## Abstract

*'History of science without philosophy is blind, philosophy of science without history of science is empty.' Can the same be said about legal history and legal philosophy? This paper argues legal history inevitably incorporates legal philosophy, though the way it does so is complex and has produced a disciplinary division between 'internal' and 'external' legal history. Internalists are legal positivists whilst externalists are not, or at least have doubts about the objectivity of legal reasoning. A more explicit consideration of these philosophical assumptions is needed before reconciliation between the two groups is possible. Equally, the relevance of philosophy to history goes the other direction: some historical findings are more compatible with philosophies of law than others. Examples of these findings include the social separation of lawyers; the long delay between social and legal change; and the so-called 'massive agreement' between legal actors. Legal positivism and its conventional nature fits this data more easily than legal philosophies denying the positivist thesis; the latter, whilst not incompatible with these historical features, must provide additional sociological theses about the social organisation of lawyers.*

# The History of Law and Its Rational Reconstructions

*'History of science without philosophy is blind, philosophy of science without history of science is empty.'*[1] Can the same be said about legal history and legal philosophy? This paper argues legal history inevitably incorporates legal philosophy, though the way it does so is complex

[1] Imre Lakatos, *History of Science and Its Rational Reconstructions*, 1970 PSA PROC. BIENN. MEET. PHILOS. SCI. ASSOC. 91 (1970).

and contentious in both directions. One particular contact is explored in detail here: the relevance of legal philosophy to the disciplinary division between 'Internal' and 'External' historians. The former, internal legal historians, write the history of positive law[2] and focus on the development of legal rules. The latter, external legal historian, study lawyers and their practice in its complex social context, going far beyond the confines of the court.[3] Recently, there have been proposals to reconcile these two positions.[4] If we treat the division as merely one of subject interest, then synthesis is straightforward. Internalists and externalists are not opposed to one another; rather they study and analyse different phenomena as a matter of academic division of labour.[5] The combination of the two is not only feasible but essential to build a complete history. The paper argues synthesis of this kind is unlikely. Tracing the origins of the terms in scientific history reveals that the internal-external divide implicates positions at a deep theoretical level, raising questions about the objectivity and nature of law, the determinacy of legal reasoning, and the reason-giving nature of law. The answers to these questions then influence the particular content of internal and external history, specifically, their position on the autonomy of legal communities. The paper has four parts: first, it examines the internal-external division in the context of scientific history to reconstruct the distinct elements subsumed under the general internal and external labels. Second, it examines how these ambiguities have been imported into legal history. Third, it carries out a similar process of reconstruction for legal history, noting alterations produced by the differing ontological statuses of law and science. Finally, it discusses these elements in the context of reconciling

[2] David Ibbetson, *What is Legal History a History of?*, *in* LAW AND HISTORY: CURRENT LEGAL ISSUES 2003 VOLUME 6 0 (Andrew Lewis & Michael Lobban eds., 2004), https://doi.org/10.1093/acprof:oso/9780199264148.003.0002 (last visited Oct 24, 2022).
[3] *Ibid*
[4] David Ibbetson, *Historical Research in Law*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 0 (Mark Tushnet & Peter Cane eds., 2005), https://doi.org/10.1093/oxfordhb/9780199248179.013.0038 (last visited Oct 24, 2022).;Michael Lobban, *The Varieties of Legal History*, CLIOTHEMIS REV. ÉLECTRONIQUE HIST. DROIT (2012), https://journals.openedition.org/cliothemis/1727 (last visited Oct 24, 2022). 3, 28. Russell Sandberg, *Subversive Legal History*, *in* SUBVERSIVE LEGAL HISTORY (2021).
[5] Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW SOC. REV. 9 (1975). 9

internal and external history. Overall, the conclusion is that reconciliation of the internal-external divide in legal history is connected to, but not determined by, philosophical debate. Whilst theory must be used to interpret historical findings, equally, those findings are relevant to the soundness of theoretical claims.

## Section 1: The Division in Scientific History

The internal and external division in legal history was drawn from Kuhn's dichotomy between the internal perspective of the scientist and the external perspective of the social historian.[6] Unfortunately, Kuhn was unclear in his use of these terms, and there is no consistent definition of them in the literature.[7] We can deconstruct his basic dichotomy into four related elements. First, there are the philosophical commitments of the historian: the metaphysical status they attribute scientific theory. Second, following their position on the first element, the subject matter of the historian: whether they study historical agents, beliefs, and actions, or disembodied scientific theory. Third, their methodological preferences, specifically how they weigh the historical importance of different subject-matter and their stance on the role of historical research generally. Fourth, and finally, the extent to which they argue scientists were a socially insular group. All four of these positions come apart to some extent, though are interrelated. The first three are related to the methodology of the historian and are treated together under section 1.1. The fourth is a substantive position which, though influenced by

[6] Ibid, fn 5 citing Thomas S. Kuhn, *Chapter Eight. The Relations Between History and History of Science*, *in* CHAPTER EIGHT. THE RELATIONS BETWEEN HISTORY AND HISTORY OF SCIENCE 267 (1979), https://www.degruyter.com/document/doi/10.1525/9780520340343-010/pdf (last visited Oct 24, 2022). p. 289

[7] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1996). 1-3; PAUL HOYNINGEN-HUENE, RECONSTRUCTING SCIENTIFIC REVOLUTIONS: THOMAS S. KUHN'S PHILOSOPHY OF SCIENCE (Alexander T. Levine tran., 1993), https://press.uchicago.edu/ucp/books/book/chicago/R/bo3684388.html (last visited Oct 24, 2022). 1; for a history see Steven Shapin, *Discipline and Bounding: The History and Sociology of Science as Seen through the Externalism-Internalism Debate*, 30 HIST. SCI. 333 (1992).

methodology, is more directly derived from historical evidence and thus treated separately under section 1.2.

### S.1.1 Internal and External as a Methodological Division

Looking at the first three methodological elements, Kuhn divides historians into two groups with shared commitments: (1) internal historians who study abstract scientific theory; adopt a scientific realist perspective; and believe the role of history is to chronicle the emergence of 'correct' scientific facts;[8] and (2) external historians who study scientists in context; are sceptical towards scientific realism; and suggest the proper role of history is to describe the past in its own terms. As noted above, these tripartite commitments influence one another but are nonetheless distinct. One could doubt scientific realism whilst studying abstracted constructs of scientific ideas or, vice versa, endorse scientific realism whilst studying scientists in context. Given these possible variations, it is unhelpful to group historians into discrete and mutually exclusive groups. Instead, the terms 'internal' and 'external' are more usefully replaced with specific positions on subject matter, philosophy, and methodological focus.

The first element is the subject matter of the historian.[9] The 'internal' subject matter is idealised concepts - for the scientific historian, scientific truth – and their change over time.[10] We can call the study of this kind of subject matter 'metaphysical history' because it presupposes the

[8] Kuhn, *supra* note 6. at 288ff
[9] What follows is close, though not identical, to Bence Nanay's division in *Rational Reconstruction Reconsidered*, 93 THE MONIST 598 (2010). at 599. The current paper suggests metaphysical history's main difference with descriptive history lies in its mind-independence, whether ontological or observational.
[10] KUHN, *supra* note 7. at 1, suggesting the subject of internal history are analogous to the contents of the science textbook. Cf Ibbetson, *supra* note 4. at fn 3, 864. Likewise, Kuhn, *supra* note 6. 288ff suggesting internal histories are closer to histories of ideas and ignore wider social context. HOYNINGEN-HUENE, *supra* note 7. at 1, suggests internal history is the history of a form of knowledge.

existence and historical importance of mind-independent phenomenon.[11] The corresponding external subject matter is historical actors, their context, personalities, and influences.[12] Although this may include the ideas of scientists and their development, its primary focus is on producing an accurate account of what people in the past felt and believed, as opposed to a chronicle of free-floating concepts.[13] Given the commitment to a complete and accurate historical record, we can call the study of this subject matter 'descriptive history.'

