

## SOME INTERNAL POINTS OF VIEW AND THE STUDY OF LAW

**THE VANTAGE OF LAW: ITS ROLE IN THINKING ABOUT LAW, JUDGING AND BILLS OF RIGHTS.** By James Allan.<sup>1</sup> Farnham (Surrey), Ashgate. 2011. Pp. vii + 202. \$124.95.

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### INTRODUCTION

Law establishes reasons for action. Even when the law-maker does not reproduce moral rules in legal form but instead creates new, truly positive laws, legal rules establish reasons for action, reasons which ground duties to legislate responsibly and to acknowledge and maintain, comply with, and apply positive law. These questions and their investigation have long been examined by classical natural law theorists, but it is to H.L.A. Hart that is owed the reception of law's relationship to reasons into contemporary jurisprudence. Situating reasons for action at the heart of jurisprudential inquiry is one of the many permanent acquisitions of legal philosophy articulated in *The Concept of Law*.<sup>3</sup>

True to his insistence on a non-evaluative methodology for the study of law, Hart's exploration of the relationship of law to reasons for action stands at some distance to those reasons. For the most part, *The Concept of Law* reports how persons and officials act *if* they take law as establishing reasons for action, but does not press *why* persons would do so or what those reasons are. We are told that to understand the role and place of legal rules, we must attend to the "internal aspect" of rules,

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

understood from the “internal point of view” of participants within the community of persons whose rules they are. From that viewpoint, a rule serves as a “guide” and as a “reason and justification” for acting in accordance with it (and for frustrating those who do not).<sup>4</sup> Hart says little about those reasons and his sometime insistence that “acceptance” is what arbitrates between the internal and non-internal (external) points of view seems too weak to communicate the reason-giving quality of law. Notwithstanding this, Hart’s focus on the relationship between the internal point of view and law’s reasons for action charts a path to one’s obligation to follow law and to how obligation relates—through reasons for action—to the authority of law. In other words, the reason-giving aspect of law sets jurisprudential investigation on a course from law-makers (who evaluate and act on reasons to create this new law) to law-appliers and law-enforcers (who maintain the law by understanding and acting in accordance with it and the reasons established by it).

Since the publication of *The Concept of Law*, studies in the philosophy of law have sought better to understand the internal point of view and its significance for our legal understanding. Many questions surfaced following Hart’s important account, questions that continue to animate jurisprudential inquiry, including: Does law provide the same reasons for action to officials and subjects? Within the class of officials, do legislator, judge, and police officer all share the same internal point of view? Does a legal rule only provide a reason for action to the subject who agrees with its merits? If there are different internal points of view, is there reason to attend more to one than to another for our understanding of law?<sup>5</sup>

For these reasons and others, James Allan’s *The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights* is an invitation to situate questions about vantage (synonymously: point of law, viewpoint) explicitly at the forefront of debates animating the philosophy of law. Allan examines how, by attending to different points of view, we might better understand certain questions respecting the relationship of morality to law, adjudication, and the role and place of bills of rights, suggesting that these debates have a different significance and salience depending on one’s vantage point. The book begins

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4. *Id.* at 11 (emphases omitted); see also, e.g., *id.* at 56, 84, 90, 291.

5. A careful overview of some issues with the internal point of view is to be found in Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. REV.* 167 (1999).

with a disclaimer that the author's aim is not "to construct an all-elucidating, philosophically sophisticated theory of law" (p. 1). That is true and, perhaps as a result, the invitation of the book to attend to different viewpoints is underexplored. That said, Allan's study is a welcome invitation to reflect on some of the questions re-introduced to contemporary jurisprudence by Hart in 1961.

