Internal versus External Perspectives on Law: Toward Mediation

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INTERNAL VERSUS EXTERNAL PERSPECTIVES ON LAW: TOWARD MEDIATION

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I. INTRODUCTION

Legal doctrine and legal practice can be understood from either an internal or external perspective. The internal perspective is manda-

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1. For recent scholarship on the internal/external distinction, see Randy Barnett, The Internal and External Analysis of Concepts, 11 CARDOZo L. REV. 525 (1990), Richard L. Schwartz, Internal and External Method in the Study of Law, 11 LAW & PHIIL. 179 (1992), and Brian Z. Tamanaha, The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociolegal Studies, 30 L. & SOCy REV. 163 (1996). This line of inquiry can be traced to the groundbreaking work of legal philosopher H.L.A. Hart, who first articulated the distinction between internal and external perspectives:

When 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.

H.L.A. HART, THE CONCEPT OF LAW 89 (2d ed. 1994) [hereinafter HART, CONCEPT]. Hart later acknowledged a third perspective—which he called hermeneutic—that is neither strictly internal nor external. According to Hart, the hermeneutic perspective allows a non-participant in a social practice to comment on the internal rules accepted by participants without sharing their commitment to the legitimacy of such rules. See H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 13-15 (1983) [hereinafter HART, JURISPRUDENCE]. This Essay draws from Hart's articulation of the hermeneutic perspective and suggests how this perspective might be understood as a way of mediating the excesses of purely internal and external approaches to law.

As a matter of intellectual history, it is worth noting that while Hart was the first legal scholar to speak at length about internal and external perspectives, German sociologist Max Weber forged a similar distinction between what he called "legal" and "sociological" points of view:

When we speak of "law," "legal order," or "legal proposition" (Rechtssatz), close attention must be paid to the distinction between the legal and the sociological points of view. Taking the former, we ask: What is intrinsically valid as law? . . . But if we take the latter point of view, we ask: What actually happens in a community owing to the probability that persons participating in the communal activity (Gemeinschaftshandeln), especially those wielding a socially relevant amount of power over the communal activity, subjectively consider certain
tory for judges and lawyers who work within the legal system. In their official capacity, these participants in the system are required to view the law as a set of rules with legitimacy and moral authority. By contrast, the external perspective predominates among sociologists, economists, and historians who approach law and legal conduct as epiphenomenal, as a reflection of deeper forces unrecognized by the players within the system. The internal perspective approximates a first-person view or insider's view of the legal system, whereas the external perspective is a third-person view or observer's view of the law.

We can view any area of law—indeed, any judicial decision—from either of these perspectives. For example, we can understand a probate code internally as a coherent set of rules for the disposition of a decedent's property, or we can examine it externally as a mechanism for perpetuation of class divisions. The internal perspective accepts the baseline assumptions of probate law, such as the right of inheritance and the rules of descent. By contrast, the external perspective seeks a deeper explanation for the probate code, perhaps by linking it to the rise of a free-market economy or to a system of patriarchal domination. In looking at the probate code, an internal theorist might address a question raised in an actual court case, such as whether the courts should enforce an undated will. The external theorist might ask, How does probate law perpetuate poverty, racism, and class divisions? This simple example illustrates that internal theory is useful to practicing lawyers because it shares their uncritical attitude toward primary legal materials such as cases and statutes. The external perspective seeks a deeper truth—it moves below the positivism assumed in the internal perspective—but it does so at the cost of diminished usefulness to the participants who have to operate within the legal system.

Every legal scholar must decide whether to favor an internal or external perspective. For example, if a law professor wants to write an essay on the doctrine of adverse possession, she faces an immedi-

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norms as valid and practically act according to them, in other words, orient their own conduct towards these norms?


2. The internal/external distinction has a parallel in anthropological theory where a distinction is drawn between insider versus outsider perspectives. Anthropologists face a methodological problem of orientation in explaining a foreign practice or institution—such as witchcraft, cannibalism, or totemism—because the foreign behavior can be understood with either an emic approach that mirrors the native's self-understanding or an etic approach that explains the native's behavior in terms of forces unknown and unavailable to the native, such as social solidarity, prohibition against incest, or economic necessity. See DAVID KAPLANS & ROBERT MANNERS, CULTURE THEORY 22-24 (1972). Because the "internal/external" terminology finds wider acceptance within legal studies than the "emic/etic" terminology favored by anthropologists, this Essay follows the accepted usage.
ate problem of orientation. Does she begin with the internal rules of adverse possession—an open, notorious, and hostile claim of right, or does she try to relativize and demystify the doctrine as bourgeois ideology? Which of these two perspectives, the internal or external, is appropriate for a legal scholar? Should a legal scholar assume an internal role and approach legal controversies from a judge's perspective, or should she stand outside the legal arguments and adopt the posture of a detached social critic? Or is it possible to consider both perspectives simultaneously?

Law professors often experience institutional pressure to take an internal perspective because they are responsible for training young lawyers in the nuts and bolts of legal doctrine and practice, something that is undercut by an external emphasis on criticism of the law. On the other hand, law professors with critical, feminist, or Marxist inclinations favor the external perspective because it looks at the larger social context of legal disputes.

The question of perspective has generated fierce disagreement between theorists in the internal and external camps. Legal philosopher Ronald Dworkin has championed the internal perspective by asserting that jurisprudence must privilege "the judge's viewpoint." Dworkin goes as far as claiming that external accounts of the law are "impoverished and defective" and "less critical in practice." In contrast, the external perspective is advanced by various Marxists, critical legal scholars, and postmodernists, who collectively argue that the internal perspective of the participants is distorted, biased, or ideologically tainted.

These two perspectives produce different types of legal theory. Internal thinkers like Dworkin tend to provide what might be called an "imminent" critique of the law by operating within the existing legal framework. For example, Dworkin's regular contributions to the New York Review of Books provide judicial-style opinions on why the United States Supreme Court has either correctly or incorrectly decided a recent case under the precedents and principles before the Court. In contrast, external theorists provide radical critiques that shake the foundations of the legal edifice or attempt to destabilize an area of law. For example, Marxists have claimed that crime is largely a social product caused by capitalism and not a matter of individual

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4. Id.
5. Id.
7. See, e.g., Ronald Dworkin, Sex, Death, and the Courts, N.Y. Rev. of Books, August 8, 1996, at 44.
They also claim that in a just society criminal treatment would replace punishment with its emphasis on individual criminal blame. Such a perspective is radical because it challenges an entire area of law and refuses to work within the established precedents.

