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Cover Page Footnote

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A SOCIO-LEGAL METHODOLOGY FOR THE INTERNAL/EXTERNAL DISTINCTION: JURISPRUDENTIAL IMPLICATIONS

*Brian Z. Tamanaha**

INTRODUCTION

In his hearing to become the next U.S. Supreme Court Justice, then-Judge Samuel Alito's opening statement before the Senate Judiciary Committee contained the following passage:

When I became a judge, I stopped being a practicing attorney, and that was the big change in role. The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand. But a judge can't think that way. A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. And a judge certainly doesn't have a client. The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.¹

This statement was reminiscent of Chief Justice John Roberts's assertion that as a Justice he will "call balls and strikes."²

From liberal quarters, Alito's statement was dismissed as "empty platitudes."³ Among academics it is widely thought that Supreme Court decision making is largely the product of the political views of the Justices. A recent book by Lee Epstein and Jeffrey A. Segal, political scientists who have conducted leading studies of judicial decision making, approvingly quotes a pioneer in the field, C. Herman Pritchett, "that judges 'are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private

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1. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2006)* [hereinafter *Alito Confirmation Hearing*] (statement of Samuel A. Alito, Jr.).

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005)* (statement of John G. Roberts, Jr.).

3. See, e.g., Andrew Cohen, *All the Pretty Words*, CBSNews.com, Jan. 10, 2006, <http://www.cbsnews.com/stories/2006/01/10/opinion/courtwatch/main1198665.shtml>.

attitudes, in other words, become public law.”⁴ Judge Richard Posner, one of the nation’s most prominent theorists and judges (and not a liberal), wrote a review of the Rehnquist Court’s final term. In that review entitled *A Political Court*, Posner declared that “[t]he evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication in the Supreme Court lies everywhere at hand.”⁵ Two leading constitutional law scholars, Jack Balkin and Sanford Levinson, have articulated a theory of “partisan entrenchment,”⁶ which holds that many constitutional provisions are often open to different interpretations, so the particular interpretation that prevails at any given moment is the product of political struggles among groups within society, filtered through the constraints of shared interpretive constitutional conventions.

This first kind of skepticism about Judge Alito’s statement derives from the belief that the Supreme Court as an institution routinely makes political decisions. Strong evidence for this belief can be found in the many divided decisions issued by the Court that fall along predictable political lines and in the political science studies which show a strong correlation between the judges’ ideological views and their legal decisions.⁷ Various reasons are given to explain this inevitable political component of Supreme Court decision making. The rarefied questions that reach this Court frequently have no clear legal answer, so Justices must draw on other sources to make the decision. Law as a general matter often invites political interpretations in this sense; many of the cases heard by the Supreme Court are politically charged and Justices cannot completely suppress their awareness and consideration of the political implications. Justices in some instances consciously decide cases on political grounds, regardless of what they say, and all Justices subconsciously see the law through the lens of their ideological beliefs, which shape their legal interpretations.⁸ Given this reality, Alito’s statement, which appears to deny that politics matter, seems either naïve or insincere.

A different basis for skepticism is focused not on the Supreme Court as an institution, but on then-Judge Alito’s judicial decisions. Senator Charles Schumer questioned his commitment to follow the law: “Judge Alito, you give the impression of being a meticulous legal navigator, but in the end

4. Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 3 (2005) (quoting C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941*, 35 *Am. Pol. Sci. Rev.* 890, 890 (1941)).

5. Richard A. Posner, *The Supreme Court 2004 Term; Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 46 (2005).

6. See, e.g., Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *Fordham L. Rev.* 489 (2006).

7. See Jeffrey A. Segal & Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002).

8. See generally Epstein & Segal, *supra* note 4; Posner, *supra* note 5.

you always seem to chart a right-ward course.”⁹ Judge Alito, Schumer implicitly charged, consciously or subconsciously manipulates the law in his legal decisions to advance a conservative agenda. This suspicion is lent additional weight by President George W. Bush’s promise to nominate a committed conservative to the bench on the heels of the Harriet Miers nomination debacle, which went down in a storm of opposition from his supporters because she lacked solid conservative credentials (and was unqualified).¹⁰

These two skeptical views of Alito’s observations, while agreeing that Alito will move the law in a conservative direction, have contrary thrusts. The first view suggests that it is absurd to insist that the law alone determines outcomes, not politics, because that is simply not how the Supreme Court and constitutional law work. The second view suggests that the law should decide cases, as Alito claims it will, but there are reasons to suspect that he will improperly twist, consciously or subconsciously, the law to serve the conservative political agenda. The second view accepts the rule-of-law ideal that Alito espouses, but does not believe that he will live up to it, while the first view rejects the ideal as unrealistic or even false with respect to the Supreme Court.

Conservatives effectively parry both skeptical positions. They assume a stance in the defense of the rule of law and Alito’s commitment to uphold it, and insist, accordingly, that inquiries about his personal political views are irrelevant and amount to improper politicization of the judicial selection process.¹¹ Reassured by his stellar conservative credentials, meanwhile, they optimistically expect that Alito will indeed interpret the law in a way that furthers the conservative agenda. Engaging in a nimble dance, conservatives rebut the first skeptical view as an unprincipled politicization and denial of the rule of law. They also reject the second skeptical view of Alito’s promise to uphold the rule of law as baseless, while silently (with a wink) accepting the shared underlying point of both skeptical views: that Alito’s political views will point his legal decisions in a conservative direction.