### I. SOME POINTS OF VIEW

The title of the book—*The Vantage of Law*—"intentionally alludes to H.L.A. Hart's *The Concept of Law*" (p. 1). Allan is taken by how Hart's study of law "shunned adopting the appeal court judge's vantage or perspective—one which is so often the implicit vantage or viewpoint in legal writing today" (p. 2). Instead, we are told that "up to chapter nine of *The Concept of Law* Hart wrote from the vantage of the outside observer" (p. 2).<sup>6</sup> Like Hart's *The Concept of Law*, Allan's *The Vantage of Law* is "concerned with vantages" (p. 3), and Allan adopts different vantages in his journeys into the understanding of law, judging, and bills of rights. His orienting ambition is to examine the relationship between vantage and understanding: "What effect does one's vantage or perspective or standpoint have on how one understands, say, the desirability of a bill of rights or the best way for judges to decide cases or whether law is—and whether it should be—separate from morality?" (p. 4). The question is important and some jurisprudential and much constitutional-theoretical debate has been burdened by insufficient attention to its importance.<sup>7</sup>

The definite article in the book's title is misleading, for Allan does not seek to identify *the* vantage of law but rather seeks to examine different *vantages* for understanding law, none of which he situates as central or focal—as *the* vantage. Rather, the introductory chapter charts three "primary vantages," two "ancillary vantages," and four "even more peripheral or ancillary vantages" (pp. 5-6). Let us begin, as does Allan, with the category of primary vantages. Here the reader is introduced to *the concerned citizen*, identified as "the person who has a stake in the legal system in which he or she lives" (p. 5).

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6. For reasons developed below (as well as others not here tackled), there is reason to question this claim.

7. For a recent study of methodological questions in constitutional theory, see N.W. BARBER, *THE CONSTITUTIONAL STATE* ch. 1 (2010).

Unfortunately, “stake” is an ambiguous term and Allan nowhere elaborates on its meaning, leaving this vantage to range, in the mind of the reader, from self-interest to the prospect of something more significant. We are told that the concerned citizen is “the average citizen”: “neither morally perfect nor immorally wicked nor even amorally indifferent,” of “limited (but by no means insignificant) altruism and sympathy,” and someone “who in the vast preponderance of circumstances is law abiding” (p. 5).

Without further accounting for this first viewpoint, Allan introduces his reader to the second primary vantage: *the judge*, who “normally” can be taken to be on “an appeal court, if not on the highest court of the jurisdiction” (p. 5). Significantly for Allan, “the judge’s *opinion* on what should be the case can become what is the case” and this is in “marked contrast to the concerned citizen” (p. 5, emphasis added). Finally, the *Holmesian Bad Man* rounds off the list of “primary vantages.”<sup>8</sup> He is “the amoral actor whose decisions, choices and motivations are unaffected by morality” and “indifferent to the claims of morality *per se*” (p. 5). With some qualification, Allan likens the bad man’s vantage to that of “the average client-advising lawyer” (p. 6).

We are introduced to the category of “ancillary vantages” with the *visiting Martian*, a somewhat imaginative label for “the descriptive sociologist, the outside observer,” being a “non-citizen with no stake in what is being observed and described other than, perhaps, a desire for accuracy and clarity” (p. 6). Now, for reasons we will explore below, one should query whether this vantage should be awarded any pride of place in a book devoted to deepening our understanding of law. Why? Because unless Allan purports to be and to report what it is to be a judge, bad man, and an average citizen, his journey into these vantages will be undertaken from the vantage of a “descriptive sociologist” and “outside observer.” This “vantage” is significant only for how it attends to how participants in the legal system relate to law. What is the viewpoint of the descriptive sociologist untethered from the viewpoints of participants? What does it describe or observe if not one or a combination of the participants’ viewpoints and interactions? In this light, sitting uneasily alongside the visiting Martian in the category of “ancillary vantages” is one such participant

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8. See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

viewpoint: the *legislator* or *law maker*, being the “person [who], as part of the group of all other legislators of some assembly, can turn policy options into law” (p. 6). Little more is said to introduce the reader to these two ancillary vantages before turning to the “even more peripheral or ancillary vantages” of the *Omniscient Being*, the *Moral Philosopher*, the *Sanctimonious Man*, and the *Law Professor* (p. 6).

