controversial.

Second, law, unlike language, is an inherently normative social practice. Stephen Perry defines a social practice as normative if "it is a social institution that also systematically gives rise (or at least is perceived to give rise) to reasons for action."⁴⁴ Thus, a proper response to "Why should I do x"? is "because it is right," "because it is good," "because you promised," or "because it is the law." The finality and nature of such reasons are subject to debate.⁴⁵ One may argue that another has identified the relevant moral or legal norm incorrectly or that what another has correctly identified as a promise or as the law should be overridden in a particular case.⁴⁶ In addition, explanations of *why* promises or the law give reasons may themselves be controversial. One may say that promises should be kept to prevent the pain of disappointment, that the institution of promise-keeping is a civilizing influence and merits support, and so on.⁴⁷ And the same controversies attend law. One theorist may argue that law gives reasons for action because the practice can be justified along rule-utilitarian lines, another may argue that it secures order and order is inherently desirable, and yet another may argue that it permits altruism and individuality to coexist.⁴⁸ All these disagreements, however, are not about *whether* law is normative, but about *the way* in which it is normative.

Are the rules of language also normative? We use rules of syntax, semantics, and context to guide our conduct and in self- and mutual criticism just as we use rules of morality or law. We claim to have standards for correct usage, and we can single out some utterances as violations. In

43. Critical legal theorists, such as Duncan Kennedy, describe individualism, autonomy, and freedom from constraint as belonging to competing sets of *desiderata* in legal decision making. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 212 (1979).

44. Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 97 (Andrei Marmor ed., 1995).

45. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 51-52 (1979).

46. In other words, identification of valid law, even from a positivistic standpoint, may well involve controversy. Application of relevant formal procedures is hardly mechanical. The judgment that a particular rule is relevant to a case can be questioned, and there may be disagreement over the claim that a rule incorporates a particular exception or other (tacit or not).

47. One may claim that the question of what policies or principles underlie a rule is separable from the question of what the rule is. The first question may be said to involve moral and prudential arguments while the second involves mere application of formal procedures. This distinction, which lies at the core of many versions of legal positivism, is vulnerable to the objection that any rule, however identified by formal methods, is subject to interpretation, and interpretation in turn involves debatable normative premises.

48. These jurisprudential accounts can roughly be identified, respectively, with the work of David Lyons, Joseph Raz, and Duncan Kennedy.

this sense of normativity, there are norms whenever there are rules, and every rule-governed practice is normative.

But this sense of normativity is more general than the kind of normativity attributable to law. The rules of language do not give reasons for action, nor do they instruct and inform us how to conduct our lives. They do not confront us with choices for action that we may adopt or reject.⁴⁹

A third characteristic of the social practice of law distinguishes it not only from language, but also from other normative practices such as morality and etiquette. Law has formal and institutional procedures for creating, applying, and interpreting its rules.⁵⁰ Moreover, officials participating in these institutions have occasion to explain their actions and decisions. Some of these explanatory accounts and arguments (legislative debates, legislative history, legal briefs) are unofficial and reflect partisan contributions to the process of making and interpreting law. Others (judicial opinions) are official documents. Accordingly, as we have seen, there are two categories of insiders, officials who have designated roles in rule creation and application and all those who are simply subject to the rules. Moreover, consideration not only of the scope and interpretation of particular rules, but also of the collective aims of the social practice, is formalized.⁵¹

Any satisfactory account of the internal aspect of law must take account of the special characteristics of law as a social practice. Hart's account dates from mid-century, when the general idea of a social practice crystallized as a byproduct of the attempt to describe the distinctive nature of the social sciences. Hart saw that the internal aspect of law requires a special analysis, one that for example allows us to distinguish two kinds of insiders: outlaws and citizens. But his account was limited by the assumption, inherent in the philosophical strategies of his time, that the openness and indeterminacies of law as a social practice were to be explained through the indeterminacies of language.

Underlying the four options that can be teased out of Hart's account for explaining the external point of view vis-à-vis law is the implication

49. In other words, identifying an action as complying with law ("That's the law.") is one kind of justification. It is on a par with other kinds of justifications such as, "that's good," "that will make you happy," and "that would be prudent." Each justification has discursive finality insofar as it is reasonable to assume that persons wish to be law-abiding, moral, happy, and prudent. Only in exceptional cases and contexts would such assumptions be questioned.

50. This point is one of the fundamental tenets of legal positivism and, accordingly, of *THE CONCEPT OF LAW*. See generally HART, *supra* note 1.

51. This point is controversial. According to many positivists, including Hart, there are formal criteria for identifying the rules of a legal system. A system has a rule of recognition. But there is no corresponding formal procedure for identifying the collective aims of the legal system, a matter about which there may be much and persistent controversy. Naturalist legal philosophers such as Ronald Dworkin maintain that what is appropriately called "the law" embraces an evolving consensus about the aims and principles of the system as much as it does particular rules. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; see also *supra* note 47.

that the quintessential external point of view is that of the scholar or theorist. If so, the contrast between the internal and the external aspect of rules is the contrast between the point of view of the legal practitioner (or citizen) and the jurisprudential theorist. In refining our understanding of the external point of view, as we will do in part two of this essay, we will also refine our understanding of the parameters and limitations of jurisprudential theory.

II. THEORY AND PRACTICE: HERMENEUTICS AND SUBTRACTION

A. EXTERNALITY AND THE ANTHROPOLOGICAL PERSPECTIVE

No legal theorist is a person without a country. Scholarly isolation (or distance) is a pose, one artificially and precariously assumed. Every scholar, we can assume, is a citizen of some state, subject to the laws of some legal system or other. Moreover, we can assume she has some attitudes toward the laws of her system and toward the purposes that the laws, individually and collectively, serve.

Jacques Derrida posits that we inhabit the structures that we deconstruct.⁵² We are all necessarily insiders to a multitude of social practices. All of us, linguistic theorists included, have a mother tongue. We are familiar with our local norms of morality, etiquette, and law. Indeed, our ability to engage in scholarship, at a distance, presupposes such a history and such a predicament. To suggest that one might try to characterize laws or language without having learned the social practice first-hand and experienced it as second nature is to presuppose the absurd handicap of Hart's natural scientist as an extreme externalist, one who lacks the concept of any internal aspect of rules.

Derrida's statement deserves more scrutiny. Is it merely a reminder of common sense, or is it an admonition or even an expression of wistful regret? The common sense interpretation is simply a reiteration of the obvious, that it is possible to study social practices because we also experience them first-hand. The admonition, amounting to a difference in nuance, is that we must remember that we are not merely observers and cross-cultural scholars, but that we inhabit a particular instantiation of various social practices. This is a warning that scholarship insufficiently

52. See JACQUES DERRIDA, *OF GRAMMATOLOGY* 24 (Gayatri Chakravorty Spivak trans., 1976). Derrida states:

The movements of deconstruction do not destroy structures from the outside. They are not possible and effective, nor can they take accurate aim, except by inhabiting those structures. Inhabiting them *in a certain way*, because one always inhabits, and all the more when one does not suspect it. Operating necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, . . . the enterprise of deconstruction always in a certain way falls prey to its own work. This is what the person who has begun the same work in another area of the same habitation does not fail to point out with zeal.

Id.; see also Thomas C. Grey, *The Hermeneutics File*, 58 S. CAL. L. REV. 211, 226 (1985).

informed by such awareness is deficient in ways that will be considered below. Finally, the statement seems wistful if it reflects the scholar-as-outsider's aspiration to purity of perspective, to a position that favors no practices over others, a stance of critical neutrality purged of normative commitments. We will consider the implications of that aspiration.

Do anthropologists, who are arguably more self-conscious than other social scientists about the extent to which "we inhabit the structures that we deconstruct," have anything to teach legal theorists? Imagine a cultural anthropologist studying a language, economic system, religious structure, or legal and moral culture not her own. The common sense presumption is that, insofar as she inhabits her own culture, one that has all of these dimensions, she can look for analogous social practices elsewhere and explain them to readers from her own culture using analogy and comparison.⁵³

If Derrida's reminder is seen as an admonition in this context, it is triple-edged. The anthropologist must be alert to the dangers of over—and under—assimilation. One mistake is to use one's own social practices as the template for cross-cultural investigation and assume that every observed kind of behavior is assimilable to familiar practices in one's own culture. The opposite mistake is to assume that one must always refrain from using familiar practices to understand alien ones. A third source of error is to regard such questions as closed and to disregard the inherently controversial character of every determination of similarity and difference. The cross-cultural anthropologist inevitably tacks between analogizing the unfamiliar to the familiar and questioning whether these analogies are useful or misleading.⁵⁴ Any misgivings about this predicament or any desires for greater neutrality and independence from one's home base are aspirations to the impossible.⁵⁵

Richard Hyland, in his provocative essay, *Babel: a She'ur*,⁵⁶ sees the jurisprudential scholar as a kind of cultural anthropologist. He begins with observations about translation. Different languages represent different ways of representing and structuring experience and thought. Hyland notes that English is peculiarly idiomatic, rife with exceptions to rules and especially hard for non-native speakers to learn.⁵⁷ At the same time, English is uniquely creative and malleable. Other languages, Latin and German for example, are rigorously logical. Their rules are complex, and the formation of compound terms is a complex but lucid process.⁵⁸

53. For scrutiny of this position from the standpoint of cultural anthropology, see CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167-234 (1983).