There is a different way to approach Alito’s observations that accepts them at face value. Alito’s statements can be considered as a standard recitation of the contrast between the *internal* role orientation of legal practice and that of the practice of judging. Understood in this way, Alito was not offering an abstract statement that judges mechanistically decide cases based upon strict fidelity to the law—so strongly worded as to appear

9. *Alito Confirmation Hearing*, *supra* note 1, at 37 (statement of Sen. Charles E. Schumer, Member, S. Comm. on the Judiciary).

10. See Elizabeth Bumiller, *White House Tries to Quell a Rebellion on the Right*, N.Y. Times, Oct. 7, 2005, at A20; David D. Kirkpatrick, *New Questions from the Right on Court Pick*, N.Y. Times, Oct. 6, 2005, at A1.

11. See David D. Kirkpatrick, *On Party Lines, Panel Approves Alito for Court: Heated Debate in Senate; Republicans Threaten to Retaliate on Nominees from Democrats*, N.Y. Times, Jan. 25, 2006, at A1.

implausible. Rather, he was identifying and contrasting a defining characteristic of each respective practice. Seen in this way, his statement is anything but naïve or dubious; indeed, it is a descriptively correct observation (though whether he is sincere in his commitment to live up to it remains an open question).

This observation perhaps seems mundane. The point is to show how a simple shift in the frame of reference of a statement throws it in a different light. Similar shifts with respect to other puzzling issues can sometimes open up a more fruitful way of thinking about problems in jurisprudence and ethics, and in rendering evaluations of the conduct of lawyers and judges. By systematically focusing on a handful of basic inquiries—What are we looking at (and from what position are we looking)? What activities are the people we are looking at engaged in? What do they think they are doing? What are they actually doing?—new angles can be taken on old issues. The internal/external distinction helps accomplish this. To set up this approach, a few core working sociological notions will be quickly sketched.

I. TWO CONTRASTING ORIENTATIONS OF A JUDGE

Before getting to that, consider the following contrast, which takes off from Judge Alito's statement. Imagine two judges, both with politically conservative personal views: One decides cases with a conscious orientation that strives to abide by the binding dictates of legal rules to come up with the strongest legal interpretation in each case, without respect to outcome (the consciously bound judge, or CB); a second judge decides cases with a conscious orientation that strives to achieve ideologically preferred ends in each case, and interprets and manipulates the legal rules to whatever extent necessary to achieve the ends desired (the consciously ends-oriented judge, or CEO).

Four realistic conditions must be added to this scenario. First, notwithstanding this conscious orientation, the CB is influenced by and sees the law through background personal views; the legal interpretations of the CB are thus not completely free of political influences in this subconscious sense. Second, the CEO is not able to achieve ends with complete disregard for conventional legal understandings because the decisions must be plausible according to legal conventions; the legal interpretations of the CEO are thus legally constrained in this sense. Third, in a large (but not total) subset of cases, the legal rules allow for more than one plausible outcome, though usually one outcome can be ranked as more legally compelling than the others. Finally, in a subset of cases the legal rules are so completely open that a decision requires that a judgment be made based upon nonlegal factors. Note the realism of these conditions, which deny a mechanistic view of judicial decision making.

Now, imagine that, in a given case, both judges arrive at precisely the same outcome, supported by identical written decisions. Had they been sitting together on a panel, they would have joined opinions. They were led

to the same result and used the same reasoning because both judges utilized the same theory of constitutional interpretation. The difference is that the CB settled upon this theory as the correct way to interpret the Constitution following a sincere and exhaustive study of constitutional law, whereas the CEO settled upon the theory because it tends to support the outcomes the judge prefers, and the CEO is willing to depart from or “adjust” the theory if necessary to achieve the desired end in other cases.

Would we evaluate the judges’ respective decisions, otherwise identical, as equivalent? They are literally identical in *external* form and in consequence. Some people might be inclined to take the position that this is enough to make them equivalent in essential respects. To forestall this view, consider the implications of the difference over time: Though in the immediate case the judges’ respective decisions are identical, in the run of decisions over their careers, owing to their differing orientations, there would be a divergence between these judges in legal reasoning and in outcomes. Furthermore, compare a legal system in which all the judges are CBs against a system in which all of the judges are CEOs; although in external form they would look the same—decisions supported by legal reasoning and terminology—these would be radically different systems.

Returning to the original scenario, I would argue that these externally identical decisions are not equivalent. The CB’s decision is faithfully law-abiding while the CEO’s decision is an abusive exercise of power in the guise of law. Note that the sole difference between these opinions is the contrasting *internal* orientations of the judges. The CB’s comports with the ideal view of the proper judicial role, whereas the CEO’s violates this ideal. Only by taking an internal view can we get at this essential distinction.