Given Allan’s want to track Hart’s methodology, there are important omissions in his discussion of viewpoints willingly pursued in the shadow of *The Concept of Law*. Among them: at no point does Allan mention, let alone engage with, the internal and external points of view so central to Hart’s jurisprudential explanation of vantage. Indeed, Allan fails to highlight how, even if Hart “wrote from the vantage of the outside observer” (p. 2), it was an outsider’s viewpoint insistent on how, to understand law and the normative vocabulary employed by legal participants, one must attend to the *internal point of view*. The only reference in Allan’s study to Hart’s internal point of view occurs late into chapter 1 and consists of the following short discussion:

Recall that he [Hart] tells the reader that people (or rather some people) in a functioning legal system have an internal point of view, a critical reflective attitude, about the law and its rules; *they feel obliged to carry out its prescriptions*; there is, to put it differently, an internal aspect to legal (and indeed other social) rules that operates in the minds of (most, or at any rate some, of) the individuals in the particular legal system. (p. 36, emphasis added)

The italicized sentence betrays Hart’s explanation of the internal point of view. It will be recalled that Hart, as early as in the preface to *The Concept of Law*, insists on the difference between “being obliged” and “having an obligation,” likening the former to “the beliefs and motives with which an action is done” and the latter to “duty.”<sup>9</sup> In Hart’s example of the gunman situation, I am “being obliged” to hand over my money when the gunman threatens to shoot me for it and “we should misdescribe the situation if we said, on these facts, that [I] ‘had an obligation’ or a ‘duty’ to hand over the money.”<sup>10</sup> In turn, appeals to my “beliefs and motives” are neither sufficient nor necessary “for the truth of a statement that a person had an

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9. HART, *supra* note 3, at v, 82.

10. *Id.* at 82.

obligation to do something.”<sup>11</sup> On Hart’s account, “[t]o *feel* obliged and to have an obligation are different,” even if they may be “frequently concomitant.”<sup>12</sup> The difference lies in the reasons for action provided by one’s obligation. To liken duty to feelings of compulsion (as does Allan: “*they feel obliged . . .*”) is to miss Hart’s lesson on how duty relates to rules and rules relate to reasons for action, reasons that obtain even if one does not *feel* like complying; indeed, reasons that obtain even when one does not comply.

Possibly as a consequence of inattention to Hart’s internal point of view, Allan does not introduce any one of his vantages in the frame of the reasons for action established by law. We are not told how the concerned citizen or the judge or the legislator understands the need to acknowledge, maintain, apply, or make law. We are not told, for example, *why* the concerned citizen is “in the vast preponderance of circumstances” law-abiding (p. 5). Allan’s various actors are introduced to the reader but their relationship to law remains obscure and, throughout the book’s discussion, one senses that each actor has a good dose of self-interest mediating his relationship to law. Perhaps for this reason, the bad man’s vantage is the most transparent of all, precisely because he denies all but one of law’s reason-giving qualities: sanction.<sup>13</sup>

The failure to attend to the internal point of view and its understanding how law establishes reasons for action leads to another omission in the framing of Allan’s project. At no point does Allan justify his selection of points of view or his willingness to categorize them into the *primary*, *ancillary*, and *more peripheral*. The unanswered question of Allan’s entire project is: Why select *these* viewpoints and not others? In turn: Why prioritize the viewpoint of the bad man to that of the law-maker (as the ranking of primary to ancillary suggests)? Why pay any attention whatsoever to the viewpoints of the law professor and the others identified as “more peripheral”? The book’s claim that we might better study our understanding of law and debates in legal and constitutional theory by attending to different points of view is an important one, but it is frustrated by the absence of account why the nine declared points of view warrant study and investigation. Stated otherwise and in keeping

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11. *Id.* at 83.

12. *Id.* at 88 (emphasis in original).

13. See Holmes, *supra* note 8, at 459 (the bad man “cares only for the material consequences which such knowledge [of the law] enables him to predict”).

with the book's invitation, Allan fails to articulate *from whose viewpoint* his nine vantages are selected and ranked as more or less primary or peripheral *and in relation to what*.