There is a reason we have turned to subject matter first: very few historians, and certainly no 'internal historians', reject the possibility of descriptive history. In fact, the most radical proponents of internal history not only accept the possibility but the *necessity* of empirical 'socio-psychological' histories of scientists. [14] As such, we can present the subject matter of descriptive history as a shared default. This is not to imply absolute uniformity: 'description' is a broad term and can be carried out with a variety of methods and approaches. Nonetheless, they all share common characteristics which distinguish them from metaphysical history. Most importantly, descriptive histories are studies of concrete individuals and groups. Kuhn himself was an 'externalist' in this sense, suggesting the correct subject and methodological approach of the historian was:

[11] See IMRE LAKATOS, THE METHODOLOGY OF SCIENTIFIC RESEARCH PROGRAMMES: VOLUME 1: PHILOSOPHICAL PAPERS (1980). 189–192. Ian Hacking, *Imre Lakatos's Philosophy of Science*, 30 BR. J. PHILOS. SCI. 381 (1979). 394 describes it critically as 'the history of anonymous and autonomous research programmes.'
[12]Lakatos, *supra* note 1. At 91; Kuhn outlines this approach as the 'emerging method' in KUHN, *supra* note 7. At 3
[13] Ibid, Kuhn, 3 ff
[14] Eg, Lakatos, *supra* note 1. at 91 "any rational reconstruction of history needs to be supplemented by an empirical (socio-psychological) 'external history"

> "inside the heads of the members of the group which practices some particular scientific specialty during some particular period; to make sense of the way those people practiced their discipline."[15]

A descriptive history should 'make sense' of past actors on their own terms in all their psychological depth. In general, context, nuance, and subtle differences in thought and behaviour between historical subjects are all highly important to the descriptive historian. Diverse factors from different parts of society and their interaction are relevant; likewise, historical accident and contingency.[16]

Metaphysical history, on the other hand, is more controversial. As noted above, its subject matter is disembodied scientific knowledge. It ignores the scientific beliefs of concrete individuals; instead, it studies scientific truths which exist and operate independently from the cognisance of human beings. Predictably, this subject matter is contested; unlike descriptive history, the very possibility of metaphysical history is debateable. It is at this juncture that we move to the second element, philosophy. Our philosophy of science will determine both the possible existence and causal relevance of disembodied scientific knowledge.[17] The 'internal historians' Kuhn describes are scientific realists.[18] They believe there is a mind-independent reality and suggest scientific theory approximates it. According to realists, correctly run

[15] Cited in Paul Hoyningen-Huene, *Philosophical Elements in Thomas Kuhn's Historiography of Science*, 27 THEORIA 281 (2012). 287

[16] For a summary of this position, see Steven Shapin, *History of Science and its Sociological Reconstructions*, 20 HIST. SCI. 157 (1982).

[17] Lakatos, *supra* note 1. at 91 noting one's position on demarcating correct scientific practice will influence what one defines as internal and external factors.

[18] Hoyningen-Huene, *supra* note 15. At 286 suggests "it is plausible, and possibly even convincingly so, if present science is more or less in possession of the truth about its subject matter." For a useful summary, see IAN HACKING, REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE (1983), https://www.cambridge.org/core/books/representing-and-intervening/F6506B708BB5A8B6A5D884BDCF28E7B7 (last visited Oct 25, 2022). Likewise, Paul Horwich, *Three Forms of Realism*, 51 SYNTHESE 181 (1982).; and JARRETT LEPLIN, SCIENTIFIC REALISM (1984).

experiments will reach the same results regardless of the time period, and there is always a correct way of constructing scientific theory from the evidential results.[19] Realist historians also tend to adopt a cumulative view of science progress whereby the scientific method slowly and consistently builds on past theories. Thus, modern science is the closest to the truth.[20] They then compare this ideal to the descriptive historical and produce causal counterfactuals: given the scientific method must result in a certain outcome when carried out correctly, what caused scientists to diverge from these results? Of course, the content of the ideal the historian adopts as 'correct' depends on their position on scientific rationality.[21] A naïve view which measures scientists in the past against the modern position without taking into account context will be inescapably blunt. It will question, for example, why Copernicus did not derive a correct approximation of Mercury's orbit, independent of available evidence or theory.[22] Kuhn criticised the scientist-historians and science textbook histories which take this view for their ahistoricity and whiggishness.[23] A more nuanced version is Lakatos's model of successive research programmes.[24] Each scientific research programme incorporates a core of unchallengeable assumptions around which theories are produced. These theories, unlike the core, are changed, developed, and improved via experimentation. Over time, evidential results which the research programme cannot predict or account for cumulate in a process Lakatos calls 'degenerative problemshift'. New sets of assumptions producing theories which can

[19] HACKING, *supra* note 18. supports the former, regarding experiments, 157, 200 (microscopes)) 209, and for an explicit statement of experimental realism, 262, 274. He is more sceptical of there being a fact of the matter about theory construction, 274ff.
[20] KUHN, *supra* note 7. at 1-3, Note, the cumulative view is not necessarily teleological. One could imagine scientific realists in a world like that of A Canticle for Liebowitz where society has suffered a reset due to nuclear apocalypse.
[21] Lakatos, *supra* note 1. at 91-92
[22] KUHN, *supra* note 7. Ch 1. For an indicative modern example, see 'To Explain the World: The Discovery of Modern Science', which treats Plato as silly, Aristotle as tedious, Galileo as behind the times, and Bacon as overrated. Only Newton escapes criticism thanks to an evaluation of his impact in hindsight. Steven Shapin, *Book Review: 'To Explain the World' by Steven Weinberg*, WSJ, http://www.wsj.com/articles/book-review-to-explain-the-world-by-steven-weinberg-1423863226 (last visited Oct 25, 2022).
[23] *Ibid*, Kuhn. Cf the legal equivalents, the lawyer-historian and the historical preface of the doctrinal textbook. FREDERIC WILLIAM MAITLAND, WHY THE HISTORY OF ENGLISH LAW IS NOT WRITTEN (1888). pp 13, 14)
[24] Lakatos, *supra* note 1.99ff

account for these gaps, demonstrating 'progressive problemshift', then gain ascendency, eventually becoming the new dominant research programme. Although superficially similar to Kuhn's paradigm shift model,[25] Lakatos's differs in an important way: progressive research programmes are objectively more correct than the degenerative ones they replace, and as successive programmes inevitably replace one another,[26] science on the whole tends towards the modern, 'correct' position.[27] The correct and 'rational' operation of science is the continuous victory and succession of superior research programmes. Lakatos suggests historians should 'rationally reconstruct' past historical theories to model an ideal version of this process. Rational reconstruction involves looking for the 'correct' scientific approach within a historically-situated research programme, sometimes using the benefit of modern hindsight to ascertain the logical implications of a particular programme.[28] For instance:

> "…the historian, describing with hindsight the Bohrian programme, should include electron spin in it, since electron spin fits naturally in the original outline of the programme. Bohr might have referred to it in 1913. Why Bohr did not do so, is an interesting problem which deserves to be indicated in a footnote…."[29]

Other kinds of 'fiddling' involve substituting in 'correct data interpretation' and revising the scientist's conjectures, as Lakatos seems to do for Bohr above.[30] If it proves impossible to

[25] KUHN, *supra* note 7.
[26] It is unclear from Lakatos's discussion the extent to which the content of specific research programmes are socially contingent. A strong realist reading is that the same chain of research programmes will always be reached if science is progressing rationally. For any period there will be a correct research programme to match the scientific evidence and the previous, progressive research programmes.
[27] For instance, Lakatos regards the replacement of Ptolemy's geocentric theory with Copernicus's as an example of an objectively superior theory replacing an inferior one. Imre Lakatos & Elie Zahar, *X. WHY DID COPERNICUS' RESEARCH PROGRAM SUPERSEDE PTOLEMY'S?*, *in* THE COPERNICAN ACHIEVEMENT 354 (Robert S. Westman ed., 2020), https://doi.org/10.1525/9780520312890-019 (last visited Oct 25, 2022).CF KUHN, *supra* note 7. At 258ff, and 206 who denies that scientific knowledge approximates any kind of absolute
[28] Hacking, *supra* note 11. at 398 notes the whiggish nature of this kind of history.
[29]Lakatos, *supra* note 1. at 107
[30] Hacking, *supra* note 11. At 396,

correct the historical record then it may be that the programme was a dead-end, and thus not an example of progressive science after all.[31] Lakatos's rational reconstruction is more synchronic than the naïve view. Whereas the naïve view measures past scientists directly against the modern position, Lakatos's research programme approach analyses what the ideal scientists would have done *given the research programme they were operating in and available evidence.*[32] Thus, we can reconcile the scientific consensus that Newton, Bohr, and Copernicus were brilliant scientists with the shortcomings of their theories compared to the modern day.[33] Nonetheless, despite greater context, the internal history is still a reconstruction: what the scientists happened to believe is irrelevant:

> "whether an experiment is crucial or not, whether a hypothesis is highly probable in the light of the available evidence or not, whether a problemshift is progressive or not, is not dependent in the slightest on the scientists' beliefs, personalities or authority. These subjective factors are of no interest for any internal history"[34]

If Lakatos stopped here he could be accused of produced an entirely fabricated history.[35] Instead, he argued a descriptive history was essential to supplement the rationally reconstructed theory. Lakatos's position is that once a society develops the scientific method, scientific theory will inevitably tend towards the modern (modern) correct position if carried out correctly and rationally. However, "human beings are not completely rational animals…",[36] thus

[31] *Ibid*, 397. Hacking notes that Lakatos is then forced to rely on external forces to explain why the scientist ended up taking the view they did.
[32] Lakatos, *supra* note 1.103
[33] *Ibid,* 108 This is important for Lakatos given the metric he uses for whether a theory of scientific rationality is reasonable is whether it classifies most 'great science' (defined by professional consensus) as rational.
[34] Lakatos, *supra* note 1. 106
[35] Kuhn, *supra* note 6. at 143; LARRY LAUDAN, PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH (1978). 170; GERALD JAMES HOLTON, THE SCIENTIFIC IMAGINATION: CASE STUDIES (1978)., 106. For a summary of such criticisms see Bence Nanay, *Internal History Versus External History*, 92 PHILOSOPHY 207 (2017). 17
[36] Lakatos, *supra* note 1. at 102

interruptions in the default operation of the idealised scientific process are pervasive and why descriptive history is necessary. Factors such as political influence, economic and technological development, and simple stupidity[37] can interrupt the correct derivation of scientific theory under a research programme.[38] The rational reconstruction thus serves as the expected default position, deviations from which are anomalous and require additional, descriptive factors to explain.