II. SOCIOLOGICAL CONCEPTS FOR THE INTERNAL/EXTERNAL DISTINCTION

A. *The Postivism-Interpretivism Divide*

The internal/external distinction is often referred to in contemporary legal discussions, but with different references and usages. H.L.A. Hart introduced the internal point of view of legal officials in jurisprudence, which he contrasted with a variety of external positions (as will be discussed later). Legal historians debate whether the 1937 “constitutional revolution” was the product of the “internal” development of constitutional doctrine or the product of “external” political factors, including the pressure on the Supreme Court brought by President Roosevelt’s Court-packing plan.¹² Political scientists characterize law professors and judges as seduced by the “internal” view that judges decide cases according to law, and take the alternative view that the “external” personal attitudes of judges

12. See G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 *Am. Hist. Rev.* 1094 (2005).

determine their legal decisions.¹³ Despite these differences, a common element shared by these distinctions is that the “internal” position in each insists that the point of view of the actors must be taken into consideration in one sense or another.

In the social sciences, the internal/external distinction aligns with the interpretivism/positivism divide.¹⁴ To state it summarily, the positivist model of the social sciences aspires to emulate the goals, techniques, and achievements of the natural sciences. Positivists strive to formulate reliable, objective laws of human behavior based upon observable patterns, invariant structures, or entrenched social relationships. These objective findings, similar to the natural sciences, allow social scientists to explain social phenomena and to make reliable predictions about future social behavior. Just as the natural sciences rely upon mathematics and measurement, which are precise, repeatable, and confirmable, the primary tools of positivist social science involve quantification and statistical analysis. Only through objective inquiry that leads to the identification of laws or patterns can the social sciences be truly scientific, according to this view. Behaviorists, functionalists, and structuralists in different ways strive to meet these goals.¹⁵ From the standpoint of positivists, the subjective ideas and motivations of individuals are irrelevant, or at least can be bracketed and ignored. Subjectivity is considered inaccessible, unobservable, unreliable, and thus a shaky foundation for science; moreover, when the goal is identifying social laws or explaining social behavior, subjectivity is epiphenomenal—social actions have social causes.

Today these positivist ideas sound a bit old fashioned, and perhaps extreme. But they still have champions. Donald Black, a prominent legal sociologist, has written a number of influential books that purport to identify “laws” that explain and predict legal behavior based upon the identification of empirical regularities.¹⁶ Black claims that the laws he identifies are universal and unchanging. His legal sociology is avowedly “pure” in the sense that it completely ignores human subjectivity. “My work . . . contains no psychology whatsoever and entirely eliminates the individual from its formulations. . . . Consider, for example, the principle stated earlier: *Law varies directly with relational distance*. It contains no assumptions, assertions, or implications about the human mind or even

13. See Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 *Law & Soc. Inquiry* 89 (2005).

14. For an overview of these approaches, see Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, at ch. 3 (1997).

15. See generally James Bohman, *New Philosophy of Social Science: Problems of Indeterminacy* (1991).

16. See, e.g., Donald Black, *The Behavior of Law* (1976); Donald Black, *Sociological Justice* (1989).

human beings as such.”¹⁷ His sociology “ignores what people think and feel. It ignores their goals and preferences. It ignores their intentions.”¹⁸

Interpretivist social scientists emerged in reaction to positivists. They disputed the proposition that the natural sciences are the appropriate model for the social sciences. Unlike the insensate material that makes up the natural world, intentional, meaningful actions underlie and give rise to social behavior. Social sciences that ignore this intentional aspect miss this core element. They are impoverished and doomed to explanatory failure, since they fail to consider an essential causal factor in individual and social behavior. Rather than look for invariant social laws—which have never been found anyway—the social scientist should strive to understand and explain the social behavior by attending to the meaningfulness that infuses the behavior.

Max Weber and Peter Winch were pioneers of this approach. Weber insisted that the “specific task of sociology must be the interpretation of action in terms of its subjective meaning.”¹⁹ Anthony Kronman explained Weber’s approach: “Only if a sociologist can see the world from the perspective of *their* values, and appreciate what these values mean to *them*, can he explain how the behaviour of his subjects is influenced by the values they hold and construct an empirical causal explanation of the sort he seeks to provide.”²⁰ Weber still hoped to identify causal laws, but Peter Winch’s *The Idea of a Social Science and its Relation to Philosophy* completely rejected the natural science model. “‘Understanding,’” Winch wrote, “is grasping the *point* or *meaning* of what is being done or said. This is a notion far removed from the world of statistics and causal laws: it is closer to the realm of discourse and to the internal relations that link the parts of a realm of discourse.”²¹ Access to the point or meaning of what is going on is available by attention to the “form of life”—the socially generated and shared webs of meaning within which the social action takes place. The job of the sociologist or anthropologist is to interpret the social action in light of this intersubjective meaning.

Winch carefully qualified his position. He affirmed that a scientist can describe a belief without personally endorsing it. “I do not mean, of course, that it is impossible to take as a datum that a certain person, or group of people, holds a certain belief—say that the earth is flat—without subscribing to it oneself.”²² His point was rather that the logic of this belief and a proper understanding of what it means must, in the first instance, be assessed within the context of its form of life. Winch’s work, it should be

17. Donald Black, *The Epistemology of Pure Sociology*, 20 *Law & Soc. Inquiry* 829, 849 (1995).

18. *Id.* at 866.

19. Tamanaha, *supra* note 14, at 157 (citing Max Weber, *The Theory of Social and Economic Organization* 88 (1964)).

20. Anthony T. Kronman, *Max Weber* 16-17 (1983).

21. Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* 115 (1958).