The undertaking set by Allan better to understand law by attending to different viewpoints never recovers from the inattention in the opening chapter to identifying points of view and their relationship to law's reasons for action. Near the book's end, the reader is offered a pathway into Allan's understanding of vantage: he there says that "vantage point can simply mean, or be shorthand for, the point of view of *the typical sort of person holding that job or that outlook or filling that social role*" (p. 184, emphasis added). This echoes the account of the concerned citizen, identified earlier as "the average citizen" (p. 5). On this framing, the book presents itself, albeit without appealing to empirical data,<sup>14</sup> as a reporting of what each of the average citizen, bad man, judge, legislator, visiting Martian, law professor, moral philosopher, etc., think about certain issues. But why should anyone accept that an understanding of law can be better developed by attending to these pseudo-statistical averages? And, even if this method were accepted (as doubtless it is for certain other ends), should we accept that there is a (single) typical judge or legislator? Even if this generalization could be receivable within a single jurisdiction at a given time, is there any reason to think that it could be when the range of jurisdictions under study includes Zimbabwe, Russia, Canada, and "Britain in the eighteenth century" (p. 9)?

In his introductory chapter, Allan invites study not only of different viewpoints, but also of different legal systems. In his words, the "importance of vantage or perspective or standpoint in understanding legal debates . . . needs also to place those vantages in context" (pp. 7–8). Allan appeals to four "contexts" and, although he nowhere ranks them in relation to each other or appeals to the central case vocabulary casually employed in his categorization of points of view as more and less "primary," it is clear that he gives priority to what he "loosely" terms "a *nice, benevolent, liberal democracy*" (p. 8, emphasis added). The other three legal systems can be understood to be more or less deficient instances of this central instance. Allan's *wicked legal system* ranges from "Hitleresque or Stalinesque or Maoist

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14. One wonders, for example, how Allan reconciles his statement that "a bill of rights will appear least attractive from the Concerned Citizen's Vantage" (p. 170) with successive opinion polls re-affirming popular support for the Canadian Charter of Rights and Freedoms.

dictatorship[s]” to the “[l]ess brutal[] and lethal[] . . . apartheid South Africa-type regime or something along the lines of Mugabe’s Zimbabwe or Milosevic’s Serbia” (p. 8). Next is the *theocratic legal system*, where “law is asserted to have an explicitly divine origin, and hence for all who accept such assertions is by definition wholly moral” (p. 9). Finally, Allan appeals to the *so-so legal system*, being a system where “things . . . are noticeably worse than in our nice, benevolent, liberal democracy” but where things are, nevertheless, better than in wicked legal systems; he lists Russia and Venezuela as among the “exemplars” of so-so systems (p. 9).

As with Allan’s selection of viewpoints, we are not told why *these* four legal systems are important for our understanding of law. More fundamentally, we are not told how these four legal systems differ beyond the ranking of the benevolent as a more central case of a legal system than the so-so, wicked, or theocratic systems. Here again, a closer reading of Hart would have highlighted the need to clarify what about “nice, benevolent, liberal democracies” makes them so, thereby also clarifying how the other three legal systems are peripheral instances of this one, central system. As Hart explained, “[s]ometimes the deviation from the standard case is not a mere matter of degree but arises when the standard case is in fact a complex of normally concomitant but distinct elements, some one or more of which may be lacking in the cases open to challenge.”<sup>15</sup> Appealing to the different elements that likely inform Allan’s benevolent legal system (predominantly just laws, a democratic law-maker with primary law-making authority, and a commitment to fair and uncorrupted administration), one can relate each of his other three systems to that one system in different ways: the wicked legal system may differ primarily on account of the injustice of many of its positive laws, whereas the theocratic system may differ on account of its rule of recognition, and the so-so system on account of its imperfect and partial commitment to rule by law. However, without further accounting for what warrants the pride of place awarded to the benevolent legal system in Allan’s scheme, his reader is without compass in his travels through these other, less central legal systems.

To provide that compass, Allan would have had to resist his want to “place [his nine] vantages in context” (p. 8); that is, in

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15. HART, *supra* note 3, at 4.



the context of his four legal systems. For that manner of proceeding gets things precisely backwards: vantage cannot be placed in context because context is vantage-dependent. Stated less obscurely: Allan's *evaluations* of legal systems as benevolent, wicked, theocratic, and "so-so" are only possible and intelligible *from a point of view*. Consider, for example, whether Allan's bad man would agree with Allan's ranking of legal systems if the bad man is concerned with law only when and because he judges that unpleasant consequences are likely to follow a breach of legal rules. For the bad man, perhaps only the so-so legal system would be identified as a non-central instance because, *from his point of view*, predictability and clarity and congruence between declared rule and administration—"the prediction of the incidence of the public force through the instrumentality of the courts"<sup>16</sup>—are all that matter and, let us suppose, those desiderata are satisfied in the benevolent, theocratic, and wicked legal systems, but only imperfectly so in the so-so legal system.