Kuhn's 'externalists', on the other hand, are sceptical of scientific realism. Kuhn for instance doubts the existence of a single 'scientific truth'[39] which modern science approximates most closely. Rather, he believes each scientific period has its own standards of success and, as such, scientific theories from different periods are incommensurable. These views do not preclude the possibility of metaphysical history altogether, merely the strong realist kind. There are other weaker forms of objectivity we could use to posit the existence of mind-independent scientific knowledge. Kuhn, whilst denying a globally correct scientific position, suggested the historian can nonetheless model local correctness within a scientific community's practice.[40] It could be possible a scientific community got the application of its own standards of scientific practice wrong.[41] The historian can rationally reconstruct a 'correct application' from those standards to act as a hypothetical. Whilst no scientists at the time may have held this position (thus making it 'metaphysical'), it could possess explanatory relevance to scientist behaviour and

[37] Hacking, *supra* note 11. at 397
[38] Example interruptions include the abandonment of Mendelian genetics in Soviet Russia in the 1950s due to political factors. Lakatos, *supra* note 1. at 114. Many others can be found in Shapin, *supra* note 16.
[39] KUHN, *supra* note 7.
[40] Hoyningen-Huene, *supra* note 15. at 284 "[Kuhn] believed in scientific progress and did not doubt the possibility of evaluating the actions of past scientists as appropriate or inappropriate, relative to their paradigm, of course."
[41] Modelled, by Kuhn, according to the logic of puzzle solving and dominant paradigms. This model of rationality, though not tending to 'truth', operates autonomously. Alexander Bird, *Kuhn and the Historiography of Science*, *in* KUHN'S STRUCTURE OF SCIENTIFIC REVOLUTIONS - 50 YEARS ON (Alisa Bokulich & William J. Devlin eds., 2015)., 8-9.

causal processes. The nature and implications of this kind of mind-independence is considered in more detail below when discussing law.

Assuming the historian accepts the possibility of metaphysical history, whether they then rationally reconstruct or closely describe scientists is a methodological question.[42] Methodological preferences are varied: they stem from differing interests; didactic purposes; intended audiences; and conceptions of history as an academic discipline.[43] Historians who prioritise descriptive accounts will be more interested in the subjective process of scientific practice; further, they are likely to view the role of history as revealing the past in all its strangeness.[44] Historians prioritising rational reconstruction, on the other hand, will view correct scientific theory as extremely important and treat the role of history as explaining when it emerged,[45] how it can be obtained, [46] and what forces interrupted its discovery. Only theories which contributed to the correct position matter; likewise, elements outside the scientific method, such as political and religious beliefs, are at most interruptions or diversions in their process. A fundamental factor when deciding narrative importance is the causal role of the subject in key events.[47] When it comes to the causal relevance of metaphysical history, these questions throw us back to the issues of our philosophy of scientific truth. A scientific realist historian will likely attribute strong causal relevance to the constraining effects of reality on the scientific process,[48] and thus regard rational reconstructions as essential for explaining scientific progress from the past to today.[49] Conversely, a historian who is sceptical of the

[42] HOYNINGEN-HUENE, *supra* note 7. 282 describes this as 'the comparative criteria of historical relevance.'
[43] *Ibid,* 283 broken into 'factual, narrative, and pragmatic relevance.'
[44] KUHN, *supra* note 7. at 1 suggesting a 'decisive transformation' could be obtained by looking at how scientific practice actually occurred.
[45] Lakatos, *supra* note 1. at 14, 15; for indicative examples, see Shapin, *supra* note 16. at 157
[46] *Ibid,* Lakatos, 91
[47] Hoyningen-Huene, *supra* note 15. 281, 282
[48] See KARL RAIMUND POPPER, OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH (1972). 159
[49] Lakatos, *supra* note 1. at 92 who regards the metaphysical statement of science as such an important factor that descriptive history alone is impossible. Although this may seem extreme, consider Lakatos's background in

existence of scientific truth will doubt a rational reconstruction's causal relevance (if it possesses any at all) and thus importance to the historical narrative. Accordingly, as a scientific realist, Lakatos naturally attaches great causal relevance to metaphysical history.[50] If the scientific method is carried out correctly, it will inevitably reach the rational reconstruction. Thus, the reconstruction is essential to the historical narrative of scientific process.[51] Conversely, Kuhn's metaphysical history is more modest. He suggests that if scientists are operating under a set of social standards and reasoning, they will tend to – but not always - reach certain conclusions.[52] The reconstruction of what this position ought to have been can be compared to the historical record and decisive breaks may suggest additional factors are at play. Nonetheless, although a relevant factor, the rational reconstruction cannot occupy the same dominant place as Lakatos's.

## S 1.2 Substantive Internalism and Externalism

The above related to the methodology of the historian; Kuhn also used 'Internal' to describe a substantive claim about how scientists organised themselves.[53] The internal historian argues scientists were insular as a social group and that their practice received minimal influence from non-scientists. 'External' refers to the opposite claim that scientific practice was frequently and substantially influenced from outside the social universe of the scientist. Examples include socioeconomic development, favoured by Marxist historians; changes in moral values, posed

mathematics and the difficulties of attempting to carry out mathematical history without referencing any notion of mathematic truth.

[50] *Ibid*

[51] For criticism of a strong link between experimental results using a sociology of knowledge approach, see Shapin, *supra* note 16.. 159

[52] Note, for both positions the possibility of over-determination – such as the scientific method leading to a certain outcome, and that outcome also being desirable because of wider social forces – can complicate things.

[53] This is the reading of Pablo Melogno, *From Externalism to Internalism: The Historiographical Development of Thomas Kuhn*, 27 FOUND. SCI. 371 (2021). likewise, Bird, *supra* note 41. K. Brad Wray, *Kuhn and the Discovery of Paradigms*, 41 PHILOS. SOC. SCI. 380 (2011). Hoyningen-Huene, *supra* note 15. 288.

as an explanation for the popularity of Darwinism; and political upheaval, in the context of Pasteur's theories.[54] More subtle influences could involve the use of analogies from wider culture in the formation of scientific knowledge and practice. Take the use of mechanical pump technology as a metaphor for the heart;[55] or the influence of the legal notion of fact on scientific verification.[56] Kuhn himself takes a substantively internalist position:

> "Like literature and the arts, science is the product of a group, a community of scientists. But in the sciences, particularly in the later stages of their development, disciplinary communities are both easier to isolate and also more nearly self-contained and self-sufficient than the relevant groups in other fields."[57]

There are several useful concepts connected to social insularity in this passage. Self-containment relates to the extent practitioners receive ideas and influence from outside their community. An insular social group will interact with outsiders less in the context of their practices, both in the participation of non-specialists and in attitudes towards the relevancy of non-specialist work. Self-sufficiency relates to the extent to which a social practice can develop its practices without additional material or influence from outside the practice. Scientists, for example, could be contrasted to artists insofar as they do not need to directly rely on cultural, aesthetic, and political trends, to develop their work. Finally, disciplinary communities relate to the entire community of practitioners, complete with mechanisms of feedback which correct and maintain continuity in a community's practices.[58] The extent to which these are composed

[54] *Ibid,* Bird.
[55] Shapin, *supra* note 16., 178
[56] Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STANFORD LAW REV. 727 (1969).
[57] Kuhn, *supra* note 6. 299
[58] Kuhn gives examples of inculcation of commitment to the basic disciplinary matrix of the paradigm at the education and training stage of the scientist. Moving against this is the need for innovation. See THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE (2011). A similar point is made in the context of law in ALFRED WILLIAM BRIAN SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW (1987). ff 94

of practitioners, use practitioner material, and reject outside attempts at regulation, all influence the social group's insularity.

It should be noted the substantive internalist's claims of insularity are empirical rather than philosophical. 'Scientific knowledge' is not defined as an ideal construct independent of social practice. Instead, it is sociological: the internal historian's position follows from their assessment of what scientists thought and how they developed their ideas; its self-conceived disciplinary boundaries;[59] distinct characteristics; and its patterns of interaction and influence.[60] Compare this with the metaphysical realist's subject matter. As noted above, the metaphysical historian studies an objective scientific position discovered exclusively via the scientific method. By definition, therefore, external factors, such as political forces and economic change, cannot affect the correct process of discovery. The substantive internalist is more flexible. They are free to adopt a contextual, balanced approach, noting both historical trends towards insularity and the danger of over exaggerating the independence of scientific development. One example is Kuhn's own earlier work 'The Copernican Revolution' where he notes wider philosophical work was formative on early astronomical theorists.[61] To the extent the substantive internal legal historian takes a general stance on the balance of internal and external factors, it is as a heuristic:

[59] Shapin, *supra* note 16.177
[60] Drawing lines around social practices for sociological purposes is a complex matter. It relates to the usefulness of ideal types in describing human behaviour.
[61] THOMAS KUHN, THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT (1957). referencing the work of Nicholas of Cusa and Giordano Bruno. See Melogno, *supra* note 53.

> "internalism is a better heuristic maxim to begin with than externalism because more often than not, plausible and detailed internalist explanations for scientific change are more difficult to find than externalist ones."[62]

As noted by Paul Hoyningen-Huene, this does not preclude externalism. Should evidence emerge which plausibly supports an external explanation, the internal legal historian must accept it. Likewise, if this continues, to the extent most explanations for scientific change are externally driven, the internalist will accept their heuristic needs to be retired.