These two perspectives on the law, the internal and the external, are each structurally deficient when used in isolation. Because law is both an internal, argumentative practice and an external, social construct, any perspective on law that is purely internal or purely external will be unworkable precisely because each ignores a fundamental feature of law. An acceptable legal theory allows the internal and external perspectives to mediate each other dialectically so that a “fusion of horizons” takes place. This Essay suggests some ways in which this fusion can be encouraged.

To get a handle on this expansive topic, this Essay explores the internal/external distinction by first examining how these perspectives play out in the social sciences on the question of suicide, and then by showing how we can approach a criminal case internally and externally. Second, this Essay discusses the advantages and disadvantages of the internal perspective, pointing out that the strength of having uniform language and doctrine to guide actors within the system is weakened by resistance to a radical critique. Third, this Essay analyzes the advantages and disadvantages of the external perspective, arguing that while critical distance is desirable, radical critiques are often not incorporated into an internal practice seeking to reform the system. Finally, this Essay offers a suggestion for mediating the two perspectives by recognizing the limitations of each perspective and suggesting how we can merge perspectives to avoid a one-sided approach.

II. INTERNAL VERSUS EXTERNAL APPROACHES IN SOCIAL SCIENCE AND LAW

The internal perspective is based on the assumption that a social practice or institution, such as law, must be understood by incorporating the meanings and interpretations offered by the participants in the practice. Peter Winch advanced the internal perspective in the social sciences by claiming that “reflective understanding [of social phenomena] must necessarily presuppose . . . the participant’s unre-

8. See Evgeny B. Pashukanis, Law & Marxism: A General Theory 175-76 (Chris Arthur ed. & Barbara Einhorn trans., 1978) (1929) (arguing that, were it not for the existence of classes in a capitalistic society, there would be no need for a penal system).

9. See id. at 177-78 (noting that in a non-bourgeois system criminal liability is shared by the collective society and treatment for an offender is required to protect society and instill responsibility).
A radically different perspective is taken by external theorists, such as Karl Marx and French sociologist Emile Durkheim, who assert that social practices must be understood externally because the participants harbor delusions and distortions about their own motivations and conduct.¹⁰

Consider how these two perspectives play out on the issue of suicide. Most philosophers and psychologists are inclined to view suicide as an internal, personal decision. This is the approach taken by French philosopher Albert Camus in his well-known essay *The Myth of Sisyphus*, in which he theorizes that the idea of suicide arises naturally from a recognition of the absurdity of life.¹² Camus gives a first-person account of suicide: Camus tries to get inside the mind of the suicidal person, to explain his struggle with the meaninglessness of life.¹³ A different internal approach might be to interview suicidal patients and to identify the reasons they give for contemplating suicide, such as family problems, alcoholism, or loneliness. In this way, the internal theorist constructs a theory of suicide by favoring the explanations and experiences of the persons involved.

Suicide can also be approached externally. Emile Durkheim claimed that suicide is not a matter of individual psychology, but a social phenomenon.¹⁴ Durkheim theorized a link between the incidence of suicide and the social structure of various societies.¹⁵ For example, societies with a “dogma of economic materialism” between members will have a particular suicide rate.¹⁶ Further, any rapid change in the division of labor leads to what Durkheim called *anomie*, a feeling of maladaptation and alienation that produces suicidal thoughts.¹⁷ Durkheim’s point is that the real cause of suicide is social, even though each victim cites her specific situation as precipitating the suicide attempt.¹⁸ Therefore, suicide is explained from a critical, external perspective and not by asking suicidal people for their insights.

¹¹ See Understanding and Social Inquiry 77-80 (Fred Dallmayr & Thomas McCarthy eds., 1977).
¹³ See id.
¹⁴ See Emile Durkheim, Suicide: A Study in Sociology 326 (George Simpson ed. & John A. Spaulding & George Simpson trans., 1951).
¹⁵ See id. at 241-76.
¹⁶ Id. at 255.
¹⁷ See id. at 258.
¹⁸ See id. at 299 (“The victim’s acts which at first seem to express only his personal temperament are really the supplement and prolongation of a social condition which they express externally.”).
Notice how one's perspective on suicide has an enormous impact on how one fashions a solution to the problem. If suicide is a personal decision unrelated to social factors, as Camus would have it, then we might try to prevent it by lifting people's psychological states, perhaps through public service announcements or anti-suicide movies or art. If, however, suicide is a social problem, then it can only be solved through social programs, such as the creation of neighborhood associations and public meeting places.

Now suppose that one is forced to take a perspective on suicide, to identify its causes, and to put forward some solutions. Should one privilege the internal or the external perspective? Does one follow Camus or Durkheim? There are dangers in either direction. A purely internal approach such as a phenomenology of suicide misses the social context in which suicide occurs, leaving only the epiphenomenon of suicide but not its material conditions. On the other hand, a purely external approach—for example, a statistical analysis of suicide rates—misses the internal experience of suicide, the inner demons that confront the suicide victim in the dark of night. Such an external focus would be about suicide but not within the experience of suicide, as it were. Perhaps the only thing we can say with certainty is that any complete account of suicide must deal with both perspectives or else it will be one-dimensional.

So far, we have been discussing the social phenomenon of suicide, which is not truly a rule-governed activity. However, the internal/external distinction becomes even more pronounced when we turn to rule-governed, social practices, such as marriage, etiquette, religion, and law. In such rule-governed practices, the participants carry a set of beliefs about the rules that are being followed, so an official explanation—an internal account—arises from within the practice. This internal account can then be contrasted with the external accounts offered by non-participants. For example, the “official” explanation of why religious persons meet corporately is that they want to worship God, whereas a sociologist like Durkheim takes an external perspective and argues that religion expresses a need for social solidarity. Thus, people attend worship to be integrated into society and not because God actually exists.

Of all the social practices that we can examine from an internal and external perspective, law is perhaps the most fascinating for the simple reason that the internal perspective is so well documented; after all, judges provide an official explanation of their behavior when

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19. See id. at 152-60 (discussing the general structure of Protestant, Catholic, and Jewish religious communities and their relationship to suicide).