54. John Rawls' general strategy of seeking "reflective equilibrium" in philosophical analysis is a useful notion in this context. JOHN RAWLS, *A THEORY OF JUSTICE* 48 (1971).

55. See also *infra* text accompanying notes 59-62.

56. Richard Hyland, *Babel: A She'ur*, 11 *CARDOZO L. REV.* 1585 (1990).

57. See *id.* at 1607.

58. See *id.* at 1604-07.

Hyland's point is that the master of several languages gains variant perspectives upon experience and thus comes to understand that it can be assimilated in different ways. This kind of insight comes as a gain and a loss.⁵⁹ It is a gain insofar as it represents a kind of wisdom and sophistication about experience, a capacity to apprehend matters from different points of view. The loss is a kind of alienation, an awareness that the priority one has given to familiar practices is an accident of personal history and has no natural priority in the sense of either being superior or being basic. One becomes a refugee in one's own culture.⁶⁰

Hyland makes the same point about legal systems.⁶¹ Each legal system addresses the need to order society around legal institutions and rules in a unique way. The scholar who becomes familiar with different legal systems comes to understand *both* what it means to inhabit each system *and* that the assumptions and procedures of his familiar and local system have no natural priority. Hyland also claims that the features of a culture's language and its legal system tend to mirror each other.⁶²

The anthropological perspective in general, and Hyland's appropriation of it in particular, is a persuasive way of characterizing the distinction between the internal and external points of view. But it is misleading. For one thing, it implies that such social practices as law and language have internal homogeneity. It minimizes or ignores the extent to which disputes about rules and their point are part of the *internal* aspect of the practice. In other words, it understates the self-consciousness of the participants and the extent to which they question and are alienated from *their own* practices. The poet stumbles into the limitations of words and coins new and surprising usages. Judges disagree about the scope and interpretation of laws, about interpretive techniques, *and* about the purposes that laws serve. The Derridian notion that "we inhabit the structures we deconstruct" identifies a tension that exists even when we are not cross-cultural observers, one that arises whenever we scrutinize our own social practices internally.

Just as Hyland underestimates the tension as it surfaces for the monocultural theorist, perhaps he *overestimates* what one gains by assuming a cross-cultural perspective. Familiarity with foreign social practices, linguistic and legal, does not necessarily undercut the priority of one's own familiar practices. That priority may survive in two senses. It necessarily survives in the practical sense that one's own language and one's own legal system are points of origin. One may persist in translating from and into one's own language and other practices. One explains the features of other legal systems as being like or unlike one's own, as serving or diserving familiar functions.⁶³

59. *See id.* at 1611-12.

60. *See id.*

61. *See id.* at 1597-1603.

62. *See id.* at 1603-08.

63. Reservations and complications attending this process are discussed *supra* note 52 and accompanying text.

A second sense of priority is that one *may* continue to favor one's own practices. Awareness of other practices raises questions about comparative value, but it does not answer them. The posture of the cross-culturalist is not necessarily one of indifference and neutrality nor one of alienation. Understanding others' social practices makes one's attitude toward one's own practices problematic, but it does not resolve the problem.

The general problem of studying social practices is a problem of hermeneutics. In the following passage, Quentin Skinner identifies the predicament of any theorist, whether she is trying to interpret a text or to deconstruct a social practice.

[I]t will never in fact be possible simply to study [a social practice] . . . without bringing to bear some of one's own expectations about what [is happening within the practice]. . . . [T]hese models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think and perceive. We must classify . . . the unfamiliar in terms of the familiar. The perpetual danger, in our attempts to enlarge our . . . understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he *was* doing.⁶⁴

What Skinner sees as “danger” is what Hyland would see as a fortuitous albeit inevitable result of scholarly theorizing. Skinner assumes that we do an injustice to the internal perspective of a practice, that we misrepresent it, if we describe it in terms that the participant would reject or fail to recognize. Hyland, by contrast and less plausibly, sees this as the singular mark of success. The theoretical perspective transcends and leaves behind the parochial assumptions of the internal participant.

B. HERMENEUTICS: AGREEMENT AND DISAGREEMENT

This apparent disagreement between Skinner and Hyland illustrates diversity among hermeneuticists and shows how much is methodologically unclear (or open) in the enterprise of hermeneutics. Before examining the external point of view from a hermeneutical standpoint, consider the base line, the ways in which those who take a hermeneutical approach to social practices agree on several aspects of methodology.

First, they recognize that they themselves are participants in the kinds of practices they study as theorists. They see themselves as necessarily wearing two hats, as practitioner and as theorist.

Second, they also recognize that their role as practitioners makes possible their work as theorists. In other words, one can adequately describe (and theorize about) a social practice only if one takes account of the

64. Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *HIST. & THEORY* 3, 6 (1969) (footnote omitted).

internal aspect, the acts, thoughts, and self-awareness of the participants.⁶⁵ While a theorist need not belong to the *particular* practices she describes (a German may engage in political or legal theory relevant to the American system), she must belong to *some* social practice of the same general kind, some political or legal system.

Third, they stress that the theorist's work is inevitably colored by her experiences as participant in a practice. The fact that one has a particular personal and intellectual history, has idiosyncratic expectations, and belongs to a particular culture will affect how one carries out the theoretical enterprise.

Once noted, however, this last concession may be seen in various ways. It is misleading to see it as the inevitability of bias. To ascribe bias is to imply that one understands what it is to lack bias; the idea of universal and inevitable bias collapses into an oxymoron or nonsense. The point may, therefore, be put non-critically as a warning to any theorist who aspires to neutrality or objectivity. She must take pains to clarify what she means by such notions and must remain vigilant about the obstacles to meeting that standard.⁶⁶

If we are to go beyond these three points, we must address ambiguities of the hermeneutical task which are implicit in the distinction between theory and practice, between the external point of view of the theorist and the internal point of view of the practitioner. A useful metaphor haunts such discussion. It comes from Otto Neurath, the Viennese epistemologist and philosopher of science whose main works date from the 1920s and 1930s.⁶⁷ He offers the warning that "[w]e are like sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials."⁶⁸

The logician, Willard V.O. Quine, draws the following lesson:

The philosopher's task was well compared by Neurath to that of a mariner who must rebuild his ship on the open sea.

We can improve our conceptual scheme, our philosophy, bit by bit while continuing to depend on it for support; but we cannot detach ourselves from it and compare it objectively with an unconceptualized reality.⁶⁹

65. See *supra* notes 12 and 25 and accompanying text.

66. In other words, conceding the hermeneuticist's points about investigative and theoretical practices does not entail that we abandon aspirations to objectivity and neutrality. Rather, it requires us to understand the criteria for objectivity and neutrality that are inherent in the practice—the "language-game." In particular, these criteria are likely to mandate habits of self-scrutiny and empathetic attention to alternative positions. Practicing such habits leads to greater objectivity and greater neutrality. In this context, objectivity and neutrality are relative terms, not absolutes.

67. See, e.g., OTTO NEURATH, *EMPIRICISM AND SOCIOLOGY* (Marie Neurath & Robert S. Cohen eds., 1973); DANILO ZOLO, *REFLEXIVE EPISTEMOLOGY: THE PHILOSOPHICAL LEGACY OF OTTO NEURATH* (David McKie trans., 1989).

68. Otto Neurath, *Protocol Sentences*, in *LOGICAL POSITIVISM* 199, 201 (A.J. Ayer ed. & George Schick trans., 1959).

69. WILLARD VAN ORMAN QUINE, *FROM A LOGICAL POINT OF VIEW: LOGICO-PHILOSOPHICAL ESSAYS* 79 (2d ed. 1961).

The metaphor is peculiarly fecund. On one level, it describes the work of natural scientists, historians, indeed all who are in the business of knowledge. Each, through training and on-going participation, is part of a community that shares certain assumptions about what questions are to be asked, what counts as research and evidence, what is in dispute, and what is to be taken for granted. In subtle and not-so-subtle ways this structure is constantly changing; the enterprise of writing history, for example, is not what it was twenty or fifty years ago.⁷⁰ But, for the vessel to stay afloat, the change must be piecemeal, and the vessel, over its course, must remain nominally the same enterprise however many changes have accumulated. Thucydides and Gordon Wood are both historians.