Substantive internalism and externalism both fall under descriptive history. They involve the study of social actors and their organisation, differing in their findings and interpretations. Nonetheless, as noted above, the product of metaphysical history can be relevant to descriptive history. If the descriptive historian adopts a realist position they will tend to a substantively internal position.[63] Scientific insularity, in the form of the self-sufficiency, self-containment, and internal disciplining, becomes more plausible if scientific theory is consistently discoverable via scientific experimentation alone.[64] As noted above, this does not exclude external factors altogether: the realist-descriptive historian accepts they affect how scientific practice is carried out. For instance, wider societal context heavily influences the timing, rate of development, and internal popularity of scientific theory by changing the operating conditions of scientific communities.[65] Nonetheless, these factors cannot affect the link

[62] Hoyningen-Huene, *supra* note 15.288
[63] Bird, *supra* note 41. at 12 suggests this is inevitable. This is not so: one could be a scientific realist whilst defining 'scientists' using a sociological concept analogously to other professions. According to this view, a groups of scientists, so defined, could begin to receive substantial external influence, disrupting the scientific method, without losing their status as scientists 'doing science', even if it ceased to be science according to modern standards.
[64] Kuhn, abandoning a definitively correct scientific position, must posit other factors which can explain the unusually firm and widespread consensus present amongst scientists. KUHN, *supra* note 7. at 173;
[65] Examples of concrete external factors include the school system, the advent of sputnik, Dadaism, and the course of the Weimar republic Hacking, *supra* note 11. at 394

between experiments and the production of accurate, useful scientific knowledge. As such, the realist historian will tend towards an internal thesis, especially given an auxiliary assumption that accurate scientific knowledge is socially useful. Interestingly the reverse, a substantive internal thesis on a social practice implying scientific realism, does not hold as strongly.[66] The presence of an autonomous social practice does not necessarily point to the existence of an anchor independent of human cognition. One could suggest a social practice had significant social autonomy, such that its members did not associate with non-members, whilst also suggesting its practices reflected no deep truths about reality. As Bird notes of Kuhn:

> "It is true that objectivists, those who believe that science has reasonable success in uncovering facts about an independent world, will be [substantively] internalists. But it does not at all follow from this that all internalists must be objectivists. Internalism makes room for both objectivists and relativists who believe that the determinants of scientific change are encapsulated within science itself. And that is the kind of internalist I take Kuhn to be." [67]

Accordingly, one's philosophical position can come apart from one's substantive position on the autonomy of scientists and, correlatively, the existence and methodological relevancy of metaphysical history. Despite these disjuncts, Kuhn uses the terms 'internal' and 'external' to cover four different features, subject matter, philosophy, methodological focus, and substantive findings. These ambiguities were then imported into legal history in 1975 via an article on American Legal Historiography by Robert Gordon.[68]

[66] For the complex interplay of theory and historical evidence, see Section 4.
[67] Bird, *supra* note 41.at 12
[68] Gordon, *supra* note 5. Also Robert W. Gordon, *Critical Legal Histories*, 36 STANFORD LAW REV. 57 (1984).

## Section 2: Gordon's Legal-Historical Division

Gordon wanted an analytical framework to discuss the changing patterns of American legal historiography. To do so, he used the notion of a 'law box.' According to Gordon, legal historians have traditionally worked on the assumption there is a distinct sphere of legal activity worth studying in its own right.[69] This distinct sphere can be modelled as a legal 'box' dividing legal material from the realm of non-law:


[69] Ibid, Gordon *supra* note 5. at 10

Inside the box is "whatever appears autonomous about the legal order".[70] In general, the lines are drawn around "the institutions, the occupations, the ideas and the procedures that have the appearance at any one time of being distinctively legal."[71] Note the vagueness of Gordon's formulations: the box includes whatever the researcher happens to think is distinct about law, ranging from social institutions, abstract ideas, to legal procedure. Meanwhile, outside the box is everything else: the "political, economic, religious, social" and, presumably, scientific, environmental, and philosophical factors.[72] The legal historian has options within this framework. They can find the box is autonomous and that its changes are primarily due to forces arising from within it; alternatively, they could find the box's lines are illusory and external forces do the majority of the work in explaining development.[73] Regardless of their position, according to Gordon, a researcher who defines themselves as a 'legal historian' has no choice but to draw the 'law box.' Having outlined the box, he then introduces a new categorisation: the 'internal-external' division. Gordon states:

> "The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects."[74]

[70] Ibid
[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid, 11

The division, according to Gordon, appears to be based on methodological focus. The internal legal historian is defined as one who studies material in the law box which, though including legal doctrine, also includes sociological phenomena, such as the education of young lawyers, professional organisation, and institutional design. The external legal historian studies the same material as the internal historian, also investigating the law box, though goes beyond the box and investigates features 'external' to the box. Thus, from this division, the internal and external division is not a difference in subject matter, given they study the same kinds of material extending beyond pure legal doctrine, nor is the division necessarily a substantive one, given, as Gordon notes, neither inherently commit a researcher to a conclusion that legal change is predominantly internally or externally driven.[75] Instead, from Gordon's initial presentation, the dichotomy merely appears to demarcate different areas of interests in the same way terms 'military', 'political', and 'social' history do, for the purpose of 'division of intellectual labour.'[76] However, Gordon then reproduces the ambiguity found in Kuhn when elaborating on his division. At one stage he suggests internal history is distinguished by three elements: its unique subject; its use of modern doctrinal analysis; and its positivism. He comments:

> "In practice [the internal legal historian] carried no greater research burden than would any legal positivist, for whom legal history was only the history of past state commands, rather than the history of an entire culture."[77]

[75] Studying internal legal history as a single subject does imply, however, the materials in the law box have sufficient similarities to justify grouping them as a category. There is no history, for instance, of 'vehicles with the letter Q in their name.'
[76] Ibid, 9
[77] Ibid, 20. Note the flavour of Austinian jurisprudence.

If internal legal history's defining feature is its use of modern positivistic legal reasoning, then its subject becomes much narrower. For example, in a history of the doctrine of contributory negligence, ancillary procedures, the legal profession, legal education, and institutional design, are excluded.[78] The only historical subject is doctrine, produced from the cases and other legal sources which establish the black-letter rules.[79] At the same time, Gordon also implies internal legal history incorporates a substantive position on legal autonomy. The internal legal historian endorses an insular view that all legal change is explicable from causes within the box.[80] Like Kuhn's substantive scientific historian, the internalist regards lawyers as a socially autonomous group which carry out a self-sufficient and self-contained practice.[81] However, as noted above, not only do the substantive and methodological elements of history come apart, but the division itself traces a complex cluster of different theoretical positions. These ambiguities, reproduced in modern usage[82] are a legacy of the Kuhnian distinction.

## Section 3: Internal and External Legal History

Kuhn's division was divided into four different positions, all of which are distinct but interconnected. These were subject matter; philosophy; methodological preference; and substantive position on the social insularity of scientists. The same 'rational reconstruction'

[78] Ibid, 11
[79] Ibbetson, *supra* note 2. uses a similar definition, suggesting internal legal history is the history of positive law. Likewise, Ibbetson, *supra* note 4., treats it as the history which can fit inside a legal textbook. Lobban, *supra* note 4., 4
[80] Lobban, *Ibid*, also takes this view, 10
[81] *Ibid*, 19, 33, fn 65
[82] Joshua Getzler, *Legal History as Doctrinal History*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 0 (Markus D. Dubber & Christopher Tomlins eds., 2018), treats internal legal history as a substantive claim about the social autonomy of legal change. Internalists give causal weight to the "internal shifts of view within the legal profession" 171; Likewise, K. J. M. Smith & J. P. S. McLaren, *History's living legacy: an outline of 'modern' historiography of the common law*, 21 LEG. STUD. 251 (2001). treats it as a thesis of legal autonomy, 272, 313; and Janet McLean, *Ideologies in Law Time: The Oxford History of the Laws of England*, 38 LAW SOC. INQ. 746 (2013)., 747, 762, viewing internal history as covering both a substantive and methodological position.

can be carried out for internal and external legal history. Unlike the history of science, there has been less debate on the methodology of legal history. Consequently, although the interconnection between the four positions above are also present in legal history, they are usually left implicit in the historian's approach.

## S 3.1 Metaphysical and Descriptive Legal History

As with scientific history, legal history's subject matter can be divided into descriptive and metaphysical history. These divisions match those used above: metaphysical history is the history of a mind-independent construct of 'law';[83] descriptive history is the history of lawyers in their social context.[84] What 'law' constitutes is a philosophical matter with similar implications for the methodology, subject focus, and substantive arguments of the historian.

A descriptive legal history is much the same as its scientific equivalent: it aims to get inside the heads of past lawyers and legal actors to understand what they were doing on their own terms. The subject is not free-floating legal doctrine, rather the opinions, beliefs, commitments, and personalities of past legal actors.[85] The work of those exploring descriptive history is therefore more open-texture, capable of combining biography, prosopography, institutional studies, surveys of the legal profession, its organisation, and education.[86] Further, like descriptive scientific history, it is largely accepted that this kind of history is possible.