20. See id. at 159-60 (finding a particular bond in various Jewish communities in which smaller self-contained societies exist out of the need to escape the hostility of the larger Christian society).
they write judicial opinions. This raises an immediate question of ideology and distortion since it is possible that judges and lawyers are deluded in the official accounts of their behavior. That is, a judge might provide an internal account of decision making that fails to acknowledge the external forces influencing her decision, such as race, class, gender, and political beliefs.

The differences in perspective sketched above can be explained by looking at the following hypothetical case, which I pieced together from reported cases in the criminal law.\textsuperscript{21} A small-time hoodlum from a poor neighborhood drills a hole through the lock on the door of a small business. The police arrive immediately after the hole has been drilled but before the defendant physically enters the building. The defendant is charged with burglary, a felony count. At the court hearing, the defendant's lawyer points out that burglary requires a breaking and entering, yet there was no "entry" in this case because the defendant's body did not enter the building. The lawyer argues that the felony count should be dropped and that the defendant should be charged with misdemeanor damage to property. The prosecutor responds by arguing that the requirement of "entry" is satisfied when a perpetrator uses any instrument to break the plane of the door; in this case, the intrusion of the drill through the lock constitutes a breaking and entering. After considering the arguments, the court accepts the defendant's argument that complete bodily entry is required for burglary, so it convicts on the misdemeanor count only.\textsuperscript{22}

A legal theorist could attack this decision from an internal perspective by saying that the court reached the wrong decision under the relevant legal doctrines. The internal critic could cite cases from other jurisdictions holding that bodily entry is not required for burglary. She could also raise a policy argument for employing a broad interpretation of the term "entering." In addition, the critic could point out that the requirement of physical entry would have the absurd result of exempting from burglary a thief who uses a long pole to avoid bodily entry. An internal theorist could also support the

\textsuperscript{21} The hypothetical case was assembled from a variety of holdings regarding burglary. \textit{See generally} State v. Spearman, 366 So. 2d 775, 775 (Fla. 2d DCA 1978) (holding that, for the purpose of proving burglary, entry can be established by the perpetrator's insertion of only a part of his body into the victim's residence); State v. Whitaker, 275 S.W.2d 316, 319 (Mo. 1955) (holding that "[t]he least entry of any part of the body is sufficient" to establish an entry); State v. Crawford, 80 N.W. 193, 194 (S.D. 1899) (holding that an entry can be established where an instrument is used to break into a building with the intent to commit a crime inside the building with the same instrument). \textit{But see} R.E.S. v. State, 396 So. 2d 1219, 1220 (Fla. 1st DCA 1981) (holding that the use of an instrument to siphon gas from an automobile did not constitute burglary). For further discussion of this hypothetical case, see LITOWITZ, \textit{supra} note 6, at 23-25.

\textsuperscript{22} For convenience and clarity, a discussion of attempted burglary in this hypothetical case was omitted. However, the point about internal disputes could be made just as effectively by looking at whether this is a case of burglary or attempted burglary.
court's decision, perhaps by saying that the central feature of burglary is bodily intrusion into another's private space, so the court was correct to dismiss the burglary count. Notice that the parameters of this internal debate are played out within the four corners of the criminal law as written, and the legitimacy of this law is taken for granted.

It is also possible to criticize the court's decision from an external perspective. For example, a radical Marxist might admit that the defendant is technically guilty of a crime, but she would quickly add that the criminal law is a sham, a mere reflection of class rule for the protection of property interests.23 The Marxist would find the internal debate of whether the crime is a felony burglary or a misdemeanor property offense too narrow because it erroneously works from within the framework of the criminal law without subjecting the framework itself to criticism.

The external critique is rather useless to the participants on the inside of the practice, just as the internal debate among the lawyers is useless to the external critic. From the judge's internal perspective, the defendant cannot be released on the grounds that private property is immoral because this move is not permitted by the internal rules of the legal process—just as one cannot stop in the middle of a game of Monopoly to assert that the various properties should be held by a central banking authority. By the same token, the internal courtroom debate over how to handle this case is uninteresting to the external critic who wants to interrogate such artificial distinctions as felony versus misdemeanor, malum in se versus malum prohibitum.

At this point it is tempting to say that we are dealing with two separate and incommensurate language games. The internal perspective is a language game within the law because it attempts to determine how the criminal law ought to be applied, while the external focus is about the law because it situates the existing law in a broader context. This way of speaking is permissible if we remember that these language games do not constitute entirely different conceptual schemes. Indeed, it is possible and desirable to translate one perspective into the other.

How might such translation occur? In criminal law, it might be possible for the Marxist to convince the internal players that the terms which they are using are ideologically loaded or distorted. She

23. This attitude toward the law is expressed in The Communist Manifesto:

But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production... just as your jurisprudence is but the will of your class made into a law for all.

may do this by showing that certain types of criminality are caused by economic conditions and hence lack the requirement of intent.\textsuperscript{24} Thus, this category of criminal defendant should be treated less harshly by the courts.\textsuperscript{24} In another context, a Marxist could argue that contracts deemed voluntary under the law are actually the result of economic coercion and therefore should be voided. These views might somehow force a reshaping of the internal rules of law. Obviously, something will get lost in this translation; the version of Marxism that can be translated into our legal system is not going to be orthodox Marxism in its entirety but a diluted version. Yet for the external viewpoint to affect the actual development of the law, it must somehow be translated into the language that is being used inside the practice of law. If this translation does not take place—if the external and internal horizons are not fused or mediated—we are left with two hermetically sealed approaches to law. The next two sections explain the problems with using either of these perspectives in a hermetically sealed manner.