On a second level, the metaphor is particularly illuminating with regard not to scholarly enterprises but to social practices. Languages and legal systems suffer constant evolution and repair like Neurath's boat. The process is both self-conscious and a response to a felt need. The process looks backward and forward at the same time.⁷¹ The structures of language and law are inherently conservative; existing rules and conventions constitute the enterprise and keep it from capsizing. This stability makes it possible to write a dictionary, a manual of grammar, or a legal code, and each, however reformative it may be, reflects pre-existing ways of proceeding. But stability is also an illusion. The rules are necessarily in constant flux. Circumstances make necessary neologisms, and breaches of grammar become accepted. New legislation passes, and new situations force lawyers and courts to reinterpret existing laws, setting new precedents.

On a third level, the metaphor identifies the predicament of the *theorist* of social practices. As theorist, she seems to aspire to get off the boat. Her "external" point of view appears, on first impression, to be that of an observer of the boat who transcends it, who occupies a balloon or bubble that floats above the boat and is not subject to its vicissitudes. She records the changes and repairs and takes note of the basic structure, but

70. Examining Neurath's metaphor one may ask whether Kuhn's distinction between normal science and paradigm shifts applies outside the context of natural science to investigations such as history. Perhaps the distinction is not as sharp and uncontroversial as Kuhn suggests. It is consistent with Neurath's metaphor that methodological shifts may be more or less radical, more or less discontinuous. In the face of such shifts, the enterprise may be in some recognizable way *the same* while its methods and preoccupations are indelibly altered. See generally KUHN, *supra* note 9.

71. Wittgenstein felicitously compares languages with old cities surrounded by newer suburbs. The old sections have become accumulations of idiosyncratic patterns; streets are narrow and curve unpredictably, numbers on buildings may not run sequentially, and structures have been rebuilt many times in different ways. Only an old inhabitant is likely to know her way about, and only through experience rather than by following rules. In the suburbs roads are straight, buildings are in orderly rows, and anyone can follow a simple map.

It is easy to transpose the metaphor to language. Some words and idioms have a long and tortured etymology; others are neologisms, and the rules of usage may be straightforward. Neurath's boat fits these situations well. Parts of the boat have been rebuilt many times with criss-crossing rough-hewn planks, and other sections have been cleanly and simply crafted from scratch. See WITTGENSTEIN, *supra* note 13, at pt. I, ¶ 18.

is not a party to these activities. But her independence is unstable and illusory. Her balloon is tethered to the boat. Her attempts to distinguish the essential structure of the boat from adventitious repairs and changes are necessarily provisional. She cannot tell what will need to be changed over time, and her understanding of the boat's history, purpose, and essence are but one interpretation among many. In that respect, she is no more or less equipped to handle the so-called theoretical enterprise than the sailors on the boat themselves. She may have the advantage, from her precarious perch above the boat, of glimpsing or scrutinizing other boats in similar predicaments, but just what difference does that make?

C. THEORY AND PRACTICE RECONSIDERED

The third application of Neurath's metaphor returns us to our main concern, the difference between theory and practice and the question of how the difference is captured in the distinction between an external and an internal point of view. How do the occupants of the balloon and the boat differ? We have seen that Hart offers several ways of characterizing an external standpoint. Two of these ways are of limited help in illuminating the distinction between theory and practice. Let us reconsider why that is before looking at more helpful characterizations.

If the quintessential participant is a lawyer, legislator, or judge, someone charged with affecting, making, or interpreting the law, then one is external if one has no such institutional role. But this simply leaves us with ordinary citizens. They are external, as we have seen, in the sense that they are not professionally expected to reflect on law or understand its institutional structure, although they *may* do so. But they are internal in the sense of being subject to the law, responsible for their actions under the law. Although the theorist, *qua* theorist, does not have an institutional role, one needs additional criteria to distinguish the theorist from the citizen.

A second way of being external is to see the law as lacking justification. This is the outlaw attitude, Holmes' "bad man" posture, or what Hart identifies as a sense of being obliged, rather than having an obligation.⁷² Outlaws, like other citizens, are subject to the law and held responsible—and, in this sense, are internal to it. And theorists, while they may abstain from taking sides on controversial moral issues within the law, do not thereby become outlaws.⁷³

Even if the non-official and the outlaw are, in a plausible sense, outsiders rather than insiders of the legal system, they do not have the external

72. See HART, *supra* note 1, at 82-86.

73. Even if we concede to Hart that most persons typically do not have the outlaw posture, we may also observe that there are likely to be some persons who have an "outlaw" attitude to the system as a whole and many persons who have an outlaw posture toward *some* laws, e.g. taxes. Moreover, it is debatable whether a system in which the outlaw attitude is widespread is, *pro tanto*, less of a legal system or an uncharacteristic legal system.

point of view of the theorist. The theorist's posture has three distinctive characteristics that we have not yet considered.

One characteristic is dissociation. Those who are internal to a legal system are associated with it in two senses: the rules of the system apply to them (they are held responsible accordingly), and they have views on what the law should be as well as what it is (whether or not they are empowered to change and interpret the law in accord with such views). Theorists are external in both senses. First, their job as theorists is ostensibly unaffected by whether or not the laws apply to them. Second, their particular views about disputed normative questions within their legal system should not affect their construction of theory. They may well refer to the fact that insiders have such disputes, that some persons are empowered to take official roles vis-a-vis such disputes, and even that the centrality of such disputes is a necessary and pervasive feature of a legal system. But, as theorists, they do not enter into the disputes themselves.⁷⁴

A second characteristic is that theorists are expected to be generalists insofar as they address sets of social practices and offer characterizations that are equally relevant to all members of the set. The theorist of language tells us about languages; the theorist of law claims to analyze legal systems in general. The description and analysis is, in this sense, external to any particular practice.

Can one say that a theorist seeks to identify the *essence* of language or legal system rather than what is *accidental* to a particular language or legal system? This distinction presumes that social practices do in fact have essences. Wittgenstein warns us against this kind of presumption, suggesting that the practices we call languages may at most have "family resemblances," features that they tend to share and that help explain why a common term is used to assimilate them.⁷⁵

At best, the notion of an essence is an ideal and a potentially misleading one. Both the assumption that we have a satisfactory theory only when we have isolated the essence of law and that we can distinguish uncontroversially between essential and accidental features may be untenable assumptions setting unrealizable goals.⁷⁶ As such they misdescribe the external point of view of the theorist.

A third characteristic is reflection and self-scrutiny. Theorists, being philosophers, reflect on assumptions that participants use unreflec-

74. Accordingly, positivists distinguish sharply between analytical legal theory and normative legal doctrine. The first involves the analysis of the nature of legal rules, legal validity, institutional structure, and so on, but not normative questions such as what rights should be part of the system and how those rights are to be understood. Critical theorists, like positivists, characteristically distinguish between questions about the nature of law (e.g. as legitimating ideology) and the particular merits, demerits, and uses of normative responses to legal issues. On the other hand, natural law theorists often address these issues in ways that bridge analytical and normative questions. See generally DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 51.

75. WITTGENSTEIN, *supra* note 13, pt. I, ¶ 67.

76. See *infra* text accompanying note 84.

tively.⁷⁷ A language user may be proficient in using the idioms of English without being able to identify the rules of idiomatic use. She may leave it to theorists to explain when and how languages change, how languages come to reflect class distinctions, and so on. A judge may have no need to be self-conscious about the ways in which he and his peers use similar interpretive tools, are constrained by moral norms, share or fail to share an understanding of the point of legal institutions, reflect unidentified biases under the camouflage of objective decision-making, and so on. The claim is not that insiders/practitioners (judges, lawyers) are generally or necessarily blind to these dimensions, but rather that participation is compatible with remaining blind and that levels of awareness will vary. The philosopher's job as theorist is to shed light and make explicit what may have otherwise remained implicit.

D. THE HUBRIS OF THEORISTS

These characteristics of the work of theorists—dissociation, generalization, and self-consciousness—are easily misunderstood. They are distillations or refinements of conceptual moves that insiders may also make. The sophisticated judge, attorney, or citizen will generally monitor her opinions in all these ways.