22. *Id.* at 110.

noted, is particularly relevant to jurisprudence because H.L.A. Hart, who introduced the internal point of view into the jurisprudential discussion, explicitly identified his view of the internal aspect of rules with Winch's.²³

The internal/external distinction in the social sciences is connected to this broader debate. Positivists take an external view of patterns of social action that ignores the intentions and meanings of the social actors; interpretivists take an internal view of the social actions that take cognizance of the meanings of and for the actors. An example of this distinction in the legal context is the contrast between legal explanations for judicial decisions and the statistical studies conducted by political scientists which ignore these internal explanations and instead correlate patterns of decision making with factors like personal ideology.²⁴ The former take seriously the meaningful actions of the actors, while the latter, relying upon a purely external view of decisions, offer a competing causal explanation. In this example, the external position describes a methodological approach—bracketing the internal view of judges and identifying patterns in their decisions. The explanation offered by political scientists, however, is ultimately grounded in the meaningful realm as well, since it points to the personal attitudes of judges. In this respect their methodological positivism is unlike Black's epistemological positivism. But both of these versions of positivism ignore the conscious orientation of the actors.

B. *Distinguishing Two Internal/External Axes: Observed and Observers*

So far we have identified one key internal/external axis, which focuses on how the *subjects being observed* are to be examined: taking account of their meaningful actions (internal), or ignoring their meaningful actions in lieu of attention to patterns of action (external). But in the legal context there is another important internal/external axis: focusing on the *persons doing the observations*. In the social scientific discussion, the status of the *observers* is generally ignored because the presumption is that only social scientists are qualified observers. Only social scientists have the training and necessary objective bearing (oriented to getting the facts right) to conduct social scientific studies; indeed participants are thought to be disqualified from observer status because they lack sufficient distancing from the activity to be able to view it in a detached fashion.

The discussion of internal and external perspectives in the legal context is more complicated because many of the most influential legal theorists and legal observers have been judges, from Oliver Wendell Holmes to Benjamin Cardozo to Richard Posner. Owing to their position as actors within the system, their work is the product of persons situated *internally*. It is as if witch doctors from a tribe studied by an anthropologist wrote their

23. H.L.A. Hart, *The Concept of Law* 289 (2d ed. 1994) (citing Winch, *supra* note 21, at 57, 65, 84-94).

24. *See generally* Feldman, *supra* note 13, at 89.

own accounts of the operation of magic that competed with those writings produced by the anthropologist.

A more immediate reason why the legal discussion of the internal/external distinction is complicated is that the most influential expositor of the internal/external distinction in law, Hart, injected a fatal point of confusion in his initial articulation of the distinction, which he never cleared up. The seminal paragraph on this distinction in his classic *The Concept of Law* begins,

The following contrast again in terms of the “internal” and “external” aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of law but of the structure of any society. . . . [F]or 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.”²⁵

In this passage, Hart specifically identifies the observer as a person outside the group, who is in that sense “external.” The status of the observer, as indicated earlier, was not an issue in the social science discussion, so this usage of “external” was not developed but presupposed.

A second sense of external suggested by Hart in the very same passage is that the external observer can recognize the norms of the group without committing to them; here he was picking up on Winch’s point that a scientist can understand a tribal belief that the earth is flat without subscribing to that belief. This usage is also idiosyncratic to Hart. For Winch, the opposite of trying to understand the form of life of a group (internal), which he advocated, is not paying attention to the form of life of the group (external), which he rejected. The latter point—Winch’s “external”—is logically and substantively different from the issue of whether the observer agrees with or rejects any particular beliefs within the form of life. Thus far Hart has used “external” in two senses—(1) the situation of the observer, and (2) whether the observer accepts the beliefs of the actors—neither of which are standard usages in the social sciences.

In the below passage, which immediately follows the one quoted above, Hart carries over these two senses of the internal/external distinction, but then he adds the standard methodological meaning from the social sciences (observing patterns of action and using these to make predictions). Hart explicitly acknowledges that he uses several different understandings of external, without bothering to clarify their relations:

Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. But whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose

25. Hart, *supra* note 23, at 88-89.

occupy the position of an observer who does not even refer in this way to the internal point of view of the group. Such an observer is content merely to record the regularities . . . in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment.²⁶

This passage contains a crucial equivocation. In the second sentence, the external orientation still refers mainly to the status of the "observer" as someone "outside" the group. In the third, fourth, and fifth sentences, Hart carries over this first meaning, but also adds a new angle on the external orientation, that is, whether the external patterns of behavior of the subjects alone will be examined and identified (and used to make predictions), or whether the meaning for the actors will also be considered. With this last reference, Hart finally hit upon the familiar internal/external distinction in the social sciences. But then Hart compounded this mess of inconsistent references by likening the external view of an outsider to the internal view of a member of the group who does not accept the rules:

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.²⁷

Hart made unannounced shifts between various meanings of internal/external. He began with this combination: an observer outside the group (external) versus participant in the group (internal); and an outsider who does not accept (external) versus insider who accepts (internal). Then he moved to a completely different meaning: examining patterns of behavior (external) versus understanding meaning for actors (internal). The confusion this generated for readers is manifest in the reaction of Joseph Raz and Neil MacCormick. Raz observed that the Hart internal/external divide tended "to obscure from sight the existence of a third category of statements;"²⁸ MacCormick likewise noted that there are "three distinct points of view, not a simple internal/external dichotomy."²⁹ As evidence of the mess Hart created, however, Raz and MacCormick each offered a *different* third position, Raz focusing on uncommitted participants and MacCormick focusing on uncommitted observers. Hart later agreed with the criticism: "Such detached statements constitute a third kind of statement to add to the two (internal and external statements) which I

26. *Id.* at 89.