With nine actors and four contexts, the book proceeds to examine three debates. Chapters 1 and 2 are devoted to the question: "Is it good or desirable to keep separate law and morality, 'law as it happens to be' and 'law as it ought to be'?" (p. 9). Chapters 3 and 4 "tackle judges and judging" and examine "the extent to which we can expect or rely on unelected judges to constrain themselves, the appointment of judges, the tensions between the demands of certainty and flexibility, the notion of the rule of law, the desirability of referring to (and deferring to) foreign law, democracy and more" (p. 10). Finally, chapters 5 and 6 explore bills of rights, including "ways of understanding rights, their connection to paternalism, a brief mapping exercise, the issue of their interpretation, a digression on statutory bills of rights" and, true to the method of the entire book, "how these instruments appear from the various vantages" (p. 10). The discussion of bills of rights fittingly comes last, as it seeks to tie together the discussion of the relationship of law and morality and the place and role of adjudication through the prism of judicially-enforceable (moral) rights in law.

The book thus ranges across a number of challenging questions. Much could be said of these questions and of Allan's various arguments to answer them, many of which warrant careful engagement. But I wish to maintain a focus on the book's primary strength—its invitation to look to vantage in our study

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16. Holmes, *supra* note 8, at 457.

of law, adjudication, and bills of rights—and to situate that invitation more generally within the study of law. It is an invitation that is lacking in too much of our legal scholarship, including—as is one of Allan’s main areas of research—constitutional theory. To do so, I seek to contrast Allan’s study of viewpoint with the project he understood himself to be carrying on: Hart’s *The Concept of Law*. The invitation put to the reader in *The Vantage of Law* would have been all the stronger had Allan attended more closely to Hart’s important distinction between two points of view as well as some of the challenges that burden the distinction.

## II. THE EXTERNAL AND INTERNAL POINTS OF VIEW

For Hart, the distinction between the internal and external points of view is essential for understanding “the idea of a rule,” an idea “without which we cannot hope to elucidate even the most elementary forms of law.”<sup>17</sup> What is a rule? Hart develops his answer by distinguishing between these two points of view. From the external viewpoint, an observer may be “content merely to record the regularities of observable behaviour in which conformity with the rules partly consists”; that observer may also record “further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met.”<sup>18</sup> However, if the observer “does not give any account of the manner in which *members of the group who accept the rules* view their own regular behaviour,” then, Hart explains, “his description of their life *cannot be in terms of rules at all*, and so not in the terms of the rule-dependent notions of obligation or duty.”<sup>19</sup> In other words, the external point of view will not be able to capture what a rule is—and, thus, will not be able to understand law—unless that viewpoint attends to the internal point of view. Without doing so, the observer’s description from what Hart labels the “extreme external point of view” will only be in terms of “regularities of conduct, predictions, probabilities, and signs”—in short, the external aspect of rules.<sup>20</sup> To understand a rule, one must attend to its internal aspect, an aspect manifested by certain observable

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17. HART, *supra* note 3, at 80.

18. *Id.* at 89.

19. *Id.* (emphases added).

20. *Id.*

features noted by the extreme external observer, but not quite captured by those features.

The internal point of view is the viewpoint of the participant, the member of a social group. From this viewpoint, the regularities of behaviour described by the observer tell but part of the story—for the participants who accept a rule, that rule is *used* as a *guide* to the conduct of social life and as “the basis for claims, demands, admissions, criticism, or punishment,” all identified by Hart as “the familiar transactions of life according to rules.”<sup>21</sup> The *consequences* of that use are what the external observer records as the regularities of behaviour, but this regularity is not self-moving and to understand the observable regularities one must understand why they occur. The internal point of view is “the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others’ behaviour.”<sup>22</sup>