The characteristics of theory are often misunderstood as giving theorists a privileged position. Theory is seen as defining a superior practice, the terms of which expose the systemic mistakes and impostures of the practice under scrutiny. We will examine the strategies and implications of this understanding of the external point of view of theorists.

In general, this is precisely the kind of move that Wittgenstein identifies and criticizes, the kind that gives flies in fly-bottles their headbumps and headaches.⁷⁸ Simple examples are the epistemologist who claims that all wakefulness is *really* a form of dreaming or that all objects *really* exist only as long as they are being observed and the moral theorist who says that all altruistic action is *really* a form of selfishness or that all attempts to find meaning in life are doomed because life *really* is meaningless. What is deceptive and fraudulent about these "insights" is that they appropriate distinctions that have a home within a familiar language-game and a way of thinking (dreaming/wakefulness, dependent/independent existence, altruism/selfishness, meaningfulness/meaninglessness) and suspend the normal criteria of usage without introducing coherent alternatives. They produce nonsense masquerading as insight.⁷⁹

77. See generally ARTHUR C. DANTO, *WHAT PHILOSOPHY IS: A GUIDE TO THE ELEMENTS* (1968); *THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD* (Richard Rorty ed., 1967).

78. See *supra* note 15.

79. This process is well described by P.F. Strawson in his discussion of philosophical skepticism:

This gives us a more profound characterization of the sceptic's [sic] position. He pretends to accept a conceptual scheme, but at the same time quietly rejects one of the conditions of its employment. Thus his doubts are unreal,

In legal theory, this occurs when dissociation is confused with neutrality. A theorist may claim that to be disengaged from normative debates is to see that all positions are equally favored or disfavored, that no arguments are better than others. The idea that one argument may be superior and thus trump another is a position for insiders, but from a “theoretical standpoint” it is simply a delusion.

Such a theorist may also claim the high ground of neutrality in *comparing* legal systems. The idea that one system may be more sophisticated or more just is seen as a determination open to a member of one system looking at other systems comparatively, but not open to the theorist who eschews an insider’s perspective.

It follows that theorists are often seduced by the idea of dissociation into seeing all participants in a social practice as systematically blinkered and deluded. Insofar as insiders participate in controversies and use notions such as fairness, justice, correctness, and rights, they fail to recognize that all such arguments are systematically devalued by bias and partisanship, by commitments and dispositions hidden from disputants themselves.

This point may be expressed in terms of subjectivity and objectivity. The insider is accused of dressing subjective judgments in objective terms, while the theorist sees through this imposture. Only the theorist, in her rejection of all arguments as infected by subjectivity, has a tenable claim to be objective.

These misguided theoretical moves come about through misunderstanding of the process of dissociation and involve inattention to the ways in which the external (theoretical) point of view is parasitic on the internal aspect, the ways in which the balloon is tethered to the boat. The external stance of dissociation, correctly understood, involves a kind of subtraction or refraining. If every theorist is, first and foremost, a practitioner and if it is only her internal experience of the practice that informs and makes possible her activity as theorist, then dissociation is a matter of refraining from making judgments that are controversial and unsettled within the practice. Judge A and Judge B take conflicting positions on the disposition of a case; attorneys C and D file briefs on opposite sides of a case; legislators E and F take opposed positions on proposed legislation. In each case, it is part of the theorist’s job *as theorist* to describe the forms of disagreement, to consider why various positions of partisans are mutually understood and embraced as moves within the social practice, to

not simply because they are logically irresolvable doubts, but because they amount to the rejection of the whole conceptual scheme within which alone such doubts make sense. So, naturally enough, the alternative to doubt which he offers us is the suggestion that we do not really, or should not really, have the conceptual scheme that we do have; that we do not really, or should not really, mean what we think we mean, what we do mean. But this alternative is absurd. For the whole process of reasoning only starts because the scheme is as it is; and we cannot change it even if we would.

P.F. STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* 35 (1959).

show how it is that agreement and disagreement coexist within the bounded practice and the theorist suspends or subtracts her hypothetical contribution as partisan.

It is important that insiders as participants are not foreclosed from sharing the theorist's insights. A well-informed and sophisticated judge, lawyer, or legislator can easily anticipate the arguments, assumptions, and strategies of those who disagree with him, can see "where they are coming from," and can describe such structures of thought and discourse in the way a theorist might.

Misunderstanding comes when the theorist claims to substitute a different position or attitude toward the internal arguments from that of the participants and claims that her substitution takes precedence. Thus, the theorist's neutrality seems to imply that, insofar as disagreement exists and is an inherent part of the practice, conflicting postures are in fact to be taken as equally meritorious, equally limited. But the theorist's dissociation affords no basis for such a judgment. Internal participants have argumentative strategies that are part of the practice and can be produced to support their positions. Theorists have no such grounds at all, and certainly no superior grounds, to assess that internal positions are of equal, unequal, or any particular degree of merit or persuasiveness. Their theory-construction is not an independent practice which yields conclusions that can decide internal disagreements.

The idea that the theoretical standpoint defines an independent and superior linguistic practice fosters a misunderstanding and misapplication of familiar truisms about social practices in general and law in particular. Among these truisms are the claims that the positions of judges, lawyers, and legislators are "politics all the way down,"⁸⁰ that all processes of justification come to an end in presuppositions that are assumed, and that insiders underestimate subliminal biases that inhere in their personal history and cultural background. None of these claims are obviously wrong, and each is instructive in its way, but it is important to see how each can be misconstrued.

What does it mean to say that legal reasoning is "politics all the way down"? In a sense, law and politics are bound together. Participants in legal practices differ in their value preferences and their styles of argument and justification. Their arguments involve a mix of empirical observations, moral premises, prudential considerations and strategies, and idiosyncratic background influences. The arguments, and the language games to which they belong, have a complex structure. Sometimes an empirical argument is a trump; a finding that a government program does not produce the benefits intended may doom the program. Sometimes there will be conflicting moral premises, but one competing premise may, by general agreement, occupy the higher humanitarian ground and proponents of other positions may wither in its face. Sometimes a position

80. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

will obviously be imprudent, and again by general agreement it will recede and disappear. And sometimes, issues will be resolved through the competition of incompatible political agendas and through a counting of votes and allegiances. But the last of these strategies of resolution often occurs when the others have failed, when the processes of rational debate have been exhausted and proven futile.

To suggest that judicial and legislative decisionmaking is politics all the way down is to imply that rational debate is always a mirage: that no empirical findings are ever trumps, that no moral positions ever emerge as superior by general consensus, and that there are no general criteria of prudence. From the fact that *some* decisions are obviously political by default, one cannot conclude that, to the theorist's eye, all of them indifferently have this character.

What are we to make of the fact that all processes of justification come to an end, that all arguments depend on some moral and cultural premises that appear to their adherents to need no justification, premises that are *logically susceptible* to being challenged? This does not show that adherence to such premises is a delusion. Rather, all social practices involving normative argument and decision-making necessarily involve such premises, and taking note of that fact does not degrade the practice. All insiders see their premises, the bases and origins of their claims, imperfectly. And the influence of their own background, training, ways of thinking, cultural experience, and so on, is never fully transparent to them. But that does not mean that they are deluded or unreasonable, merely that self-awareness is an inexhaustible and Sisyphean obligation for persons in their roles, and the theorist's job is to outline the parameters of that obligation.

The theorist, as we have seen, is an insider to some legal system, participant in such a practice either as official or citizen, before and while he is a theorist. Being an insider is, as we have seen, a precondition for doing theory. In Derrida's terms, inhabiting the structure is a precondition for deconstructing it and, in Neurath's terms, occupying the boat and participating in its reconstruction is a prerequisite for hovering in a bubble above the boat and observing the process. As insider, the theorist is privy to all issues at all levels of abstraction that are matters of contention within the practice and to the relevant strategies of argument, but more importantly he also has a position on these matters, favoring one side or another and using one or another kind of argument.

When he takes the "external point of view" as theorist, he may disengage or dissociate himself from these debates. But he does not thereby join a different or transcendent practice that affords him a different way of looking at these debates. In particular, nothing warrants his commending a posture of neutrality, whereby conflicting positions are in equipoise, or an attitude of indifference. And there is no vantage point from which he can argue that the participants are systematically unjustified or mistaken in holding the positions and making the arguments that they in fact

make. The claim that a particular argument is unjustified and that the person making it is mistaken is always available, but it is an internal move within the practice, one that rests on evidence the relevance of which is established by the rules of the practice.

E. THE EXTERNAL POINT OF VIEW REDESCRIBED

An understanding of the links between jurisprudential theory and the internal aspect of legal practices has two very different kinds of application. First, it makes clear the perspective of a theoretical point of view on the normative questions, arguments, and decisions that constitute moves within the practice. I addressed this issue in the last two sections.