27. *Id.* at 90.

28. Joseph Raz, *The Authority of Law: Essays on Law and Morality* 155 (1979).

29. Neil MacCormick, *H.L.A. Hart* 39 (1981).

distinguish.”³⁰ After this unelaborated adjustment, Hart left jurisprudence with internal and external statements in an unspecified relationship with detached and committed statements (which makes four potential positions, not three).

The wrong turn made by Hart, from which multiple confusions have resulted,³¹ was his erroneous initial identification as an aspect of the internal/external distinction the acceptance or nonacceptance of the observer with respect to the beliefs of the group being examined. This is an important issue, but it is not a way to distinguish internal from external, and should not have been discussed in terms of this distinction. The basic problem is that observers have more options than being detached and committed, such as critical or ironic, and participants have more options as well, so there is no way to construe the attitudes of either observers or participants in terms of a simple internal/external dichotomy. Hart in effect acknowledged this when he pulled it out as an unspecified third category.

Rather than step deeper into this morass, a basic table of the internal/external distinction is set out below, drawing from the social scientific and the legal discussion. One axis is based upon whether the *observer* is someone internal to the practice or external to the practice—this focuses on *who* is conducting the observations. A second axis is based on whether that practice will be examined with attention to the internal meaning of the participants or by focusing on their external patterns of behavior alone—this focuses on *how* the group being *observed* will be looked at. Using familiar examples, the below table is constructed around accounts of the practice of judging.

INTERNAL AND EXTERNAL STUDIES OF THE PRACTICE OF JUDGING

		OBSERVER	
		Participant Observer (Internal)	Non-Participant Observer (External)
OBSERVED			
Meaningful Subject (Internal)	Cardozo's <i>Judicial Process</i> (Internal/Internal)	Dworkin's <i>Law's Empire</i> (External/Internal)	
Patterns of Behavior (External)		Political Science Attitudinal Studies (External/External)	

30. H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 14 (1983).

The table is self-explanatory. Cardozo was a judge (internal) who wrote about how judging is done from the standpoint of a judge (internal). Dworkin is not a judge (external) and at least purported to write from the standpoint of how a judge decides cases (internal). Political scientists who conduct attitudinal studies are not judges (external) and examine patterns of decisions in a manner that disregards the internal views of judges (external). The internal/external box is left blank because it is unusual for a participant to take a purely external view of an activity, which is an odd posture to assume, and no one fits this category perfectly. Perhaps one person who at times qualifies is Judge Posner, who observed, "I am denying that judicial introspection, and *a fortiori* judges' avowals concerning the nature of judicial decision making, are good explanations for judicial action."³² He is an insider who rejects the insider view of judging (oddly, since Posner is a judge this statement situates him in a variant of the liar's paradox), and gives more credence to political scientists' external attitudinal studies.

C. *Practices, Institutions, and Interpretive Communities*

To fill out the sociological concepts that will help draw the internal-external distinction, three additional ideas will be quickly sketched. The notion of a *practice* has received much attention in social theory and the social sciences. There are prominent contemporary philosophical and sociological exponents of the idea, including Alasdair MacIntyre, Stanley Fish, and Pierre Bourdieu.³³ The basic idea is that practices involve an activity that consists of shared, often tacit ways of knowing and doing. MacIntyre put it this way:

By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music. . . . Thus the range of practices is wide: arts, sciences, games, politics in the Aristotelian sense, the making and sustaining of family life, all fall under the concept.³⁴

31. For a comprehensive reconstruction of Hart's approach, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, at ch. 6 (2001).

32. Richard A. Posner, *The Problems of Jurisprudence* 189 (1990).

33. See generally Stephen Turner, *The Social Theory of Practices: Tradition, Tacit Knowledge, and Presuppositions* (1994).

34. Alasdair MacIntyre, *After Virtue* 187-88 (2d ed. 1984).

MacIntyre struggles to pin down this elusive idea. And his examples need not be taken as authoritative—bricklaying surely has its own techniques and standards of excellence.

A concise formulation of his idea is that practices involve socially established activities which have their own integrated knowledge, ways of doing, and standards of excellence. “To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judge by them,” wrote MacIntyre. “It is to subject my own attitudes, choices, preferences and tastes to standards which currently and partially define the practice.”³⁵ Or as Stanley Fish put it, “To think *within* a practice is to have one’s very perception and sense of possible and appropriate action issue ‘naturally’—without further reflection—from one’s position as a deeply situated agent.”³⁶

MacIntyre also usefully clarifies the distinction between practices and *institutions*: “Chess, physics and medicine are practices; chess clubs, laboratories, universities and hospitals are institutions.”³⁷ Practices are often supported by institutions, such that “institutions and practices characteristically form a single causal order,”³⁸ but they remain distinct notions.