III. INTERNAL THEORY: ITS ADVANTAGES AND DISADVANTAGES

The most vocal supporter of the internal approach is perhaps Ronald Dworkin: "[My work] takes up the internal, participants' point of view . . . . We will study formal legal argument from the judge's viewpoint . . . ."\textsuperscript{26} Dworkin goes on to reject external, third-person accounts of law as "perverse" and "impoverished": "Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective . . . ."\textsuperscript{27} Dworkin supports this claim by pointing out that external accounts are about law but not within law.\textsuperscript{28} As a result, they fail to grasp the law as a complex argumentative practice, as a collective struggle with rules and principles.\textsuperscript{29} Dworkin's internal perspective rules out any methodology that does not privilege the judge's perspective, including Marxism, radical feminism, Critical Legal Studies, and postmodernism, all of which traditionally cannot be applied by judges in their official capacity. Although Dworkin professes to tell us about "law's empire" in his book of the same name, he sticks to the judge's perspective on

\begin{quote}
\textsuperscript{24} See PASHUKANIS, supra note 8, at 175-78.
\textsuperscript{25} See COLLINS, supra note 6, at 50-51.
\textsuperscript{26} DWORKIN, supra note 3, at 14.
\textsuperscript{27} Id. This pronouncement is preceded by a more balanced statement: "Both perspectives on law, the external and the internal, are essential, and each must embrace or take account of the other." Id. at 13-14.
\textsuperscript{28} See id. at 225-27.
\textsuperscript{29} See id.
\end{quote}
this empire and adopts the perspective of a mythical judge with infinite wisdom and time, whom he calls "Hercules."30

The internalist school focuses almost entirely on the act of deciding cases, which they see from the perspective of the appellate judge. When Dworkin asserts that affirmative action is constitutional or that the U.S. Supreme Court should recognize a right to die, he accepts the basic framework of our legal system and argues either that a judge within that system has made a false move or that a legal doctrine should be changed slightly. This approach is a type of virtual judging, where the theorist steps into the shoes of a judge and either affirms or second-guesses her opinion.

Internal theorists have not been interested in either the external project of showing how legal concepts are ideologically laden or in demonstrating that legal doctrine is hopelessly indeterminate, sexist, or racist. Perhaps internal theorists believe the adoption of these positions will be unhelpful to the players inside the legal system, whose perspective they adopt. Internal legal theorists speak in a language that mirrors the terms used by lawyers and judges, and they try to solve puzzles that face lawyers and judges: Should a killer recover under the will of his victim? Should good Samaritan or bad Samaritan laws be enacted? Is affirmative action constitutional? Was decision X properly decided by the court? These are inquiries within law as a normative practice, but they are not about law as a social construct. One solves these puzzles by thinking like a judge, not like a critical observer.

The chief advantage of internal theory is that it tracks the language games and concepts used by the players within the legal profession, so it provides a legal analysis that could be adopted by a court in deciding a case. In our society, most social controversies eventually end up in courts where they will be decided from the judge's perspective. By providing an internal perspective, theorists like Dworkin place us directly at the battlefront of legal controversies over abortion, flag burning, affirmative action, and homosexuality. By stepping into the practice of law, the work of these thinkers has the added feature of capturing the experience of lawyers and judges who struggle on a daily basis with the law as a system of rules and principles.

However, internal theory falls victim to three closely-related problems: (1) it assumes the legitimacy of the existing legal framework without subjecting it to a radical critique; (2) it ignores sociological data on the external influences that determine the law; and (3) it has a conservative bias that cuts off paradigm shifts within the law.

30. See id. at 239.
The first problem is that internal theory simply takes too much for granted; it works within and fails to rigorously examine the foundations and ground rules of the existing legal system, with the result that there is a formalist and conservative bias built into it. For example, when Dworkin examines the famous case of *Riggs v. Palmer*,\(^1\) he tells us how the case should be decided, yet silently assumes that inheritance is justified and fails to examine how private property is linked with the type of violence at issue in the case.\(^2\) The error here is to focus narrowly on the precedents and materials before the court. Tellingly, Dworkin refers to the weight of precedents as a gravitational force,\(^3\) but he does not focus sufficiently on the downside of being sucked into this gravitational field. We can also ask why we need a philosopher like Dworkin to tell us how a court should rule on a case, when we already have law professors and practicing lawyers who can provide the same internal analysis—only more sophisticated.

The second problem is that internal theory discounts important sociological findings such as studies showing that judicial opinions correlate with judges' political affiliations and gender.\(^4\) Such insights are often ignored by internal theorists because the insights are external to the judging process. That is, judges do not examine their own class and gender biases when deciding cases, so internal theorists do not do so either. This rejection of sociological data leads to some curious results. For example, given these statistical correlations, one would expect Dworkin to be leery of adopting the perspective of an ideal, neutral judge who remains unaffected by his gender or class and never falls victim to ideology.\(^5\)

There is something to be feared when legal scholarship becomes exclusively internal to the point that it fails to achieve any critical distance from the existing legal system. The tendency of legal theory to occupy the same universe as legal practice brings about a situation where theorists cannot see an "outside" to the present practice. At such times we need an external approach to make us feel less comfortable with our practices, to raise doubts about the status quo.\(^6\)

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\(^{1}\) 22 N.E. 188 (N.Y. 1889). In *Riggs*, an heir murdered his grandfather and then sought to collect under the grandfather's will. See *id.* at 190.

\(^{2}\) See DWORKIN, supra note 3, at 15-20.


\(^{5}\) To his credit, Dworkin engages with Critical Legal Studies, but his analysis never recognizes the importance of critical concepts such as ideology, legitimation, and hegemony. See DWORKIN, supra note 3, at 271-75.

\(^{6}\) Mark Tunick captured this point nicely: "The power of the radical critic is that some who would have said before reading him that they were at home will say afterward that really they aren't. Or he may incite us, get us mad, lead us to take a critical stance
The third problem with the internal perspective is that it cuts off radical paradigm shifts in the law. From an internal perspective on the law, it is difficult to justify, for example, the abolition of inheritance or the existence of a right to shelter or work because there is no precedent for these within the legal system. By focusing so intensely on the workings of the existing system and by never looking at alternative systems, internal theorists get stuck in a self-perpetuating circle that fails to recognize itself as a circle. It is true that a judge must adopt the internal perspective and restrict her focus within the parameters of the existing law, but there is no a priori reason that a legal scholar must do the same, especially if she wants to keep some critical distance from her object of study or wants to conceptualize a better legal system.

IV. EXTERNAL THEORY: ITS ADVANTAGES AND DISADVANTAGES

The external perspective holds that the players inside the practice of law can be deluded about their own actions. Consider Alan Hunt's rejection of the internal perspective:

The dominant tradition of contemporary legal theory is epitomised by H.L.A. Hart and Ronald Dworkin, who despite their other differences insist upon the adoption of an internalist perspective .... Internal theories exhibit a predisposition to adopt the self-description of judges or lawyers as primary empirical material .... There is thus a naive acceptance of legal ideology as legal reality. Internal theory is simply too close to its subject matter.