Second, an understanding of links between theory and the internal aspect clarifies the job of theory. When theorists claim to consider the structure and point of the practice as a whole, to what extent are their views parasitic upon their experience and dispositions as insiders?

We have seen that every theorist begins by generalizing from a home base. She seeks to identify structures and procedures that are common to her own and other comparable practices and make sense of them by identifying the *point* of the practice in general. Her question becomes not "Why does my culture have a legal system"? but "Why do cultures in general have legal systems"? What point do they serve?

The answers to these questions, however, will themselves be matters of contention, not only among those theorists who compare legal systems, but also within the theorists' own legal system. In that sense, the situation of Anglo-American jurisprudential theorists is illustrative. H.L.A. Hart's sophisticated version of positivism emphasizes the separation of law and morals and internal attitude. For him, the distinctive features of a legal system include, first, an institutional structure by which legal rules can be identified and implemented independently of moral considerations and, second, a normal attitude of acceptance on the part of those subject to the law.⁸¹ Acceptance occurs when the laws give rise to a sense and a language of obligation and citizens act accordingly.

Oliver Wendell Holmes, Jr., defends a different kind of positivism, one that resonates with the work of John Austin.⁸² Finality and the independence of law from morals are central features. In this model, law is a set of directions and prohibitions that may or may not be "accepted" in Hart's sense. Order may simply be imposed and security achieved by making certain forms of behavior non-optional and sanctioned.

A third model, consistent with Ronald Dworkin's work, de-emphasizes finality and concerns itself with the intersection of law and morals.⁸³ It describes law as a system of rules and moral principles that works itself

81. See HART, *supra* note 1, at 79-99.

82. See Hart, *supra* note 20, at 593-94.

83. See generally RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*]; RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*].

pure over time through a process of evolution, interpretation, and refinement. Law, in this view, implements shared social goals and moral convictions.

Proponents of these models and others defend their generality and claim to have identified the underlying presuppositions of the enterprise, the point of law. At the same time, proponents of each model anticipate theoretical controversy and know how models can be faulted. A positivist disposed to agree with Hart may concede (to Dworkin) that moral principles play a large role in deliberative processes (judicial and legislative) and (to Holmes) that some legal subjects, sometimes many of them, have the outlaw mentality. One who defends a version of Holmes' "bad man" theory is likely to concede (to Hart) that citizens often agree with the law and identify with it as a parameter for moral action and criticism.

These sketches of possible theoretical orientations reflect different points of view that typically coexist not only among theorists but within a legal system—the point of view of the ordinary citizen, that of the outlaw, and that of the official or decision-maker empowered to interpret, create, and transform the law. But role and point of view are not strictly matched. The ordinary citizen may understand and play out the role of armchair legislator or judge, and he may favor that account as most illuminating. The judge or legislator, in turn, may understand and even harbor the outlaw attitude. Various opinions about the point of law and its distinctive characteristics will coexist not only within any legal system that embraces different kinds of roles and players, but (more importantly) within the attitudes and understanding of each player. Each can see, however darkly, through the others' eyes.

When theorists spell out the structure and point of law, generality is purchased at a high price. The external point of view as theorist does not in fact afford insights that are denied to insiders, participants in legal practices. To the contrary, theoretical insights are merely partial internal perspectives, writ large and universalized.⁸⁴ The debates that naturally occur within any legal practice, struggles not only over laws and cases but implicitly over the point of the practice as a whole, simply have their reflection in the debates of general theorists.

The special self-awareness of the theorist is therefore not an attitude distinctive of the external point of view at all. Every insider can and may benefit from having the same kind of self-awareness. Such awareness of law as a social practice by an insider has three dimensions. First, the in-

PLE]; DWORKIN, *LAW'S EMPIRE*, *supra* note 51; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 51.

84. Accordingly, every insider in the practice will be sensitive to such considerations as the importance of finality, the relevance of moral arguments, the need for law to be "accepted," the role of sanctions, and so on. Theorists choose among these aspects of the legal practice, giving one or another aspect analytical precedence. Compelling jurisprudential arguments are constructed in this way, but the resulting jurisprudential disagreements among theorists merely mirror the internal debates of insiders. And they are similarly unlikely to be resolved. See *supra* note 44.

sider cannot only take positions on substantive questions (disposition of cases, legislation) and give reasons that others will see as reasons, but she can also anticipate and construct the positions and arguments of those other insiders who may disagree with her. Second, she can take positions on more general questions of the point and structure of the legal system, and she can recognize that different insiders can conceive the point and structure differently. To some extent, she can understand how these different "theoretical" conceptions adumbrate various internal roles, that of judge, lawyer, legislator, citizen, outlaw, and so on. Third, she can extrapolate from these "theoretical" conceptions about her own legal system to an understanding of other legal systems and offer not so much a general theory of law as a general account of the coexistence of conflicting positions on the nature of law.

Awareness in all of these dimensions involves tension between the conviction that one is prepared to defend answers to questions at each of these levels *and* the conviction that one can see through the eyes of other insiders whose answers and modes of defense are different from one's own. The sophisticated insider inhabits this tension and constantly refines her views and modes of argument in light of it. It is a misconception, therefore, to identify the internal and the external aspects of law respectively with the two sides of this tension. The insider embraces both sides. The external point of view, by default, is parasitic on the internal standpoint because it is an attenuated form of the tension, the internal understanding of the practice with the observer's internal commitments provisionally subtracted or put aside.

III. BURSTING THE THEORIST'S BUBBLE: RECENT JURISPRUDENCE

Many contemporary writers of jurisprudence see the relationship between the internal and external point of view imperfectly. They fail to see that a theorist of law remains tethered to Neurath's boat, remains an inhabitant of the structures he deconstructs. Various recent theoretical accounts of law can be seen as ignoring or denying this truism. In this part, I will look at the way in which the disposition to do so devalues their claims.

A. THE FISH/DWORKIN DEBATE

Ronald Dworkin's jurisprudential writings⁸⁵ have been widely influential over the last twenty-five years. As a self-styled naturalist critic of

85. See generally RONALD DWORKIN, *FREEDOM'S LAW*, *supra* note 83; RONALD DWORKIN, *LAW'S EMPIRE*, *supra* note 51; DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 83; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 51.

positivism⁸⁶ and an articulate defender of liberalism,⁸⁷ Dworkin has often drawn fire. Stanley Fish, a literary theorist much concerned with hermeneutics and with the internal and external standpoints of interpreters of texts, has been one of Dworkin's more persistent critics.⁸⁸ Their debates illuminate the interplay of insight and confusion about internal and theoretical points of view.

Dworkin offers a characterization of law as a social practice. His theory is preoccupied with the centrality of the judicial function. It stresses the dynamic, open-ended character of law by scrutinizing the role of judges as interpreters of law. Dworkin is particularly concerned with the resources that judges are expected to use, the ways in which they use them, and the nature of their results:

I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. . . . Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; and they call this their legal philosophy. It will include both structural features, elaborating the general requirement that an interpretation must fit doctrinal history, and substantive claims about social goals and principles of justice. Any judge's opinion about the best interpretation will therefore be a consequence of beliefs other judges need not share.⁸⁹

Dworkin concludes that

judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of . . . private law.⁹⁰

In this way, what Dworkin calls the "adjudicative principle" instructs that the total set of laws be seen as morally coherent.⁹¹ It is this that he calls the ultimate legal and judicial mandate of "integrity."⁹²

Dworkin's account of law thus addresses the question of the determinateness of law, and it does so in a way that claims to be more sophisticated than any positivistic account. For positivists, law is determinate to the extent that there are formal criteria for legal rules.⁹³ A legal system is defined in terms of the availability of such criteria. The question of formal identification of law is treated separately from the question of law's

86. See generally Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

87. See DWORKIN, A MATTER OF PRINCIPLE, *supra* note 83, at 181-233. See generally DWORKIN, FREEDOM'S LAW, *supra* note 83.

88. See STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 87-119, 356-71 (1989).

89. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 83, at 146, 161-62.

90. Dworkin, *supra* note 86, at 165.

91. DWORKIN, LAW'S EMPIRE, *supra* note 51, at 176.

92. *Id.*

93. See *supra* note 36.

normativity, the question of the distinctive attitude of those who are inside a legal practice.⁹⁴

For Dworkin, determinateness and normativity come together. In his theory, law is not determinate in the positivistic sense that judges and citizens who disagree about the principles and point of their legal system will nonetheless agree about how to identify its rules. Rather, it is determinate to the extent that all who take a role in interpreting the law will be doubly constrained, first, by the general ideal of a process of interpretation defined by integrity and, second, by the more particular avenues of moral justification that are made relevant within the shared social practice. Thus, the principles that constitute law's normativity at the same time make it determinate. In doing so, they allow us to make sense of the claim that there are better and worse ways of interpreting the law, right and wrong answers to legal questions.