It should be emphasized that the notion of a practice, at least in my usage, is a heuristic or framing device, a way of marking off discrete fields for the purposes of inquiry. Offered with no larger pretensions, it is a flexible way of focusing on and distinguishing activities that operate at different levels of generality. Practicing law is a different practice from judging, and both of these practices are yet different from doing legal theory. Legal theory is usually done within academic institutions; judging is done within court institutions; and practicing law is done within law firms, government institutions, or in solo practice. Sub-practices can also be identified as nesting within broader practices or distinct from other versions of related practices. Appellate judging is different from trial judging, as is state judging from federal judging, though they share common elements. Tax practice is different from criminal defense practice, from corporate law practice, from criminal prosecution practice, and so forth. These activities are comprised of their own particular bodies of knowledge and standards of excellence, though again they share elements with related or more general practices.

The notion of a practice provides a useful way to organize the internal/external distinction by providing an answer to the threshold question: *internal or external with respect to what?* The table in the previous part was constructed around observations with respect to the practice of judging, but the same table can be filled in with respect to the

35. *Id.* at 190.

36. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 386-87 (1989).

37. MacIntyre, *supra* note 34, at 181.

38. *Id.*

practice of law (or around some sub-practice thereof), or any other legal practice. The internal/external distinction need not be drawn with respect to practices—for Winch it was “forms of life;” Hart referred to members of a social group, and to legal officials—but in the legal context this is often a helpful way to frame the question, as later parts will show.

A final useful idea, developed by Stanley Fish, is interpretive community.³⁹ Interpretive communities are people who share in socially generated and transmitted clusters of meaning—complexes of ideas, beliefs, knowledge, symbols, and terminology or language that characterize discrete groups. The conventions of the interpretive community help stabilize meaning for its members. All trained lawyers share indoctrination into the interpretive community of a given legal tradition, usually transmitted in the course of undergoing legal education. Lawyers, judges, and academics are members of the interpretive legal community, which allows them to communicate (and there are more specialized subcommunities of legal knowledge as well).

A practice is not limited to the realm of meaning—it involves *doing*, engaging in a discrete activity that integrates meaning and behavior. But practices have a close relationship with interpretive communities. People who have not been indoctrinated into the legal interpretive community can function as practicing lawyers, but they will experience some difficulty, at least initially. A narrow and routine legal practice (like residential real estate transactions) can be picked up through tutelage in the practice, but more complex legal activities require membership in the interpretive legal community, which can only be gained through immersion in its meaning and conventions.

These three concepts focus on different aspects of a social arena. For example, when judges engage in judging (practice), they do so within a broader judicial system (institution), and are informed by the knowledge and language of their legal tradition (interpretive legal community). To demonstrate the usefulness of this handful of sociological concepts in drawing and exploring the internal/external distinction, the remainder of this essay will briefly take up a few questions in jurisprudence, and will end by returning to the Alito statement set forth at the outset.

III. UNTANGLING A COUPLE OF JURISPRUDENTIAL PUZZLES

A. *Holmes's Prediction Theory of Law*

In *The Path of the Law*, when posing the question “What is the law?,” Holmes offered an answer that continues to puzzle readers: “The prophecies of what the courts will do in fact, and nothing more pretentious,

39. See generally Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980).

are what I mean by the law.”⁴⁰ An easy rebuttal points out the absurdity of Holmes’s answer: When applied to judges, it suggests that judges are engaged in predicting their own behavior.

But this rebuttal is easily countered by paying attention to the relevant practice at issue. The article was an address to graduating law students at Boston University, the theme of which was that the practice of law is a business (itself a scandalous idea at the time, but one repeated by others).⁴¹ Holmes’s observations were about what it is like to be a practicing lawyer—offering comments on the internal views of lawyering, if you will. The second sentence of the essay made clear his orientation: “We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court.”⁴² Confusion continues to arise because critics of Holmes interpret “What is the law?” not as a question posed with respect to the internal view of a practicing lawyer, but instead as a classic question perennially debated in legal theory (itself a discrete practice), or as a question posed by a judge when presiding over a case. In the latter two contexts his answer would be indeed absurd; in the former context it is indisputably correct.

A related controversy, also easy to dispel, surrounds Holmes’s observations about the “bad man.”⁴³ His point was that the immediate and most pressing concern most clients will have for a practicing lawyer relates to the legal consequences they face in connection with their actions. The lawyer’s job is to offer a reliable prediction of how the law (courts, specifically) will respond. When referring to the “bad man,” Holmes was not making normative or descriptive observations or claims about the views of citizenry towards law, or anything of the sort; again, these are the kinds of questions that occupy legal and political theorists. Indeed, rather than use the “bad man” example (which had a provocative ring), Holmes could have made the very same point using the “good woman” client inquiring about the enforceability of a real estate sales contract. In either case, and in all cases, clients consulting lawyers want to know how the law will treat their conduct. Viewed from this standpoint, in connection with the role of a practicing lawyer, Holmes’s observations, which have so often troubled theorists, are obvious rather than controversial.