Accordingly, the goal of critical legal theory is to see law "from the outside," as reflective of the wider class and gender biases within the culture at large, even though judges do not acknowledge these influences. David Kairys articulates this perspective on behalf of Critical Legal Studies:

Judges are the often the unknowing objects, as well as among the staunchest supporters, of the myth of legal reasoning. Decisions are predicated upon a complex mixture of social, political, institutional, experiential, and personal factors ....

from the inside (while he remains outside)." MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 64 (1992).

37. In some cases, it might be possible to advocate radical reform from within the legal system itself, for example to advocate the abolition of inheritance on the grounds of equality or fairness. For an example of this argument, see D.W. Haslett, Is Inheritance Justified?, 15 PHIL. & PUB. AFF. 122 (1986) (formulating an argument for abolishing inheritance and offering an alternative system of lifetime gift quotas).

38. Hunt, supra note 6, at 10.


Those robed people sitting behind ornate oversized desks are not controlled or bound by law; regardless of their honest self-appraisals or their pretensions, they are in the business of politics.  

Perhaps the most extreme external approach is Marxist legal theory, which holds that lawyers mistakenly see the law as a set of autonomous principles standing above the class divisions in civil society, when in fact the law is actually a reflection of class struggle. Engels, for example, pointed out that lawyers have a distorted and ideological conception of law:

The reflection of economic relations as legal principles is necessarily also a topsy-turvy one: it goes on without the person who is acting being conscious of it; the jurist imagines he is operating with a priori propositions, whereas they are really only economic reflexes, so everything is upside down.

By way of example, Engels points out that the right of inheritance has an economic foundation—to keep capital within the family—yet obtains legitimation under the guise of a God-given natural right to dispose of one’s private property. Similarly, the exploitative system of wage-labor is legitimated by “freedom of contract,” whereby poverty-stricken workers are deemed to have a “meeting of the minds” with wealthy industrialists.

Radical critics sometimes even assert that the legal system causes crime and poverty:

When it is the normal functioning of society which produces poverty, racism, imperial conquest, injustice, oligarchy—and when this society functions normally through an elaborate framework of law—this suggests that what is wrong is not aberrational, not a departure from law and convention, but is rather bound up with that system of law, indeed, operates through it.

However, an external theorist need not be a political radical; she need only view the legal system from a vantage point outside the official perspective of the players in the system. An extremely detached perspective is offered by sociolegal scholar Donald Black, who argues that law is best understood as a system of social stratification and control, not as a system of rules:

In the traditional conception, law is fundamentally an affair of rules. . . . By contrast, the sociological model directs our focus to

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41. Id. at 8.
the social structure of a case—to who is involved in it—and this explains how it is handled. The rules provide the language of law, but the social structure of the case provides the grammar. . . .

Black also observed that “the central concerns of legal education and scholarship—rules, principles, and logic—provide a drastically incomplete description and scientifically inadequate explanation of human behavior.” From this perspective, external theorists pursue the following questions: Why does the legal system assume the legitimacy of private property? Why are accident victims compensated by individuals instead of through a public liability fund? How does the law legitimate and replicate social hierarchies? How are judicial decisions affected by race and class?

The advantage of an externally oriented approach lies in its critical distance, in its ability to present before our eyes things that happen behind our backs. Ideally, these external insights can be folded back into the internal practice to improve it. For example, if a legal theorist can convince a judge that she has an unconscious class, race, or gender bias, this insight might affect her future decisions. The external perspective also brings to light legal notions that are silently assumed in the ordinary practice of law but which seem artificial and problematic when considered from a distance. For instance, law students are essentially thrown into a system that they are forced to accept in order to function, such as the feudal classifications that haunt contemporary property law, with its fee simple determinables, springing remainders, and the Rule Against Perpetuities. Lastly, the external perspective allows a comparison of the existing system with alternative traditions from which we might borrow to improve our legal system.

Despite these advantages, external theory has two major drawbacks: (1) its critique of the legal system is often so global that in striving to undermine the entire system it actually accomplishes very little to reform the system; and (2) it degenerates into behaviorism by reducing the richly textured internal perspective to robot-like reflexes.

As for totalizing critiques of the law offered by external thinkers like Marx, Nietzsche, and Foucault, the intended goal is to destabilize or criticize the entire legal system—or to at least question an entire area of law, such as property law or criminal law. This approach can be seen in Marx’s claim that jurisprudence is a reflection of class interests, in Nietzsche’s claim that democracy and equal rights con-
stitute a type of "slave morality," and in Foucault's claim that the liberal guarantees of freedom and autonomy are bogus. These thinkers seem to be saying that the entire legal tradition is rotten, that it is built on a faulty or deceptive edifice; so any tinkering within the system that is short of a revolution will be as fruitless as rearranging deck chairs on the Titanic.

Paradoxically, this strategy often fails completely because the critique is so far removed from the practice of law that it leaves the internal workings of the legal apparatus untouched. As Wittgenstein said in a similar point about philosophy, "It leaves everything as it is." This point was captured in Michael Walzer's quip about Michel Foucault: "[W]hen critical distance stretches into infinity, the critical enterprise collapses."

To see this in more detail, consider Nietzsche's claim that the movement toward equal rights is a symptom of "slave morality," a leveling down of great individuals into the herd. This claim is certainly not going to be of much immediate help to the players inside the legal system who must decide cases and enact laws. Nietzsche's argument may be of some use to legislators in deciding whether to enact welfare laws or affirmative action schemes, but Nietzsche's claim about "slave morality" is not couched in the language games typically used by judges and legislators who speak about constitutional rights, compelling state interests, and balancing tests. If Nietzsche's work is to affect the legal system, it must do so in a very roundabout way, perhaps by functioning as a reminder that our push toward equality might have a downside, or by causing legislators to stand back and take a globally critical perspective on the legal system. In other words, Nietzsche's external critique must somehow be translated or mediated so that it can affect the internal practice of the law, perhaps by forcing a rethinking of foundational notions in the legal system—justice, property, mercy, punishment, and the adversarial system.