[83] See JOHN BAKER & JOHN BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY (2001).p. 2
[84] *Ibid*, "[the] practical operation and the actual state of juristic understanding at a given time"
[85] In this sense, Getzler and Baker are external legal historians
[86] Ibbetson, *supra* note 2. at 33

A metaphysical history of law, on the other hand, is the study 'law' independent from what particular lawyers happened to believe.[87] The plausibility and causal relevance of this kind of history is also a philosophical question. A useful contrast is between a positivistic and natural law legal history.[88] The latter looks like an internal history of religion.[89] An objective 'natural law' position is identified and historical legal practice described in terms of its approximation to that standard.[90] The account is likely to be teleological but not linear, with past legal systems coming more or less close to the correct natural law position, without a line of progress from the past to the present.[91] The metaphysical statement may have strong causal relevance in the actions of concrete actors: perhaps if they carry out the correct kind of reasoning they will reach the correct natural law position regardless of wherever – or whenever - they are.[92] Conversely, if the metaphysical law is positivistic (the usual position of 'internal historians') then the history is more synchronic. The historian identifies past legal sources using the period's rule of recognition and carries out doctrinal analysis on those sources to produce an ideal, correct statement of 'the law.'[93] They compare this rational reconstruction[94] to descriptions of historical practice and, in extreme cases, criticise past lawyers for applying the law incorrectly, [95] or even radically reconstruct what the picture ought to have been. [96] As the historical sources and the rule of recognition are capable of change, the positivist legal historian is unlikely to

[87] *Ibid*
[88] For the ontological commitments in positivism, see JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001). F. Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXF. J. LEG. STUD. 493 (2005).
[89] For a discussion, see H. RICHARD NIEBUHR, THE MEANING OF REVELATION (1941)., pp. 18-42
[90] Objectivity in the sense of natural law existing regardless of any individuals or communities endorsing it.
[91] Unless one assumes modern law has attained the closest point to moral acceptability.
[92] If this is the case, and the present is not identified as the correct position, the metaphysical natural law historian will have to explain why the correct process of moral reasoning is not commonplace.
[93] Ibbetson, *supra* note 4. 873, notes the construct will be hypothetical.
[94] For use of this term in the legal context, see Introduction, , *in* EUROPEAN LEGAL DEVELOPMENT: THE CASE OF TORT 1 (David Ibbetson & John Bell eds., 2012), https://www.cambridge.org/core/books/european-legal-development/introduction/4F0F24280D0B4808D8F6A0E9AD81503B (last visited Oct 25, 2022). 27
[95] S. J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW (1975)., p 24, 142 criticising a statement of the law on the basis it does not accurately reflect the cases; for a reconstruction, p. 169.
[96] For instance, David Yale's description of Milsom's HFCL as 'an exercise of imagination.' Cited in David Ibbetson, *MILSOM'S LEGAL HISTORY*, 76 CAMB. LAW J. 360 (2017).

endorse a single set of rules as timelessly correct. Rather, their ideally constructed legal rules will depend on the time period's sources and rule of recognition. [97] This differs from scientific realist and natural law histories which track a single ideal corpus of knowledge, the components of which emerge – or disappear – over time.[98] Whilst synchronic in identifying the specific rules, the positivist historian is *achronic*[99] when it comes to their criteria for identifying their subject matter: only social groups with secondary and primary rules have 'law'.[100] Accordingly, like the scientific historian and the scientific method,[101] they often identify a point in which the ideal of 'law' was invented,[102] and any groups which lack a rule of recognition simply fall outside the ambit of their study.[103]

Whether or not a historian focuses on objective legal doctrine or social context is a methodological matter dependent on similar factors mentioned above, including didactic purpose, specialism of the historian, audience, area of interest, and philosophical commitments. The last is of particular interest. As noted, generally, a metaphysical history is interesting if it can tell us something about the causal influences on historical agents.[104] A scientific realist history is interesting because it posits a strong causal connection between mind-independent reality and scientific practice, regardless of place or time period. We can compare this to a

[97] In addition to any of the other necessary features of law in the historian's version of positivism.
[98] As noted above, Lakatos's forms of internal scientific history do evaluate each period based on available evidence to produce an 'ideal history' for the period.
[99] MATTHEW H. KRAMER, H.L.A. HART (2018)., p. 4; Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO 'THE CONCEPT OF LAW' 0 (Jules L. Coleman ed., 2001), https://doi.org/10.1093/acprof:oso/9780198299080.003.0010 (last visited Oct 25, 2022).p.123; Brian Bix, *Conceptual Questions and Jurisprudence*, 1 LEG. THEORY 465 (1995).
[100] Assuming the historian is following a Hartian model of legal positivism. Ibbetson, *supra* note 2.34
[101] Lakatos, *supra* note 1., 107 'the emergence of science was a purely European affair.' Hoyningen-Huene, *supra* note 15., 285
[102] ALDO SCHIAVONE, THE INVENTION OF LAW IN THE WEST (2012).
[103] Whether or not groups predating the point at which descriptive historians regard the positivistic concept emerging can still be regarded as having 'law' is a matter for how useful 'law' is as a general descriptive category. It is one of sociology. See section 4 below for more detail.
[104] Though this may not always be asserted: consider idealised abstract models of economic behaviour, Paul Lewis, *On The Merits Of Critical Realism And The ?Ontological Turn? In Economics: Reply To Steele*, 23 CRIT. REV. J. POLIT. SOC. 207 (2011).

metaphysical statement of law. For present purposes, only positivist metaphysical history is considered on the basis it is the most popular kind of metaphysical legal history.[105] A metaphysical statement of positive law is causally weaker than a scientific realist position on science. This is because virtually all positivists argue law is socially constructed.[106] There are several consequences of this ontological status. One is that, unlike natural kinds, law does not exist independently from human beings and their beliefs.[107] A metaphysical statement of the law might be produced that no-one in the period endorsed or would even have accepted as correct had it been suggested to them.[108] If law is socially constructed, not only would this statement describe a non-existent subject, but it would also have no causal relevance in historical narrative. Compare it to a metaphysical histories of science with realist commitments.[109] As Hoyningen-Huene notes in the context of realist scientific historians:

> The question "Why didn't anyone notice Mendel's theory in the 19th century" is a question of undoubtedly Whiggish character. It is a question that may only be asked by someone unfamiliar with 19th century biology, but who knows about the relevance of genetics in the 20th century. Though the question would not have been asked in the 19th century, it does not seem to be an illegitimate question, and it can and should be answered in an anti-Whiggish sense."[110]

[105] There are some examples of natural law history, though usually in the context of a legal theorists bringing in historical examples as test cases. For instance, see the Hart-Fuller debate and Dworkin's discussion of the law of the antebellum south.
[106] Schauer, *supra* note 88. KRAMER, *supra* note 99.
[107] For the mind-dependence of Law, Kramer *Ibid,* 123
[108] S. F. C. MILSOM & S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (Second Edition, Second Edition ed. 1981).
[109] As noted above, it is hard to imagine Kuhn arguing that modern scientific theories, such as relativity, which have been used to build modern technology would not be similarly effective if transplanted in the past. Indeed, he regards modern theories as more powerful, specialised, and capable of producing technological advancements. Whether or not this makes him a realist is a matter of definition. KUHN, *supra* note 7.173; postscript, 206. For similar comments, see HACKING, *supra* note 18. 274
[110] Hoyningen-Huene, *supra* note 15. at 291

Hoyningen-Huene's point is that if we assume there is a scientific truth independent of social context, such that experiments testing hypotheses analogous to Mendel's theory in the 19th century would have confirmed it then as they do now, we can sensibly ask why they did not discover it.[111] That is one explanatory strength of a metaphysically realist position; another is that we can more closely tie it to the operation of scientific practice. For example, we can suggest that experiments looking for signs of the 'aether' failed to throw up useful results because there was no such thing: no amount of experimentation would have led to positive results.[112] Likewise, we can suggest heavier than air flight could not have occurred until sufficiently powerful engines were developed given our current knowledge of aeronautical engineering. Law on the other hand lacks this capacity to constrain independent of the participants' beliefs and practices: constructing a positivist legal system out of legal sources which were never used in a positivist manner[113] produces a castle in the sky.[114]

The positivist model of law, in its ontological status and causal relevance, is closer to Kuhn's model of metaphysical science. Many positivists accept the existence of legal positivism is contingent on human belief[115] and that the concept of positivism is a historical phenomenon