B. *The Hart/Dworkin Dispute*

In his postscript to the second edition of *The Concept of Law*, Hart objected to Ronald Dworkin’s “imperialistic” view of legal theory. “Dworkin appears to rule out general and descriptive legal theory as

40. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

41. See Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, at ch. 3 (2006).

42. Holmes, *supra* note 40, at 457.

43. *Id.* at 460.

misguided or at best simply useless."⁴⁴ Dworkin is less than clear about why general, descriptive legal theory is inappropriate. His basic argument seems to be that legal theory is always internal to law as a purposive activity, which precludes legal theory from being general (divorced from any particular legal system), and which requires that legal theory be normative (to advance the purposes of the legal system).⁴⁵ Along these lines, Dworkin asserts that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice."⁴⁶

Against Dworkin's assertion, using the concepts set out earlier, it is a simple matter to demonstrate clear dividing lines. Judging and doing legal theory are separate practices that have different standards of excellence, different foci, take place in different institutions with different objectives, and are subject to different demands and constraints, resources, venues, and consequences. A brilliant work in legal theory is markedly different in form and content from a brilliant judicial opinion. A terrible piece of legal theory will be ignored (or not published), whereas a terrible judicial decision will have concrete consequences for the parties which can be devastating (even if later overturned). It is correct that judges and legal theorists are members of the same interpretive legal community, which allows them to communicate and produces overlapping concerns; but this does not diminish the fact that they are involved in completely separate and very different practices.

When Dworkin mused about the internal view of judging in the luxury of his university office, drawing up his model philosophical-judge Hercules, he was engaged in the practice of legal theory, not in judging (to state the obvious). Many judges would say, as Judge Harry Edwards did, that Dworkin's observations bear little resemblance to the actual practice of judging and for that reason have little of value to offer judges.⁴⁷ When Judge Benjamin Cardozo wrote about judging (in a far more realistic fashion than Dworkin, not coincidentally), participating in the legal theory discussion, he was not actively judging but was reflecting upon judging informed by his experience in the practice.⁴⁸ This distinction helps explain an apparent inconsistency between Cardozo's candid acknowledgment of the moments of discretion called for in judging, compared to his beautifully crafted judicial decisions which conceal the discretionary decisions he made as a judge. The conventions and standards of the respective practices—theorizing about law versus judging—shaped and constrained how and what Cardozo could write about in each.

Once it is clear that the practice of judging is not even on a continuum with the practice of jurisprudence—though participants are members of the

44. Hart, *supra* note 23, at 242.

45. Ronald Dworkin, *Law's Empire* 13-14 (1986).

46. *Id.* at 90.

47. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 47 (1992).

48. See Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).

same interpretive community and are part of the same legal tradition—Dworkin’s denial of the value or appropriateness of Hart’s general, descriptive jurisprudence loses its import. Hart’s jurisprudence is an entirely legitimate sub-practice within legal theory (known as legal philosophy or analytical jurisprudence). Legal theory is an academic activity, and is governed and adjudged by the rules and norms of academic production, norms which emphasize the production of valid knowledge. Even if Hart’s general and descriptive observations are completely useless for those engaged in the practice of law or in judging (about which Hart had little to say⁴⁹), they are still important contributions to knowledge about law.

IV. BACK TO THE CB JUDGE AND THE CEO JUDGE

Recall the scenario set out earlier in this essay, comparing the consciously bound judge to the consciously ends-oriented judge, both of whom, in a given case, happen to arrive at the same end on the same stated legal grounds. From an external standpoint they are indistinguishable: In explicit legal terms they are identical, and a social scientist would mark them as identical. But if the internal standpoint is taken into consideration, I asserted, the former is a paragon of judging while the latter is a usurper who should be condemned. The basis for rendering this judgment is that one of the defining characteristics of the practice of judging in our legal tradition—its *primary* standard of excellence—is that judges consciously strive to abide by the binding import of the legal rules and not decide cases based upon their personal preferences. That is the point of “the rule of law, not man.”⁵⁰ Holmes, the ever-skeptical hero of the Legal Realists, said “[i]t has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits”⁵¹ Holmes prided himself on his judicial capacity for “heroic disinterestedness.”⁵²

The skepticism of Posner, of political scientists, and of Balkin and Levinson, who suggest that judging on the Supreme Court is essentially a matter of politics (filtered through current legal conventions), fails to sufficiently acknowledge the significance of this internal aspect of the practice of judging. Such skeptics, particularly political scientists and often Posner (though not Balkin and Levinson), suggest that the *conscious orientation* of the judge is mostly irrelevant because personal ideology will influence interpretations of law unbeknownst to the good faith consciously

49. See Frederick Schauer, *(Re)taking Hart*, 119 Harv. L. Rev. 852 (2006) (reviewing Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004)).

50. Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 122 (2004).

51. Louis Menand, *The Metaphysical Club* 67 (2001) (quoting Letter from Oliver Wendell Holmes to John T. Morse (Nov. 28, 1926)).

52. *Id.* at 66.

bound judge. To dismiss the significance of the internal views of the judges is to obviate the distinction between the CB and the CEO.

The point here is not just that the CEO can be condemned from within the standards of excellence of the practice of judging; it is more so that the decisions over time produced by the CB and the CEO will differ, with radical consequences for others and the system. To appreciate the full parameters of this situation, imagine an entire system filled with CEOs. Over time the practice of judging will change, and CEOs' conscious attitudes will become the norm in the practice of judging. The new standard of excellence for judging will involve the most artful achievement of ends through legal reasoning. That would be an entirely different system, one which can be adjudged "legal" in form only.