Although a large-scale critique of the legal system may have some romantic appeal, it is difficult to see how any political or legal theory—apart from, say, anarchism—could be derived from such an atti-

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47. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 117 (Walter Kaufmann ed. & trans., Vintage Books 1989 (1886)).
51. NIETZSCHE, supra note 47, at 147-48; FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 154 (Walter Kaufmann ed. & trans., Vintage Books 1989 (1887)).
52. That is, they may have a Nietzschean conception of the "Will to Power" in the back of their minds when they are deciding whether to pass a particular law.
tude of distrust toward our practices and traditions. Hilary Putnam summarized this point nicely:

Many thinkers have fallen into Nietzsche's error of telling us they had a "better" morality than the entire tradition; in each case they only produced a monstrosity, for all they could do was arbitrarily wrench certain values out of their context while ignoring others. We can only hope to produce a more rational conception of rationality or a better conception of morality if we operate from within our tradition....

While we must interrogate our traditions, there is no sense in escaping them altogether because that would leave us homeless. As Richard Rorty is fond of saying, "We have to start from where we are." To paraphrase Putnam, we can only hope to form a more rational legal system by working within the present system without fetishizing it. This point can be illustrated by looking at the failures and successes of external feminist theory. When Catharine MacKinnon pronounces that "the state is male," the critique is so total that it seems to leave no room for changing the system without displacing it entirely. However, this position is belied by MacKinnon's undisputed efforts at reforming this "male" system from within. Feminist theory succeeds when it steps into legal doctrine and points out, for example, that the legal definition of rape contains a male bias (in requiring physical resistance by rape victims) or that the public-private split which runs through the law has traditionally left women in an unprotected private realm. Here, as elsewhere, external critics need to translate or mediate their message so that the message can register on the internal side of the law.

The second problem with external theory is that it tends to be overly reductionistic and dismissive of the mental states of the actors within the legal system. In extreme cases, the internal perspective

55. See PUTNAM, supra note 53, at 216.
57. MacKinnon led the way for courts to adopt sexual harassment as a legal theory of sex discrimination. Not only did MacKinnon contribute to the brief for Mechelle Vinson in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), MacKinnon's work has been cited by several federal courts deciding sexual harassment cases. See, e.g., Bryson v. Chicago State Univ., 96 F.3d 912, 915 (7th Cir. 1996) (citing CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979)).
58. See, e.g., Nadine Taub & Elizabeth M. Schneider, Women's Subordination and the Role of Law, in THE POLITICS OF LAW, supra note 40, at 151.
59. This is true of behaviorist accounts in general. See B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 35 (1953) ("The objection to inner states is not that they do not exist, but that they are not relevant in a functional analysis. We cannot account for the behavior of any system while staying wholly inside it. Eventually we must turn to forces operating upon the organization from without.").
is reduced to folly, confusion, and ignorance—judges are tools of the bourgeoisie, modern day inquisitors, or mere conduits for reinforcing social hierarchies, such as corporate and administrative bureaucracies. The problem here is that the internal side of law is reduced to blind ideological reflexes, much as behaviorism reduced the inner experience of human emotions to stimulus and response. The external characterization fails to capture the reality of legal practice in which judges weigh policies and principles, struggle to achieve justice, and occasionally question the law and its fundamental assumptions.

V. THE NEED FOR BOTH PERSPECTIVES

A. Toward Mediation of Perspectives

This Essay so far establishes that external theorists should translate their insights into the internal practice of the current system and that participants inside the practice should look outside, lest they operate in a self-perpetuating vacuum. Clearly, both viewpoints need to be respected, but the question is to what degree.

Presently, most legal theorists work from an internal perspective. This need not prove troubling—in fact, the internal perspective should predominate in legal studies for two reasons. First, the external perspective is only possible because a full-blown internal perspective is already in place by which the practice of law functions from day to day, just as any meta-discourse is made possible by the existence of a first-order discourse as the underlying subject matter. Since law is primarily a rule-governed, argumentative practice at the internal level, legal theory must engage squarely with the experience of the participants at this level. To the extent that traditional law review articles help practitioners to understand and reform the law within certain established parameters, they serve an important purpose.

Second, most people in Western democracies accept the basic legitimacy of the legal system and the political process. As a result, most people see the law internally as rules of common behavior to which they hold themselves and others. For example, if Mr. Smith is involved in a legal dispute with Mr. Jones about whether Smith's

60. See Pashukanis, supra note 8, at 174 ("Society as a whole does not exist, except in the fantasy of the jurists. In reality, we are faced only with classes, with contradictory conflicting interests. Every historically given system of penal policy bears the imprint of the class interests of that class which instigated it.").
property has an easement over Jones's parcel, they tend to view the applicable precedents internally as a set of rules to which they have tacitly consented and not externally as a system of class oppression or social stratification. To be sure, some members of our society see the law in purely external terms as a set of sanctions or punishments imposed on them from above. Nevertheless, most people adopt the internal perspective from day to day and only venture outside this perspective when the internal rules appear unjust or arbitrary, at which time the external viewpoint can provide a fresh perspective on our practices and traditions. Since the internal view predominates in our society, it merits primary focus in legal theory.

Legal controversies do not occur in a vacuum, however, and the law is not a system of rules closed off from the larger social context. We are a society divided by race and class with the result that legal doctrine is itself shaped by fundamental unspoken assumptions and biases in favor of certain arrangements (private property, competition, wage-labor, and negative rights) and against others (positive rights and collective ownership of the workplace). It is virtually impossible to practice law without tacitly accepting these commitments, despite what one believes about them privately. The law harbors ideological distortions, and it contains rules that are downright cruel and absurd.

It would be helpful if judges and lawyers could see the legal system from the outside. For example, in Brown v. Board of Education, the Supreme Court looked to empirical sociological studies to reach the conclusion that the legal notion of “separate but equal” did not conform to the experiences of African Americans who felt separate and unequal. Only through a similar process of stepping outside legal practice can we determine if the meaning of terms within the system—reasonable force, due notice, adequate consideration—are “off” or “skewed.” This opportunity arises at the highest levels of judicial and legislative proceedings, where judges and legislators can adopt a critical perspective that leads to the recognition of new rights and the striking of oppressive laws. The same analysis applies to legal theorists who adopt the internal perspective: they must learn to stand

63. This is the perspective of the person whom Justice Oliver Wendell Holmes called “the bad man”: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” Oliver Wendell Holmes, The Path of the Law, in THE MIND AND FAITH OF JUSTICE HOLMES 74 (Max Lerner ed., 1989). Despite this passage, Holmes generally took an internal perspective on the law when deciding cases, working within the cases and statutes before him.