Stanley Fish has repeatedly argued that Dworkin's account is incoherent, that (following Dworkin's premises) one cannot make sense of the idea of better or worse ways of interpreting the law or of right or wrong judicial answers.⁹⁵ He points out that such normative conclusions presuppose that one can distinguish between the judge's apprehension of the facts of the case and the relevant rule(s), the judge's use of certain principles to decide the case, and the ways in which an observer of the process may assess the choice of principles and may see other principles and a different resolution as preferable. For Fish, these are not separate processes; to apprehend the facts and relevant rules is *already* to see them in the light of a moral commitment to the principles that define the point of law.

[T]o have a belief (or an interpretation) is to believe it, to believe it is to think that it is correct, and to think it correct is to prefer it to someone else's belief. In short, everything that Dworkin would secure in the name of the "right-wrong" picture—a ground for assuming "that interpretations may be sound or unsound, better or worse, more or less accurate"—already is secured by the fact that the interpreter is embedded in a structure of beliefs of which his judgments are an extension. The entire project of explaining how "ordinary interpreters think" as they do—think that they are right and others are wrong and that what they believe is true—is unnecessary because they could not possibly think anything else.⁹⁶

The distinction between explaining a text and changing it can no more be maintained than the others of which it is a version (finding vs. inventing, continuing vs. striking out in a new direction, interpreting vs.

94. In other words, Hart treats as separate issues the distinctive existence of use of a rule of recognition for valid legal rules and the distinctive attitude (acceptance, the non-outlaw attitude) of those subject to a legal system. His discussion of the internal point of view is ambiguous, but only one of four possible interpretations of it links the internal point of view to awareness and use of a rule of recognition. See *supra* notes 35-37 and accompanying text.

95. See generally FISH, *supra* note 88.

96. *Id.* at 115-16 (footnote omitted).

creating). To explain a work is to point out something about it that had not been attributed to it before and therefore to change it by challenging other explanations that were once changes in their turn. Explaining and changing cannot be opposed activities . . . because they are the same activities.⁹⁷

The debate between Dworkin and Fish defies easy summary and brief analysis. Each arguably makes compelling arguments about the relation between theory and practice while mistaking significant aspects of it. According to Fish, Dworkin seems to imply that understanding and mastery of the interpretative process give the theorist a purchase on rightness that may not be available to the judge or insider (except in an idealized role). If Fish's characterization is correct, Dworkin, as we shall see, is surely mistaken. Fish, in turn, argues that many distinctions made by insiders (judges, practitioners) and appropriated by outsiders (theorists) are meaningless, but he arrives at that conclusion only through a misdescription of the internal aspect of practices, only by flattening and homogenizing them.

Once we are clear about the dependence of theory on practice, the dependence of the external upon the internal aspect of law, it is easy to see that Dworkin and Fish are arguing at cross-purposes. Fish is surely correct that Dworkin *would be* in error in suggesting that legal questions present themselves as "brute issues" to judges, with interpretations *subsequently* to be laid on them. Every judge sees every problematic question as problematic in the light of an evolving social practice; the question is framed for her initially by a shared understanding of evolving legal doctrine and legal controversy, by the interpretive options that are part of the social practice of legal interpretation, by more general aspects of culture, and by the idiosyncracies of understanding traceable to her personal history.

Moreover, the only perspective from which it makes sense to speak of resolutions of these issues being better or worse, right or wrong, is the perspective of an insider. The judge herself recognizes various strategies of solution offered up by the practice. The process of thinking them through *is* the process of seeing and preparing arguments why some resolutions are better, others worse. Anyone who takes issue with her, whether as an official or merely an observer, will necessarily do so by using another available strategy within the practice. Rightness and wrongness are notions that these disputants deploy to characterize their arguments.

This does not mean that it is impossible for a judge to be creative, but it means that creativity is to be understood internally. The practice *itself* embraces criteria for evaluating radical variations on existing strategies and judging them to be creative, misguided, or both. Attributions of creativity are often retrospective. A judge looking back on earlier decisions

97. *Id.* at 98.

that affected the course of law, that reshaped the available ways of thinking about specific legal issues or legal decision-making in general, will call some creative. A historian or theorist who makes that judgment will do so, if at all, in the same way that a later-generation insider does.

It would be a mistake for Dworkin or any theorist to see the constrained, or rather contextual, character of legal judgment and interpretation as implying that internal strategies converge over time, that the legal system “works itself pure.” There is no independent external point of view from which the strategies of reasoning within the practice can be evaluated as better or worse, right or wrong, or convergent. The moral parameters that make possible such judgments, controversial or not within the practice, are all artifacts *of* the practice.

Even the term “constraint” to describe the contextual character of legal judgment is potentially misleading. Judges themselves are constrained in the sense that the practice defines and determines the strategies they have available, their options in framing and resolving the interpretive task at hand. It determines what is imaginable to them as a real option. It is *not* a constraint in the sense of being a conscious barrier or prohibition that is part of their deliberations, an awareness of forbidden but imaginable options.

Fish is helpful in pointing out that cases present themselves to judges already interpreted, as artifacts of the social practice shaped by the interpretive framework of the culture and by the idiosyncratic conceptual habits of the judge. But he is mistaken when he implies that because the case is already contextualized, there is no further work for the judge to do, no process that one can refer to as done well or badly. The case presents itself not with a solution but as a problem. The judge’s familiarity with the practice and with the job of interpretation is such that she envisions different ways of addressing and resolving the case, all of them understandable and largely anticipatable⁹⁸ as part of the shared practice.

The practice itself, however, is complex enough so that different approaches will be seen and labeled, *by herself and others within the practice*, as variously sound and unsound resolutions, as evolutionary or revolutionary, as instances of developing law incrementally or as radical reinventions of it. Thus, the conceptual moves of insiders, an important aspect of the internal point of view of the practice, embrace self-criticism and mutual evaluation. The distinctions between finding and invention, explaining and changing, interpreting and creating—which Fish criticizes as meaningless—have a home within that point of view.

98. This raises the complex issue of creativity and change within ongoing practices that involve disagreement and decision-making. The parameters of the practice are more or less fixed to the extent that any judge, for example, understands the range of responses and arguments that are appropriate to a particular case. But the mutually understood parameters of the practice are not frozen. A judge may deploy arguments in a way that surprises colleagues and turns out to “have legs,” to influence other judges in their strategies. A judge has room for creativity, and thus the practice evolves over time.

And there is no other point of view. It is simply a fallacy for a theorist like Fish to assume that the external point of view is a vehicle for moving from the observation that all judges belong to and work with social practices (or, in Fish's terms, "interpretive communities") to the observation that all moves within the practice are indifferently interpretive, inventive, or creative, and that none are better or worse. Judgments about rightness and wrongness, strength, weakness, and creativity of arguments have their only home as they are deployed within the practice by insiders who distinguish and mutually criticize each other's moves.

B. CRITICAL LEGAL STUDIES

Recent as it is, the movement called "critical legal studies"⁹⁹ is as much a historical artifact as Hart's positivism. Its energies and insights have been diffused through the work of current theorists who have struck out in various directions.¹⁰⁰ I shall consider some distinctions between theory and practice that seem implicit in the critical point of view.

Duncan Kennedy's early articles put forward arguments that have achieved a substantial afterlife in legal pedagogy and discourse, even as they have been disclaimed by their author.¹⁰¹ Accordingly, "there are two opposed rhetorical modes for dealing with substantive issues [in American private law], . . . individualism and altruism."¹⁰² Any issue can be treated in either rhetorical mode, and "the choice of form is seldom purely instrumental or tactical."¹⁰³ Thus, it is a quixotic quest to seek the "best" resolution of a legal issue. The most that can be said is that any resolution is political in the narrow sense, reflecting *not* the collective political will of the culture but the partisan political aims of one of two equally available approaches. "At [a] deeper level, [this shows that] we are divided, among ourselves and also within ours[e]lves, between irreconcilable visions of humanity and society. . . ."¹⁰⁴ Kennedy labels this a "fundamental contradiction."¹⁰⁵

Proponents of this approach tend to describe it as making clear from the external point of the theorist what is obscured from the practitioner. But this is an illusion. The internal point of view, as we saw in Part II of this Article, is more complex and nuanced than Kennedy implies. It is

99. See, e.g., ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); *CRITICAL LEGAL STUDIES* (James Boyle ed., 1992); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982); Symposium, *Critical Legal Studies*, 36 STAN. L. REV. (1984).