[111] Similar questions can be asked of quantum mechanics and 19th century mathematics. See SCOTT AARONSON, QUANTUM COMPUTING SINCE DEMOCRITUS (2013), https://www.cambridge.org/core/books/quantum-computing-since-democritus/197A4CD13738E10AAD787DBB78D8E92C (last visited Oct 25, 2022)., p. 109: "the theory [of quantum computing] could have been invented by mathematicians in the nineteenth century without any input from experiment. It wasn't, but it could have been. And yet, with all the structures mathematicians studied, none of them came up with quantum mechanics until experiment forced it on them.?"
[112] HACKING, *supra* note 18. at 274
[113] Though note, positivist history usually requires the presence of legal sources amenable to positivistic analysis. Historically, this provides at least some evidence they were so understood. For societies with obviously incongruous sources positivistic analysis is not used: instead, the historian will simply regard them as lacking law.
[114] For similar concerns in the context of economics see Lewis, *supra* note 104. There is always a temptation to suggest that those being studied don't understand their own concepts, see MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS (2003). 136.
[115] For a naturalised version of positivist methodology, see BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007). DICKSON, *supra* note 88.68–9

which must, therefore, have emerged over time.[116] Descriptive history is therefore needed to determine whether a population did, in fact, hold these views. Simultaneously, however, they suggest that as lawyers began to think in this positivistic way, constraints on the outcomes of their reasoning arose *independently* from their current beliefs. Kramer raises this possibility when he argues that, whilst lacking strong existential mind-independence, law has strong observational mind-independence.[117] Past lawyers could adopt a framework of thought which objectively required, according to its own terms, certain conclusions, but which none of them endorsed in an act of collective error.[118] We could then add an additional empirical thesis that lawyers tended to seek and value rational coherence in their thought.[119] In doing so, it becomes more plausible to argue the historian's ideal rational construction of the law, derived from the historical agents' own assumptions,[120] models a causal force on past lawyers' behaviour, even if they were at times unaware of it.[121]

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[116] Schauer, *supra* note 88. DICKSON, *supra* note 88. 68 analogising the legal theorist to the anthropologist.J. H. Baker, *English Law and the Renaissance*, 44 CAMB. LAW J. 46 (1985)., D. J. Ibbetson, *THE RENAISSANCE OF ENGLISH LEGAL HISTORY*, 80 CAMB. LAW J. S91 (2021). suggesting the rise of positivism in the 16th century, Baudouin Dupret, *The Concept of Positive Law and Its Relationship to Religion and Morality*, *in* THE OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY 0 (Marie-Claire Foblets et al. eds., 2022), https://doi.org/10.1093/oxfordhb/9780198840534.013.22 (last visited Oct 25, 2022). NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (2008). suggesting positivism emerged as a distinct sub-system sometime in the 16th-17th century.

[117] KRAMER, *supra* note 99.124. MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW (2007), https://www.cambridge.org/core/books/objectivity-and-the-rule-of-law/EA179B33F42BFB437E8002856016FAE7 (last visited Feb 16, 2022). Kramer suggests law has weak ontological mind-independence insofar as it depends on a community's endorsement to exist, but does not depend on any single individual's mental state. Likewise, under 'modest objectivity' see Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 UNIV. PA. LAW REV. 549 (1993)., 608. At 549, applying this notion to the linguistic marker for gold, they essentially reinvent Lakatos's rational reconstruction.

[118] Assuming, of course, there were uniformly shared standards for reasoning. See Leiter and Coleman, *ibid* on 'conceptual clarity.'

[119] Brian Leiter, *Legal Indeterminacy*, 1 LEG. THEORY 481 (1995). 384, links the rational determinism of the law with its causal determinism through this assumption. Note, this is different from holding a positivist concept of law and can be roughly styled 'positivist ideology.' For a recent historical approach to Intellectual Property law using positivist ideology, styled as 'internalism', see Shyamkrishna Balganesh & Taisu Zhang, *Legal Internalism In Modern Histories of Copyright*, 134 HARV REV 1066 (2021).

[120] Coleman and Leiter, *supra* note 117.. 620, 628 for this process. The evaluative position of the historian towards their statement is the simulative one described by Hart in 'The Concept of Law.' KRAMER, *supra* note 99. 68. For more detail, see Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociolegal Studies*, 30 LAW SOC. REV. 163 (1996).

[121] Ibbetson suggests this kind of long influence in the development of legal rules. D. J. IBBETSON, *4. The Substantive Law of Torts*, *in* A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 0 (David Ibbetson ed., 2001). Ibbetson, *supra* note 4. 872.

There are limitations to this account. When we ask 'why didn't courts decide cases according to the internally consistent correct doctrinal statement of the law?' we cannot assume that the constraining effects of our reconstructed position were as strong as, say, the laws of thermodynamics on experiments. Few deny that, at least in some cases, a plurality of outcomes can be reached using correct legal reasoning, even from the same sources.[122] Therefore, merely working out a legal population was positivistic does not enable us to confidently state what result judges in the community had to reach.[123] At most, it lets us work out a range of likely positions their practices and sources suggested they would have reached according to their own standards, and, assuming they had a desire and ability to carry out their reasoning correctly, attribute a degree of constraining influence on their behaviour.[124] Even with these hedges, the influence a desire for consistency has is limited. First, unlike the laws of nature, it is not absolute: it has to be balanced with other motivational influences acting upon the judge.[125] Second, there are weaker practical incentives in a legal community to derive rightly correct positions from their practices than a scientific one, and thus greater potential for internal mistakes and inconsistency. Scientific theory has a narrower (though not singular) scope of social value than legal theory.[126] Accurate scientific theories capable of predicting events are of immense value and there are consistent incentives and pressures to improve them in this

[122] Note, this is not to adopt a global thesis on legal indeterminacy. It takes the more modest position that legal sources will, in some cases, lead to multiple outcomes.
[123] Cf philology, Ibbetson in David Ibbetson, *Comparative legal history: A methodology*, *in* MAKING LEGAL HISTORY: APPROACHES AND METHODOLOGIES 131 (Anthony Musson & Chantal Stebbings eds., 2012), https://www.cambridge.org/core/books/making-legal-history/comparative-legal-history/2375CB1A63C54811DA71B8C1B2E8A2DF (last visited Oct 25, 2022). suggests it operates according in regular, modellable patterns despite being socially constructed.
[124] BAKER *supra* note 83. p. 5, regarding the possibility of mistakes and their link to long-term prediction; likewise, he suggests in 'English Law and the Renaissance' that legal reasoning has causal influence on historical actors, *independent* of particular communities.
[125] The usefulness of the metaphysically derived 'ideal' statement of law is inverse to the extent to which these other considerations weigh, and influence judges.
[126] Shapin, *supra* note 16. provides numerous examples, ranging from intra-professional conflict (such as the vested interests of specialised sub-disciplines) to cultural conflict, such as the lowland-highly divide in Scotland.

direction.[127] On the other hand, legal doctrines which, though not 'correctly' derived from the sources, are nonetheless widely accepted can retain significant usefulness. To give a basic example of practice diverging from law, a fundamental contract case in English contract law, Slade's case, was misinterpreted for over 200 years.[128] To resist this argument and suggest a method of doing law with a narrow band of 'correct doctrinal deductions' is both possible and necessary for social purposes (increasing the pressure to reach those deductions, and thus a tendency towards them) is a difficult to substantiate claim.

The above covers several alternative accounts for a metaphysical history of law. We can also consider the sceptical 'external' position: that law lacks objectivity in any sense.[129] One might argue there is no distinct 'concept of law' which people hold and that, as a result, the positivist concept is incapable of describing *any* historical period's legal actors. [130] Of course, if one took this view, it would be necessary to offer another account of 'legal language' and what it constitutes. [131] Another, less radical, view is that although there may be a vague concept of 'law' it lacks observational objectivity. Law is merely what people in a given system believe, in the same way fashion is defined by whatever people think is fashionable.[132] As such, whilst we can group people together by their shared concept of law, there is no point on creating counterfactuals of ideally derived legal rules which no-one at the time held. Such a counterfactual would have no causal relevance because there would be no tendency for legal actors in the system to reach that counterfactual when thinking legally. It would be akin to

[127] Kuhn notes that, although not approximating 'truth', scientific practice does nonetheless get more powerful and sophisticated. KUHN, *supra* note 7. (104). CF, Shapin, *ibid* 196, suggesting it is entirely contingent whether scientific practice is propagated
[128] J. H. Baker, *New Light on Slade's Case*, 29 CAMB. LAW J. 213 (1971).
[129] For a good survey, see Gordon, *supra* note 68.
[130] Eg. Scott Hershovitz, *The End of Jurisprudence*, ARTICLES (2015), https://repository.law.umich.edu/articles/1466.60 ff.
[131] *Ibid*, who reformulates legal language as moral reasoning
[132] See Coleman and Leiter, *supra* note 117. on modest objectivity; for a historical example, see 'Common Learning' in BAKER, *supra* note 83.

proposing an ideal mode of idle doodling despite the fact doodlers have no tendency to approximate an ideal state of practice.