64. 347 U.S. 483 (1954).
66. See Brown, 347 U.S. at 488.
outside the judge's viewpoint lest they silently absorb that perspective in toto, including the prejudices and distortions that inevitably accompany it.

If I am correct, a sophisticated understanding of law must subsume both the internal and the external perspectives. This approach has been suggested at various junctures by certain thinkers associated with Critical Legal Studies, such as Duncan Kennedy and J.M. Balkin. Kennedy asserts, "What is needed is to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to their system of thinking and doing." 67 Balkin maintains, "A critical perspective does not reject the importance of the internal perspective... . Instead of taking for granted the primacy of the internal viewpoint of participants in the legal system, a critical perspective asks how this internal experience comes about." 68 This project allows the external perspective to check the internal perspective while allowing the internal perspective to set limits on the reforms that can be incorporated from outside. For example, legal doctrine can benefit from Marxist theory without embracing the utopian ideal of a socialist state. A useful metaphor for characterizing this dialectical process in which perspectives play off each other is "fusion of horizons," a term used by German philosopher Hans-Georg Gadamer in his groundbreaking work on hermeneutics.69 For Gadamer, understanding is a dialectical project, much like a conversation in which both sides reconsider their arguments in light of the other side: "To reach an understanding in a dialogue is not merely a matter of putting oneself forward and successfully asserting one's own point of view, but being transformed into a communion in which we do not remain what we were."70 In true dialectical fashion, a person comes to realize the inherent limitations, the one-sidedness, of her perspective, which moves her toward the opposite perspective, and eventually leads to a mediation of the two perspectives in the formation of a unified whole, at which point the process begins anew.71 This would play out in legal

67. Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW, supra note 40, at 47.
70. Id. at 379.
71. In the Hegelian notion of dialectic advanced in this Essay, contradictions at a given level of analysis are resolved when opposites are sublated into a larger whole that negates, yet preserves, each opposition: "The dialectical moment is the self-sublation of these finite determinations on their own part, and their passing into their opposites." G.W.F. HEGEL, THE ENCYCLOPAEDIA LOGIC 128 (T.F. Geraets et al. eds. & trans., 1991). Similarly, one can transcend the internal/external distinction by translating and mediating
studies as follows: the purely internal or external theorist would realize the inherent limitations of her approach, which leads her toward the opposite approach, and finally toward a mediation of the two into a unified approach that incorporates both perspectives.\textsuperscript{72}

Interestingly, Hart's later work points toward the possibility of a fusion of horizons that transcends a rigid internal/external dichotomy.\textsuperscript{73} According to Hart, one need not stand wholly inside or outside the law; one can discuss the internal perspective held by others without completely embracing it oneself, thereby allowing room for critical distance. It is therefore possible to discuss how others accept rules and why they do so, even if one does not accept such rules. Hart attempted to illustrate this perspective by using Joseph Raz's distinction between "committed" and "detached" statements of law:

I drew a distinction between internal statements which manifest their authors' acceptance of a rule and external statements which simply state or predict certain regularities of behaviour whether it is rule-governed or not. But I wrongly wrote as if the normative vocabulary of 'ought', 'must', 'obligation', 'duty' were only properly used in such internal statements. This is a mistake, because, of course, such terms are quite properly used in other forms of statement, and particularly in lawyers' statements of legal obligations or duties describing the contents of a legal system (whether it be their own or an alien system) whose rules they themselves in no way accept.

I believe it is possible to play off the two perspectives, which would result in a theory that deals with both aspects of legal doctrine and practice.

\textsuperscript{72} German social critic Jürgen Habermas has recently published a study of law that attempts to bridge the internal and external perspectives through discourse theory, which supposedly facilitates the incorporation of external social scientific data into internal normative discussions about the law. Although I disagree with Habermas' reliance on discourse theory to perform this mediating function, he brilliantly identifies the problem raised in this Essay:

The tension between normative approaches, which are constantly in danger of losing contact with social reality, and objectivist approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view. Rather, one must remain open to different methodological standpoints (participant vs. observer), different theoretical objectives (interpretative explication and conceptual analysis vs. description and empirical explanation), the perspectives of different roles (judge, politician, legislator, client, and citizen), and different pragmatic attitudes of research (hermeneutical, critical, analytical, etc.).

JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 6-7 (William Rehg trans., 1996). Unfortunately, Habermas is not convincing in his claim that we need a discourse theory—a "theory of communicative action"—to bridge the internal and external approaches, and further, his approach relies unnecessarily on universal principles deriving from an idealized discourse. If I am correct that the internal and external perspectives can be translated and mediated in a dialectical fashion, then we do not need to borrow Habermas' complicated account of the transcendental terms, conditions, and suppositions for normative discourse. The elimination of this baggage makes for a more free-standing account of how the two perspectives can play off each other.

\textsuperscript{73} See HART, JURISPRUDENCE, supra note 1, at 13-15.
way endorse or accept as standards of behaviour. In so doing, lawyers report in normative form the contents of a law from the point of view of those who do accept its rules without themselves sharing that point of view. In terms of Raz’s distinction, already mentioned, such statements of legal obligation or duties are ‘detached’, whereas the same statements made by those who accept the relevant rule are ‘committed’. Of course those who make such ‘detached’ statements must understand the point of view of one who accepts the rule, and so their point of view might well be called ‘hermeneutic’. Such detached statements constitute a third kind of statement to add to the [first] two (internal and external statements) which I distinguish.74

There is much to be gained by adopting the “detached” perspective of one who recognizes the internal perspective of others but also remains open to insights about the power relations and ideological forces that shape the “committed” view inside the social practice. Here we can take Hart’s use of the term hermeneutic in its true sense as a process of interpretation and mediation, a dialogue in which one questions and reforms one’s prejudices toward an object of interpretation.