100. Among the movements that owe a significant debt to the methodology of critical legal studies are communitarianism, legal feminism, race studies, legal hermeneutics, and legal postmodernism.

101. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 55 (1997).

102. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

103. *Id.* at 1710.

104. *Id.* at 1685.

105. Kennedy, *supra* note 43, at 211.

not simply the captive of a particular political approach, delusionally seen as neutral and correct. Rather the practitioner in principle is capable of appreciating the availability of competing solutions, the possibility of bias, and the certainty of the contextualism of any hermeneutical task, but understands as well that the relevance and defensibility of decisional strategies must and can be assessed case by case. Even if we concede what is questionable, namely that most competing approaches to most legal issues can be characterized as individualistic or altruistic, the internal point of view includes the sense that on some issues one or another approach can be supported with better arguments concerning such matters as justice, general interest, and economic welfare. The fact that competing approaches are available does not entail that, from an "external" or any perspective, they compete equally, that one side always has as much and no more to be said for it than the other.

The pretense that the external point of view yields this kind of illumination distinguishes critical studies even when Kennedy's bipolarity thesis is left behind. In a seminal early article, Robert Gordon critically examines the assumption that "[l]egal systems should be described and explained in terms of their functional responsiveness to social needs[,] . . . [the working hypothesis that [t]he legal system adapts to changing social needs."¹⁰⁶ He suggests that this is a "legitimizing ideology,"¹⁰⁷ one that conceals from those inside a legal system the fact that the connections between law and society are radically indeterminate.

It will . . . help us to relativize our understanding of the past's relation to the present if we see that our conventional views of that relation are mediated by familiar narrative story-lines, that are so deeply entrenched in our consciousness that we are often unaware of their rule over our conception of reality. These story-lines, like other mentalities, have a history filled with ideological purposes, and there always exist . . . competing stories that impress the same historical experience with radically divergent meanings.¹⁰⁸

Three different ideas coexist in Gordon's analysis. Two are well supported. It is surely correct that the task of historian, the retrospective analyst, differs from that of the practitioner. The historian appropriately second-guesses practitioners, seeing influences and patterns that may be invisible to those *in media res*.

It is also surely correct that every practitioner needs to remind herself at every turn to assess issues through the eyes of others, to weigh the kinds of arguments that she can well anticipate will be offered by those who differ with her. She has the twin obligations of justifying her position against those who think otherwise and understanding their positions. Inevitably this requires her to make the grounds, motives, and personal his-

106. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 63-64 (1984).

107. *Id.* at 93.

108. *Id.* at 101-02.

tory governing her approach as transparent to herself as possible, to ask herself what role legitimating ideologies play in her thinking.

But all of this does not warrant a third idea, one that is not necessarily Gordon's but that may all too easily be inferred from his comments. It is that the theorist for whom the contingent history of the practice is clearly evident and who can identify "legitimizing ideologies" is thereby justified in criticizing all decisions, all uses of decisional strategies by insiders, as equally blinkered by unacknowledged ideologies and delusions of objectivity. Piecemeal self-scrutiny of the kind illuminated by theorists is an inherent part of the insider's role, and it does not leave the insider/judge bereft of the capacity to choose one resolution over another.¹⁰⁹

Some critical theorists want to have it both ways. They want to criticize insiders as systematically blind to determinants of their decisions and, at the same time, to defend an agenda for substantive decisions. This can sometimes be seen in the work of critical feminist theorists as well as critical race theorists. Catharine MacKinnon, for example, argues that laws and decisions that aspire to neutrality, fairness, and justice are typically biased against women.¹¹⁰ The point is not that male dominance affects how some, even many, aspects of law are seen; rather it is that the legal system for all insiders is pervaded by male dominance. "Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality."¹¹¹ Male and female insiders are equally tainted, men insofar as they are blinded by the legitimating ideologies that institutionalize their engendered preferences, women insofar as they have been brainwashed by that very system. Only an external point of view affords awareness of the system's biases and partiality.

MacKinnon, to her credit, recognizes the paradox. "The practice of a politics of all women in the face of its theoretical impossibility in traditional terms is creating a new process of theorizing. . . . Its project is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience."¹¹²

This rhetoric, however powerful and reductive, rests on the same misleading premises as critical theory. The external point of view offers *no* resources that are *in principle* unavailable to an insider. There may be compelling advantages in self-delusion in many cases, but an insider contemporaneous to MacKinnon can uncover and use the same insights about male dominance that feminist theorists put forward. Indeed, the insights are available to the theorist only to the extent that they are also

109. By contrast, to see all decisional strategies as determined by unacknowledged biases and predilections is to undermine the possibility of rational, self-conscious decision making. It is paradoxical for a theorist to take this position and also advocate an agenda for rational and autonomous reformers.

110. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *MACKINNON, THEORY OF STATE*].

111. *MACKINNON, THEORY OF STATE*, *supra* note 110, at 116-17.

112. *Id.* at 116.

available to an insider in the context of addressing particular legal issues.¹¹³ There are feminist theorists only insofar as there can also be feminist legislators and judges. The theorist may have less of a vested interest in self-delusion, but whether that is so depends not on her situation as insider or outsider but on the particular issue at hand. In the end, there is no paradox. The feminist agenda, like the agenda of reformers concerned with racial attitudes, is a possible internal agenda for judges, legislators, and citizens. Feminist proposals are not revelations available only outside social practices, revelations that implement a distinctive critical theoretical method. One is likely to believe that only if one ignores the relevant complex moves within the social practice of legal reasoning and decision-making.

Duncan Kennedy, in his most recent and most ambitious book, *A Critique of Adjudication (fin de siècle)*,¹¹⁴ wrestles once again with the relationship between theorist and practitioner. He defines the book's methodology, which he labels "[m]odernism/postmodernism (mpm)," as "a project with the goal of achieving transcendent aesthetic/emotional/intellectual experiences at the margins of or in the interstices of a disrupted rational grid."¹¹⁵

[Moreover, m]pm is a critique of the characteristic forms of rightness of [our legal] culture and aims at liberation from inner and outer experiences of constraint by reason, in the name, not of justice and a new system, but of the dialectic of system and antisystem, mediated by [arguments that] . . . are supposed to put in question the claims of rightness and, at the same time, induce a set of emotions—irony, despair, ecstasy, and so on—that are crushed or blocked when we experience the text or representation as "right."¹¹⁶

Kennedy offers a more accessible account of this process, less imbued with the mystique of postmodernism, when he says the following:

We don't get to the point of psychologizing American judges until we have decided that, at least for the moment, there's no sense in continuing our investigation of their views on the merits, because those views are wrong and, indeed, there is no sense in further dialogue with them on their own terms, because, for the moment, it is more

113. It follows that some of the ways in which liberal feminism and radical feminism are differentiated are illusory and self-serving. Liberal feminism is typically grounded in practice. Liberal feminists identify issues in which the equal rights of women have been ignored, distorted, or violated. They use rhetorical strategies that are available within the practice, and they reinterpret equality, respect, and other relevant notions.

The radical theorist who seems to believe that all strategies within the legal practice and even the available rhetoric, the language of practice, is irremediably tainted presents us with a self-refuting paradox. We not only recognize her language as part of the practice, as an available if creative strategy, but we can also readily imagine it in the voice of an insider, a judge or legislator. If no judge or legislator in fact takes these positions, the reason is likely to be political rather than conceptual. The radical feminist insider may, perhaps, have trouble being appointed or elected, but her approach to legal issues is not one that insiders *in principle* cannot voice.

114. KENNEDY, *supra* note 101.

115. *Id.* at 7.

116. *Id.* at 340-41.

interesting to figure out why they say what they say, on the assumption that it's wrong, than to investigate further whether it is wrong.¹¹⁷

And yet he also backpeddles when he observes that "the mere adoption of the psychologizing posture doesn't close off the possibility that there is no misrepresentation, that the view we're about to psychologize is correct."¹¹⁸ Conceding that "I don't claim to have shown that it is impossible to exclude the ideological," he concludes nonetheless that "for the time being, it seems worthwhile to psychologize."¹¹⁹

These brief excerpts display well Kennedy's pervasive and largely unquestioned assumptions about the prerogatives of the theorist. Judges and other insiders are, he presumes, wrong and ideological—wrong *because* they are ideological. They are, according to Kennedy, doubly wrong insofar as they see themselves as nonideological *and* insofar as the claims to objectivity of ideological pieces of legal reasoning are wrong. The critical theorist, on the other hand, has the job of laying bare her pretenses, demonstrating (by psychologizing or by using "postmodern" dialogic techniques) that what *she* calls "rational" is merely ideological.