## S 3.2 Substantive Internal and External History

The substantive internal position in scientific history is that scientists were an autonomous social group. Again, this thesis is not restricted to the natural sciences: there are many social practices which could be described as autonomous.[133] Examples include language, economics, religion,[134] storytelling,[135] literature, [136] and law. A substantively internal position in law suggests lawyers were socially autonomous, primarily socialising with themselves, relying on work written by other lawyers,[137] and disciplining their own members using legal reasoning standards as a metric. As a consequence, legal decisions demonstrate an independence from trends in wider society. A substantively external position, on the other hand, suggests lawyers were highly interconnected socially, 'imbricated' in wider parts of society;[138] that their work was influenced by the work of non-lawyers; and that broader social standards are essential to understanding legal behaviour. Correlatively, they suggest the outcome of legal decisions is closely linked to the needs and demands of different social forces.[139] This debate is carried out

[133] LUHMANN, *supra* note 116.; NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (2013). Referred to as the 'autonomy' thesis in Gordon, *supra* note 68.
[134] *Ibid*, Luhmann regards art, the economy, politics, law, the media, and even love as autonomous 'subsystems.'
[135] Elo-Hanna Seljamaa, *Perfected Truth: Walter Anderson's Law of Self-Correction*, L KEEL JA KIRJAND. 888 (2007).
[136] As Kuhn describes himself, Kuhn, *supra* note 6.292
[137] See comments on these lines in MILSOM, *supra* note 108., page xii.
[138] David Sugarman, *Simple Images and Complex Realities: English Lawyers and Their Relationship to Business and Politics, 1750-1950*, 11 LAW HIST. REV. 257 (1993). David Sugarman, *Writing "Law and Society" Histories*, 55 MOD. LAW REV. 292 (1992). David Sugarman, *Theory and Practice in Law and History: a Prologue to the Study of the Relationship Between Law and Economy from a Socio-Historical Perspective*, *in* LAW, STATE AND SOCIETY (1981).
[139] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (2009).; JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1984). P. S. Atiyah, *The Legal Background, 1770–1870*, *in* THE RISE AND FALL OF FREEDOM OF CONTRACT 0 (P. S. Atiyah ed., 1985), https://doi.org/10.1093/acprof:oso/9780198255277.003.0013 (last visited Oct 25, 2022).

in a variety of different fields, such as comparative law[140] and legal sociology.[141] Legal history has its own brand of substantive internalism which suggests legal change historically has, more often than not, been driven by changes within the legal profession.[142] These accounts mirror those in scientific history, suggesting it is difficult to find plausible external explanations for specific legal changes;[143] that lawyers have close disciplinary communities;[144] that they have mechanisms for the transmission of accepted practice and knowledge;[145] and that the profession inculcates thought-patterns which discourage individual, innovative thought.[146] Note, this is a descriptive, rather than definitional, independence. Metaphysical histories of law which are positivistic, like those which are scientific realist, by definition exclude wider context: only the sources of law are relevant. The autonomy of lawyers in a substantively internal position follows from their interpretation of social patterns of historical lawyers as insular. Against, or at least qualifying these approaches, are external accounts which suggest legal practice is closely connected to, and influenced by, wider society. Factors such as political needs,[147] economic transformation,[148] and social norms[149] are used to explain how lawyers organised and practiced their craft. A balanced position is possible between these two extremes: one could argue, for example, that different time periods, jurisdictions, areas of law (for instance, comparing land and criminal law), and even subsets of the legal community have different degrees of autonomy. As with Kuhn's internalist, contextual nuance is possible because the

[140] Richard Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. LAW REV. 785 (1982). Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 UNIV. PA. LAW REV. 1121 (1983).
[141] LUHMANN, *supra* note 116.
[142] For a clear example, MILSOM, *supra* note 108.
[143] Baker, *supra* note 116.47; Hoyningen-Huene, *supra* note 15. 288, Ibbetson, *supra* note 123.
[144] SIMPSON, *supra* note 58., 95, McLean, *supra* note 82.,
[145] Simpson, *ibid.* KUHN, *supra* note 7.
[146] Simpson, *ibid,*
[147] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).
[148] KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1976).
[149] CHRISTOPHER BROOKS & MICHAEL LOBBAN, LAWYERS, LITIGATION & ENGLISH SOCIETY SINCE 1450 (1998). MARGOT C. FINN, THE CHARACTER OF CREDIT: PERSONAL DEBT IN ENGLISH CULTURE, 1740-1914 (2003).

divide is not ontological: both the internal and external substantive positions fall under 'descriptive history.'

As noted above, the metaphysical statement (or range of statements) of law has less causal relevance to descriptive history than that of science. Nonetheless, it is not irrelevant: a historian who believes a population was positivistic is more likely to take a substantively internal view. Positivists tend to endorse certain assumptions about legal reasoning which have implications for the social autonomy of legal practice. [150] First, positivists believe it is possible to derive conclusions using a distinct process of legal reasoning. They believe the sources used in this process are conceptually separate from the wider sources in society used to make decisions; and whilst they accept there is ambiguity at the edges of legal reasoning,[151] are unlikely to regard the reasoning outcomes from those sources as pervasively indeterminate.[152] These commitments have relevance to the social organisation of lawyers. Even if we assume the legal system incorporates many non-legal sources in its test for deriving the correct legal rule, such as reasonableness or fairness, the existence of a constrained sub-set of sources makes a distinct canon of 'lawyerly' material a possibility.[153] The more this sub-set differs from the sources considered in society at large, the greater likelihood of self-containment.[154] This holds true even if the sources cannot be used to derive legal answers: a group is more likely to be insular merely if it uses a highly restricted set of sources. Consider the limited reading diet of terrorist

[150] The general 'internal' position appears to be that legal practice is autonomous because of its positivistic character. Nonetheless, one could be a positivist and believe legal practice is not autonomous, and one could deny positivism whilst maintaining a thesis of autonomy.
[151] H. L. A. HART, THE CONCEPT OF LAW, https://www.oxfordlawtrove.com/view/10.1093/he/9780199644704.001.0001/he-9780199644704 (last visited Oct 25, 2022).Ch7.
[152] For an outline of this thesis, see Leiter, *supra* note 119.
[153] For the separation of the closedness of a legal system, its autonomy, and its positivistic character, see Frederick Schauer, *Formalism*, 97 YALE LAW J. 509 (1988); Frederick Schauer, *Ruleness*, *in* LEGAL RULES IN PRACTICE (2020); Frederick Schauer & Virginia Wise, *Legal Positivism as Legal Information*, 82 CORNELL LAW REV. 1080 (1997).
[154] Balganesh and Zhang, *supra* note 119; Schauer and Wise, *supra* note 153.

cells, cults, and the Amish. Of course, if legal reasoning can be used to derive legal answers[155] independently from wider inputs, then legal practice is more likely to be self-sufficient and self-contained. Lawyers could rely exclusively on legal sources to consistently derive legal outcomes for their practices, [156] whether to make decisions, coordinate criticism for deviation, develop new positions, or predict future legal outcomes. Thus, the possibility of operational self-sufficiency and self-containment becomes greater.[157]

Second, such a historian is more likely to assume that, once derived, these legal conclusions have a strong motivational force. As noted above, one of the requirements for a metaphysical statement of the law to influence concrete actors is that they have an inclination or tendency towards reaching it as a conclusion.[158] It requires lawyers to have a desire (or feel an obligation) to derive the correct legal outcome from the sources, and once derived to view it as providing reasons for action capable of competing with wider considerations.[159] If either of these requirements are missing influence will be minimal.[160] Even if the legal sources required a determinative outcome according to the lawyers' own assumptions, if the lawyers had no incentive to reach it, or once they did reach it, had little incentive to act on it, the metaphysical reconstruction will have no causal force. Many positivists assume that a defining feature of legal norms is that they import their own reasons for action.[161] Thus, at least provisionally, we can say this makes it more plausible actors thinking and reasoning a legal way will be

[155] It is not necessary for there to be a single correct answer in all cases, or even most cases, for socio-legal autonomy. Provided legal reasoning provides a limited range of possible answers the judge must reach, sufficient to render legal decision-making somewhat unlike decision-making normally, this is sufficient. CF Leiter, *supra* note 119. at 488, and Coleman and Leiter, *supra* note 117. at 564, who approach determinacy from a legitimacy perspective.

[156] Leiter, *ibid* 482, suggests it is a precondition of the causal determinacy of legal adjudication that it is rationally determinate. Schauer in *Formalism* suggests its role in 'screening off' non-legal factors in the decision-making process, *supra* note 153

[157] This is especially so if we regard consistency and certainty as strong values in legal practice given legal insularity is likely to assist in both.

[158] This is a core part of the theory of legal path dependency. See Introduction, *supra* note 94., p 24.

[159] Leiter, *supra* note 119. calls these 'background conditions' for the causal determinacy of legal reasoning. 482

[160] Jerome Frank, *Are Judges Human? Part 1: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 UNIV. PA. LAW REV. 17 (1931). who suggests that legal decision-making is explained by judicial neurosis.

[161] Generally, the ANφ reason-giving model of law, Ward, D. criticises this model.

influenced by the law. If this legal process is carried out independently from wider inputs, as suggested by the positivist's first assumption, the second assumption also suggests legal autonomy will be more likely.