Skeptics who dismiss the significance of the conscious orientation of judges toward being rule-bound miss this larger implication. They also fail to consider whether their repeated claims that judging is politics might hasten the day in which this is true, because everyone in the legal culture, including judges, come to believe that it is true, and judges cease to be consciously rule-bound, thinking it a naïve stance to assume. The risk of this occurring is heightened in the current highly politicized atmosphere surrounding judicial appointments at both the state and federal levels. Since judges are openly selected (or rejected) based upon their political views,⁵³ it would make sense for judges to think that their personal views have a role to play.

A crucial mistake is commonly made in contemporary discussions of judging. It is correct that judges' background views can shape their interpretation of the law, and that this process is subconscious and at some level unavoidable. It is also correct that sometimes the law runs out or calls upon the making of discretionary judgments by judges. Too often, however, an unwarranted jump is made from recognition of these points to the conclusion that, therefore, judges are naïve or lying when they claim that their decisions are determined by the law. To the extent that a judge is in fact consciously rule-bound, the judge is unconditionally correct in claiming to be rule-bound *in the only sense that this can be humanly achieved*. Since judging is a human practice, it makes no sense to evaluate the conduct of judges by reference to a standard that is impossible to achieve, inevitably finding them wanting.⁵⁴

It is precisely this conscious orientation, and nothing else, that marks the difference between a system filled with CB judges versus ones filled with CEO judges, and it cannot be doubted that these are starkly different systems. It is wrong for political scientists to call all judges "politicians in black robes"⁵⁵ when that label precisely fits CEO judges, but not CB

53. For an exploration of this politicization, see Tamanaha, *supra* note 41, at ch. 10.

54. This argument is developed more fully in *id.*, at ch. 13.

55. *Id.* at 124 (quoting H.R. Glick, *Courts, Politics, and Justice* 243 (1983)).

judges. Their loose application of this label to all judges eliminates the capacity to make this important distinction.

This is not a rejection of the external point of view, but a suggestion that it can be done better. At least in theory, political scientists should be able to identify through their studies a baseline range of correlations between judges' decisions and their attitudes that represents the level of unavoidable subconscious influence. This baseline will differ depending on the court (legal questions are more open and contestable at the Supreme Court level compared to the appellate level, though it might be that trial courts also have more discretion than appellate courts owing to the decisions entrusted to their judgment). But for each level it should be possible to statistically identify distinctions between judges who reason in CB terms and judges who reason in CEO terms. Presumably the correlations between CEO judges' decisions and their attitudes should be higher than that between CB judges' decisions and their attitudes at each level of court. In this manner, the external studies will offer a window into the internal conscious orientation of judges.

The findings of such studies would offer important lessons for the relationship between law and politics in judging. A liberal CB judge and a conservative CB judge should agree on many decisions, and indeed studies of appellate judging tend to support this argument (presuming most judges are still CBs).⁵⁶ The agreement among conservative CEOs should be high complete, and likewise among liberal CEOs. However, even among these like-minded judges, the decisions will not line up every single time with attitudes—sometimes the law so clearly points in the other direction that the CEOs' attitudes cannot overcome it. There should also be a divergence in decisions, attributable to the binding force of the law, between conservative CBs and conservative CEOs and between liberal CBs and liberal CEOs. Whatever else they show, these studies should demonstrate that the law determines the decisions in a significant proportion of cases for judges who are consciously bound to following the law. And that is essential to a rule-of-law system.

This would be an immensely complicated project, of course, and it is not clear that it can be accomplished, but it would provide a valuable way to cut through much of the rhetoric and confusion that pervades the subject of judging and politics.

56. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal. L. Rev. 1457 (2003); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301 (2004). Although the authors emphasize that ideological effects show up, they also recognize that "[i]t would be possible to see our data as suggesting that most of the time, the law is what matters, not ideology." *Id.* at 336.

CONCLUSION: BACK TO ALITO

Alito's statement cited at the outset was an accurate description of the differing conventions that characterize the practice of law and the practice of judging. If Alito lives up to his description of the role of a judge, if he behaves like a CB, he cannot be condemned, although liberals might not like all the results. If Alito takes the bench and surreptitiously behaves like a CEO, he deserves the condemnation of both conservatives (however much they like the results) and liberals for betraying the practice of judging and for betraying the legal system.

How will we know? Studies conducted by political scientists have found that a few Justices, like Rehnquist and William O. Douglas, show remarkably high correlations—in the 95% range in civil rights cases—between their decisions and their ideological preferences in certain classes of cases.⁵⁷ Such extraordinarily high correlations raise a red flag that a judge is reasoning in a CEO fashion, especially since other Justices show lower correlations. It seems unlikely that a consciously bound reading of the law would line up conservative or liberal in more than nine out of ten times. Admittedly, this will not conclusively establish that a judge is reasoning like a CEO, but it will be the best evidence available. If Alito's decisions line up this way, as Senator Schumer suggested routinely occurs in his appellate decisions, it is fair to surmise that he is reasoning like a CEO.

Only one person will know for sure: Alito himself. Alito will experience the pain of betraying the practice of judging and the legal system as a whole, if he is truly committed to these ideals, every time his conscious orientation downplays the binding force of law in lieu of consciously striving to achieve ends in his decisions. His very articulation of the ideal confirms his knowledge and acceptance of it as a governing standard for his judicial conduct. No other constraint can be imposed on judges. In the end it is left to the individual conscience of each judge.

57. See Tamanaha, *supra* note 14, at ch. 7.