All of this rhetoric veils a congealed mix of truism, pretension, and plain error. It is true, as we have seen, that every practitioner (and for that matter *every theorist*) does not come naked into the world of theory, but comes clothed with beliefs about why law is worth having, what arguments and solutions to some issues are better than others, and so on. She also comes clothed in awareness that others, participants in the same legal practice, see things differently and that some of her own motives and reasons for holding views may not be transparent to her. If this predicament is labeled "ideological," then we are all always ideological. Wisdom comes, not in seeing "being ideological" as *wrong*, but in understanding the inevitable context, nature, and contestability of rightness claims. Not all insiders appreciate this, of course, but the most sophisticated and self-critical of them do. What is clear is that the external point of view, the pretenses of the postmodernist and the psychologizer, has little to add to the self-reflection of such insiders. It is plain error to label all inside arguments as "wrong" when, by the critical theorist's own argument, there can in principle be nothing one could call "right."

C. SCHLAG ON THEORY

The distinctions and arguments of critical theory, represented in their most refined form by Kennedy's writings, have influenced a generation of legal scholars. The idea that the external point of the theorist affords a pinnacle from which to mock the blinkered objectivism of those within the practice is taken for granted by many self-styled postmodernists. For example, Pierre Schlag claims that

117. *Id.* at 198.

118. *Id.*

119. *Id.*

[for legal thinkers,] values are taken to be self-evidently self-grounding and it is presumed that participants in the legal conversation already take values to be the primary source of authority. . . . Once emancipated from their generative history, values tend to become the ethical equivalent of currency—endlessly recyclable, ready for appropriation by any force, ready to underwrite any end.¹²⁰

From any internal point of view, of course, terms such as justice, freedom, and equality are contested and contestable in many contexts, but they are not, as the critic would have it, simply and equally available to all comers. It is one thing to note the possibility that they *may* be used carelessly or promiscuously. It is something else, and unwarranted from any external perspective, to say that all uses are equally unjustifiable, equally “wrong.” Insiders will not take that position because each will have her own favored strategy for achieving justice and furthering other values. Outsiders have no independent grounds for such claims.

According to Schlag, “legal thinkers” fall into error because they “self-identify” with judges.

[This is a practice] that enables and sustains the fundamental formal ontology of law—the notion that law comes in object-forms such as rules, doctrines, principles, precedents, methods, models, theories, and so on. . . . Judges are supposed to produce decisions that maintain the rule of law, advance efficiency, keep the peace, produce justice, or achieve some such desired normative goal. . . . In short, they are supposed to honor the norms, values, and beliefs that generally hold in the relevant authoritative community. . . . In their self-identification with judges, legal thinkers take on the same orientation.¹²¹

In other words, legal thinkers are disabled from seeing that values are nothing but “currency . . . ready to underwrite any end” and realizing that rules, doctrines, and so on are nothing but “legitimizing ideologies.”¹²²

One could treat as an empirical question whether judges and theorists, either or both, fit this description. No doubt some do. My argument in this Article is conceptual, not empirical. It considers whether *any* judges or theorists can go beyond the simple-minded formalization of rules, values, or principles to see them as artifacts of the practice and, therefore, as the contestable ingredients of internal debate. If this point of view is available to the “external” theorist, that is because it is also available to the reflective internal practitioner, whether judge, lawyer, or citizen. And neither the theorist nor the practitioner has reason to infer from the character of rules, principles, and values as artifacts and as contestable that they are devalued, that they are currency that can be used with *equal* justification by all comers, or that something less important is at stake in internal debates and disagreements than practitioners suppose.

120. PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 44, 58 (1996).

121. *Id.* at 136.

122. Gordon, *supra* note 106, at 93.

Schlag considers the paradoxical nature of theory. He discusses Fish's notion of interpretive communities to raise questions about the vantage point from which such "theoretical" observations are made.¹²³ The paradox seems to arise because, on one hand, our categories of thought are determined by our interpretive community, and we are wholly *inside* those categories. On the other hand, we are supposedly able to refer to and think about our interpretive community as one among other possible interpretive communities, and doing so implies that we can position ourselves *outside* our interpretive community. The paradox is, of course, self-referential and impeaches Fish's own position as theorist.

Schlag notes that Fish devises the notion of "relatively autonomous self" to address the paradox.

The self knows that there is something irreducible about the act of interpretation that simply cannot be . . . captured by anything so systematic, so universal, or univocal as a theory. . . . The self cannot choose its interpretive constructs. It is always already within them. But at the same time (and quite conveniently), very little can be known about these interpretive constructs, so the self need not feel closeted by an overly determined objectivity. The concept of interpretive communities offers the self *a formal closure* against the claims of theory, reason, and history. But at the same time, the concept is *substantively empty*, so that the self can project into "interpretive communities" just about anything it wants. . . . Of course, the relatively autonomous self (as its name indicates) is not entirely stable. Being only *relatively* autonomous, it is constantly called upon to adjudicate the boundaries of its own autonomy. Indeed, it is constantly being seduced or bullied into accepting some insuperable subjectivism or some intolerable objectivism.¹²⁴

Schlag concludes with a series of celebratory self-contradictory conclusions, such as "[t]he relatively autonomous self is a relatively accurate description of the modern self," "[t]he relatively autonomous self is a fiction," and "[t]here is no reason to believe . . . in the relatively autonomous self."¹²⁵

As obfuscation (whether attributable to Schlag alone or conjointly with Fish), this is exemplary. As analysis, the imprisonment metaphor breaks down. To say that we cannot choose our interpretive constructs or choose to belong to another interpretive community is to note the truisms that we cannot live someone else's life or have a different history from our own. This is, to be sure, a kind of limitation, but one that is not quite as limiting as Schlag supposes. Nothing prevents us, using the tools of our conceptual community, from inquiring into the experiences and beliefs of anyone in history and making *the effort* to understand them. Nothing prevents us from addressing the consequences of this effort, the ways in which it partially succeeds, partially fails. And nothing prevents us from

123. See SCHLAG, *supra* note 120, at 91-113.

124. *Id.* at 98, 100, 103.

125. *Id.* at 106.

seeing our own conceptual community as one of many or from understanding diversity within and among interpretive communities. We can do all of this from inside. One who thinks we cannot do so underestimates the resources and nature of interpretive communities. In other words, nothing stops us from occupying Neurath's boat and being aware of it *as the kind of boat it is*. It is our nature as participants in our practice to "occupy the practices we deconstruct."¹²⁶

Thus, relative autonomy is not the dilemma. Autonomy makes sense *within* the practice in the sense that we can exercise autonomy by resisting physical, psychological, and conceptual coercion. We engage in self-questioning, entertaining alternative arguments and points of view. That is how we experience autonomy. But it makes no sense to look for autonomy *from* the practice, any more than it makes sense to seek autonomy from life itself. Being internal to this rich practice is a condition of our being, but that being exists as tension. We struggle both with others who see things differently and would bring about what we see as an inimical state of affairs, and with ourselves to the extent that we question our own point of view and try out those of others. But these are ways of exercising autonomy within the practice, not autonomy from it.

IV. CONCLUSION

The philosopher Wittgenstein is sometimes interpreted as placing the role of philosophy in question and in jeopardy and concluding that philosophy can, at best, be a kind of therapy.¹²⁷ It cures us of using terms and arguments outside their natural use in linguistic practices, cures us of asking abstractly about the nature of reality, knowledge, or goodness. It directs us instead to attend to what goes on inside social/linguistic practices and how terms like "real," "know," and "good" acquire meaning through use. If philosophy survives at all, its role is to make us self-conscious about the nature of our practices or "language games" (which have as much to do with how we think as what we say).

One can agree with Wittgenstein about philosophy or "theory" and yet find it to be a fairly robust enterprise. The ways in which we are oblivious or unselfconscious about our practices can be considerable and can lead us to make odd and misleading claims. To the extent that moves within the practice *include* reflections about the practice, theory does not stand apart from but is included within it.

I have tried to spell out some of the consequences of seeing the external point of view of legal theory as dependent upon the internal point of view of individuals inside legal practices. The balloon of the theorist is tethered to Neurath's boat. To forget this is to indulge that dangerous arrogance of some theorists, those who devalue the role of internal points of view and do so at their peril.

126. *Supra* note 52 and accompanying text.

127. See, e.g., THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS? (Avner Cohen & Marcelo Dascal eds., 1989).