Conversely, if a historian is sceptical of these assumptions they will be more likely to reject substantive internalism. As noted above, there could be disagreement at a variety of levels. They might disagree at the philosophical level because they adopt a different concept of law with a weaker tendency to autonomy[162] or deny 'law' exists as a separate concept at all.[163]Alternatively, they might accept positivism but take a stronger position on the indeterminacy and persuasive weakness of legal reasoning.[164] For these historians, social, moral, and economic pressures become more important in explaining why adjudicators made the decisions they did. As Leiter notes, "when legal reasons do not justify only one outcome, then other psychological and sociological factors (e.g., the personality or the political ideology of the judge) must come into play to causally determine the decision." [165]

The relative independence, however, of substantive autonomy and philosophical position means the influence can go the other way. It is possible to find lawyers, defined sociologically, are autonomous as a group, as Kuhn does for scientists, without starting from a definitive philosophical position.[166] Some legal positivists, [167] for example, argue that because evidence

[162] Although Dworkin, and his commitment to there being one right answer, would appear to align on legal determinacy with positivism. See Coleman and Leiter, *supra* note 117.
[163] Hershovitz, *supra* note 130.
[164] Either because they regard the class of legal reasons as indeterminate or take a global approach, Leiter, *supra* note 119. at 483; they may also attack the role of analogy as a specific method. 484; for scepticism on the part of Critical Theorists, Coleman and Leiter, *supra* note 117. fn 2, pg 549; and a summary of criticisms, 567ff
[165] Leiter, 'Legal Indeterminacy' *ibid*, 482, 'when legal reasons do not justify only one outcome, then other psychological and sociological factors (e.g., the personality of the political ideology of the judge) must come into play to causally determine the decision'
[166] As Kramer notes in KRAMER, *supra* note 114., the sociological evidence of legal activity for different jurisprudential theories is underdetermined. P. 139
[167] Kramer, *ibid.* ch 6, Brian Leiter, *Explaining Theoretical Disagreement*, 76 UNIV. CHIC. LAW REV. (2009), https://chicagounbound.uchicago.edu/uclrev/vol76/iss3/5.

of social autonomy is more compatible with positivism than alternatives, these findings are jurisprudentially relevant.[168] We can consider two different phenomena in particular: the gap between enacted law and societal context; and the massive agreement of legal officials. The former draws attention to the disjunct frequently observed between the legal sources of a time period and social, political, and economic needs. As Bird notes in the context of scientific history, denying autonomy suggests we ought to see the same kind of chaos in the social system as we do in other areas of human activity.[169] Legal positivism, as explained above, helps explain why this is not the case: the subset of legal sources differs from that of the sources in society generally, can take longer to change, and can therefore fall out of sync.[170] The latter 'massive agreement' point is related to the observation that, outside appellate courts, the community of legal actors in a legal system agree on the majority of legal points.[171] Again, positivism helps explain this phenomenon via the limited determinacy of legal reasoning. Provided all the members of the legal system are carrying out correct reasoning, they will come to the same outcomes.[172] Thus, alignment on the law can be explained as a consequence of conventional and highly regular reasoning methods.

Those who disagree with positivism have two options. First, they could assert a substantively external thesis and deny the presence of these phenomena. For instance, suggesting the legal sources (and potentially all human discourse) are entirely indeterminate, and that as a result the

[168] Assuming a model of positivist methodology which is susceptible to empirical falsification. See John Gardner, *Law in General*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL (John Gardner ed., 2012), https://doi.org/10.1093/acprof:oso/9780199695553.003.0011 (last visited Oct 25, 2022). 277; cf KRAMER, *supra* note 99., p. 4; Bix, *supra* note 99. at 467. For this in the context of legal history, Maks Del Mar, *Beyond Universality and Particularity, Necessity and Contingency: On Collaboration Between Legal Theory and Legal History*, *in* LAW IN THEORY AND HISTORY : NEW ESSAYS ON A NEGLECTED DIALOGUE 22 (Maksymilian Del Mar & Michael Lobban eds., 1 ed. 2016)
[169] Bird, *supra* note 41.12
[170] See Introduction, *supra* note 94. on path dependency in legal reasoning
[171] *Supra* note 167
[172] *Ibid*

law in practice is - on closer inspection - a highly chaotic mess.[173] Second, they could provide an alternative, non-positivistic explanation for unusual social autonomy.[174] This typically requires alternative psycho-social mechanisms of consensus and stability. Kuhn, for example, is forced to answer new questions about the 'remarkable disciplinary cohesiveness' of the scientific community after denying scientific objectivity.[175] Similarly, Simpson, in denying legal positivism is an accurate description of the common law, must provide a detailed account of how a customary system can maintain consistency.[176] Dworkin, in denying positivism, turns to a 'consensus of conviction' explanation linked to education and social pressure.[177] The common question is whether a legal community, despite deciding cases according to non-legal considerations, could nonetheless do so in a unique, partially contained, consistent manner. Consider a hypothetical legal system with judges who decide every case before them according to their own moral reflections but, because of the insular culture of the lawyers within it, consistently had their own standards for decisions. The community would have its own moral principles called 'lawyer morality', writings, influential figures, and group discussions separate from wider society. It might even publish guides on how decisions would be decided according to lawyer-morality. Although every judge would be deciding each case on the merits, the strong social cohesion present in the community would ensure they all instinctually agreed on similar outcomes. An outsider looking at this practice would be surprised at the unusual moral positions of these judges, diverging, as they do, from the consensus in wider society. Such a thesis is not impossible: it merely needs to be verified by checking it against the historical data.

[173] Bird, *supra* note 41.12
[174] Gordon *supra* note 5. at 88, call this the 'autonomy problem.'He lists other solutions, including that of Alan Watson ('disengagement')
[175] Kuhn, *supra* note 6.
[176] SIMPSON, *supra* note 58. 95ff
[177] RONALD DWORKIN, LAW'S EMPIRE (1986).p. 88. KRAMER, *supra* note 99. at 139, suggests the following 'runs afoul of Occam's razor.' Note, that although Dworkin seems to take a strong position on the objectivity of law, the ideal 'herculean' statement of law is not straightforwardly epistemically available, and thus cannot be used as a tool for social coordination.

# Reconciling Internal and External Legal History

This paper has demonstrated the internal-external debate is fundamentally philosophical: each label covers multiple, partially contingent positions. I will now briefly summarise the compatibility and incompatibilities of the various positions: overall, the conclusion is that synthesis between them is highly complex, combining both theory and substantive history.

Turning to the most basic element, methodological focus, there is nothing incompatible about studying different parts of history. Indeed, this 'division of labour approach' would make reconciliation akin to putting a jigsaw together. The different histories merely describe different parts of the same picture: so long as the right connecting pieces can be found no frictions will arise. As Lakatos demonstrates in scientific history, the twin subject matters external and internal history are *prima facie* compatible. A historian can produce an accurate descriptive history of law whilst simultaneously taking into account potential influence from mind-independent legal phenomena. Nonetheless, the existence and extent of this compatibility will depend on the philosophical commitments of the historian. The stronger the philosophical claim about law's objectivity, the greater the role for rational reconstruction in this narrative. Accordingly, differing views on the nature of law's objectivity, determinacy of legal reasoning, and law's capacity to provide reasons for action, will lead to major differences in attributing historical causation. Further, if a legal historian denies law has any objectivity at all they will deny the possibility of metaphysical history – and thus the plausibility of many internal legal histories – altogether. Thus, what appears to be a reasonably simple division implicates a number of contentious theoretical issues.

Whilst the division between substantive externalism and internalism appears to avoid these problems, similar issues arise. At first glance, it looks like a divide over the interpretation of historical evidence: whether or not lawyers were an autonomous social group. As mentioned above, there is space for contextual nuance: internal and external accounts need not be inherently opposed even if they take different views on autonomy. On closer inspection, however, the philosophical debates from above are implicated. Some philosophical models of law are more compatible with a thesis of social autonomy than others. Thus, first, if we find a positivist concept of law is present in members of a system, then a theory of widespread autonomy becomes more plausible, and, secondly, if we find autonomy is present independent of a close investigation of the subjects' concepts of law, the likelihood members held a positivistic concept of law increases. We can draw an analogy to the process of Inference to Best Explanation and scientific theory:[178]

> "Inference to the Best Explanation can be seen as an extension of the idea of `self-evidencing' explanations, where the phenomenon that is explained in turn provides an essential part of the reason for believing the explanation is correct. For example, a star's speed of recession explains why its characteristic spectrum is red-shifted by a specified amount, but the observed red-shift may be an essential part of the reason the astronomer has for believing that the star is receding at that speed…"

Applying this to the history of law, the thesis a population had a positivistic concept of law helps explain the autonomy of the legal profession, which in turns supports the theory they were legal positivists.[179] Of course, the support is not as strong as in scientific explanation: the

[178] PETER LIPTON, INFERENCE TO THE BEST EXPLANATION (1991).
[179] For a slightly different use of history, see the use of genealogy to 'debunk' or undermine philosophical concepts. Amia Srinivasan, *Genealogy, Epistemology and Worldmaking*, 119 PROC. ARISTOT. SOC. 127 (2019).

weaker causal relevance of legal positivism to the behaviour of lawyers allows for a positivist system's profession to be substantially open to wider society,[180] and the availability of other explanations for social autonomy can allow for other concepts of law to act as plausible 'fits' for the historical evidence. Nonetheless, despite this flexibility, as mentioned above legal positivism has an asymmetric affinity to legal autonomy, meaning one cannot be a substantive internalist without, implicitly, moving closer to metaphysical internalism. The internal-external divide therefore traces a highly complex division: theory is required to inform substantive historical finding, which in turn inform one's theory and methodological choices. The limited flexibility in historical explanation means reasonable disagreement is possible in selecting a theory, whilst any chosen theory remains defeasible to sufficiently strong counterevidence. Yet despite these difficulties, it is only once these questions are addressed that the internal and external divide can be developed, the field reunified, and the two bodies of research fully connected.

[180] Both in adopting a pervasive realist position with a minimal sliver of positivist practice and because the existence of positivism is not equivalent to the closedness of a legal system. See Frederick Schauer & Virginia Wise, *Legal Positivism as Legal Information*, 82 CORNELL LAW REV. 1080 (1997).notes,