B. Achieving the Fusion of Internal and External Perspectives

This hermeneutic fusion of horizons between the internal and external perspectives can be encouraged in the following ways. First, internal theorists should understand the social context of the puzzles they are trying to solve, for example by seeing how a criminal case or a contract dispute is reflective of economic or cultural conflicts in society at large. Second, they should look to alternative legal traditions as a way of stepping outside the narrow boundaries of the internal perspective. Third, internal theorists should try to see the legal system through the eyes of those who have traditionally been outside the system: criminals, oppressed people, the poor, and litigants. Fourth, internal theorists should be open to the suggestion that current legal practice is riddled with ideological distortions and that the stock stories which lawyers and law professors tell themselves may be wrong. These recommendations amount to what might be called a “hermeneutics of suspicion” for internal theorists, reminding them to question the self-descriptions offered by the players within the legal system.75

74. Id. at 14 (emphasis added).
75. See PAUL RICOEUR, FREUD AND PHILOSOPHY 32-33 (Denis Savage trans., 1970) (“Three masters, seemingly mutually exclusive, dominate the school of suspicion: Marx, Nietzsche, and Freud . . . . If we go back to the intention they had in common, we find in it the decision to look upon the whole of consciousness primarily as ‘false’ consciousness.”).
On the other side of the equation, external theorists need to take seriously the internal side of the law. Judges and lawyers are not ideologically programmed robots, but real people who struggle daily to achieve justice within the bounds of our legal system. External theorists need to study legal doctrine to get a richer feel for the way that lawyers reason in hard cases. But most importantly, they need to learn the process of translation by which they can couch their insights in terms compatible with the existing legal system. This rules out grandly skeptical and behaviorist accounts of law but makes room for serious criticism and reform within the rule of law.

To illustrate how the fusion of horizons might take place, consider the interplay of internal and external perspectives that could be brought to the Supreme Court's treatment of standard form contracts in *Carnival Cruise Lines, Inc. v. Shute*, a lawsuit arising from the injury of Ms. Shute while taking a Carnival Cruise vacation. A resident of Washington State, Ms. Shute purchased her ticket in Washington and brought suit in Washington. Carnival claimed that the suit could only be brought in the state of Florida because the cruise ticket contained a small-print forum selection clause that required all lawsuits against the company to be brought in Florida. After a series of rulings and appeals, the Court upheld the forum selection clause as a binding contract between the parties, despite acknowledging that nobody reads or negotiates such provisions.

An internal analysis of *Carnival Cruise* would focus on precedents dealing with similar provisions as well as on contract law principles such as assent, meeting of the minds, duty to read, and unconscionability. If one looks only at these precedents and authorities, the Court's decision may seem reasonable. However, the external perspective has something to offer here, namely the problematizing of the existing precedents. From an external perspective, black-letter contract law depicts the process of contract formation in a way that is wildly inconsistent with the way most people experience contracts. In the rarified air of contract doctrine, the parties are rational, autonomous, and independent. They choose with whom to enter a contract, and they set the terms for their involvement with others. In light of their fully informed consent to the terms of a contract, they are

77. See id. at 588.
78. See id. at 587.
79. See id. at 587-88.
80. See id. at 596-97.
81. See id. at 593. A similar decision was handed down in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997), in which the court held that a small-print pamphlet inside a computer box constituted a binding contract for a consumer who could not read the contract until he had broken the seal on the package. The court reasoned that the consumer could have read the contract and returned the computer if he did not like the provisions.
bound to uphold their end of the bargain, and it is quite fitting that courts bind such parties to their agreements. This view of contract formation produces a picture of society as a vast assemblage of voluntary associations, where the sovereign individual enters contracts to freely choose his housing, health care, employment, and property holdings.

This internalist perspective does not mesh with the real world, where the contracts that affect us most intimately—leases, mortgages, employment agreements, and consumer contracts—are standardized forms that seem voluntary only in a narrow, restrictive sense. Instead, these agreements seem imposed upon us in an all-or-nothing manner, and we barely have time to read them, let alone negotiate the essential terms. It is not at all clear why people should be bound to such agreements. In other words, the ideology of contract law revolves around a union of two rational individuals, but this fails to capture the involuntary imposition of contract provisions through the use of standardized agreements. Indeed, there is a question whether such agreements can properly be termed "contracts." It is surely possible to rationalize such contracts by saying that they are necessary in our society, but this seems to be an apology for class interests, since the standard forms are not necessary as far as consumers are concerned, and they provide stability only for businesses. We can conclude from an external perspective that the general principles of contract law are ideological distortions when applied to standardized contracts, and that the upholding of such contracts is a blatant favoring of one class at the expense of another.

These external insights can then be folded back into the internal perspective by trying to reform the law of standardized agreements as it operates within legal doctrine, perhaps by adopting the rule of interpretation that standardized contracts are presumed unenforceable unless the party with superior bargaining power can prove that the provision in question was willingly accepted. By attending to matters outside legal doctrine—matters such as ideology, history, power relations, and class struggle—we can find a way to change the inner trajectory of legal doctrine.

82. See generally Arthur Allen Leff, Contract as Thing, 19 AM. U. L. REV. 131, 132-37 (1970) (arguing that standard contracts are best understood as objects to be regulated like other products).


84. One could argue that if a court could incorporate these external insights into its opinion, they would not be truly "external" in any meaningful sense. This is true to some degree, yet it would be rare indeed for a court to analyze the law from a genuinely external approach, such as Marxism, postmodernism, and literary theory. Similarly, it is difficult to imagine a court engaging in an ideological critique of the existing rule of law. Nevertheless, since a court could look to external insights, we must concede that there is no bright-
VI. Conclusion

There is no magic formula for bridging the internal and external perspectives, yet any comprehensive account of law must allow for both. Hart saw that both perspectives were essential: "One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence." This is more difficult than it appears, as evidenced by Hart's failure to seriously engage with the externally oriented accounts of law offered by Marx, Weber, and Durkheim. If I am correct, Hart's laudable project of honoring both perspectives is best accomplished by moving inside and outside legal doctrine and by playing each perspective against the other. This is not a result-oriented recommendation for reaching particular outcomes but a matter of completeness when fashioning an analysis of the law. At the very least, theorists who insist on retaining a purely internal or external perspective should be aware of the one-sidedness of their orientation.

line demarcation of the internal and external perspectives, but rather degrees of internality and externality. This can also be expressed by pointing out that a court risks the loss of legitimacy if it wanders too far afield from the applicable precedents and the accepted mode of legal reasoning by analogy, so the internal perspective tends to perpetuate itself. Further, it is only the appellate courts that are free to seriously question the precedents in a broader context because lower courts are bound to the internal perspective by stare decisis.

85. HART, CONCEPT, supra note 1, at 91.