At first glance, Hart’s distinction between the external and internal points of view might suggest that there are but two such viewpoints and that the study of law is confined either to reporting regularities of behaviour or assuming the viewpoint of a participant—incomplete description or unmediated participation. It is not so. Hart’s appeal to the qualifier *extreme* external point of view hints at the need to discriminate within the external viewpoint. He identifies that from the point of view of “an observer who does not accept the rules of the society which he is observing,” one may (a) “merely record the regularities of behaviour on the part of those who comply with the rules as if they were mere habits,” or (b) “record the regular hostile reactions to deviations from the usual pattern of behaviour as something habitual” in addition to the usual patterns, or (c) in addition record “*the fact that* members of the society accept certain rules as standards of behaviour, and that the observable behaviour and reactions are regarded by *them* as required or justified by the rules.”<sup>23</sup> The third version of the external point of view is the most sophisticated and it is the only one that attends

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21. *Id.* at 90.

22. *Id.* at 98.

23. *Id.* at 291 (emphases in original). For example, consider the following statement by Allan with respect to the judge’s vantage, which seems more obviously to fit within options (a) or (b) than (c): “judges may only sometimes, not always, be able to elide their own personal moral judgments or evaluations into the determination of what counts as law” (p. 152).

to the internal aspect of rules by reporting, albeit as *fact*, what participants, from the internal point of view, understand as the *reasons* for action established by the rule.

The point of view appealed to by Hart throughout much of *The Concept of Law* is this third instance of the external point of view—that of the “non-participant external observer . . . describing the ways in which participants view the law from such an internal point of view.”<sup>24</sup> In later work, Hart would term this the “hermeneutic method,” which “involves portraying rule-governed behaviour as it appears to its participants.”<sup>25</sup> On this understanding, the internal point of view is intelligible to the observer without himself adopting it, thus charting the promise, for Hart and others, of a descriptive, but not incomplete or misdirected study of law. Where Hart is perhaps less searching than he might have been is in questioning whether the hermeneutic method allows the observer to understand law *just as those with the internal viewpoint understand law*. Precisely because the observer does not adopt that viewpoint and therefore does not understand the rule as a standard *for himself*, he should be alive to the prospect that what “appears” to him *as fact* may not have the same salience for the participants for whom “appearance” is at best secondary.<sup>26</sup>

On this point, consider the three characteristics of obligation identified by Hart, the first one of which he identifies as the “general demand for conformity”: “insistent” and “great . . . social pressure [is] brought to bear upon those who deviate”; “hostile or critical” disapproval is manifested; those deviating feel “shame, remorse, and guilt.”<sup>27</sup> What is “important” for Hart-qua-observer “is that the insistence on importance or *seriousness* of social pressure behind the rules is *the primary factor* determining whether they are thought of as giving rise to

24. *Id.* at 242; see also Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT 311-54 (Jules Coleman ed., 2001).

25. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983). See also NEIL MACCORMICK, H.L.A. HART (2d ed., 2008).

26. An important engagement with this question is undertaken in H. Hamner Hill, *H.L.A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in The Concept of Law*, 3 CANADIAN J. L. & JURIS. 113 (1990). Hill puts the following challenge to Hart: “Given that the internal aspect of rules is primarily a psychological fact, Hart faces a dilemma. Either this psychological fact can be determined through observation of behavior alone . . . or one must adopt the internal point of view and thereby give what are, in effect, first person data reports that are then evaluated from a moderate external point of view.” *Id.* at 125. Bix helpfully summarizes this challenge as “the problem of knowing other minds.” Bix, *supra* note 5, at 189.

27. HART, *supra* note 3, at 86.

obligations.”<sup>28</sup> Now, there is little reason to doubt that this characteristic will appear primary to the observer. General demands and social pressure and hostile disapproval are observable and liable to be reported as facts. But when Hart brings into view “[t]wo other characteristics of obligation [which] go naturally together” with this first one,<sup>29</sup> one is tempted to think that observation privileges the observable quality of *conduct* to the *reasons why* that conduct manifests itself, reasons which are less visible and therefore less observable. In other words, that what is primary to the observer is at best secondary for the participant.<sup>30</sup>

For the participant who understands the reasons for action established by a rule, the “primary characteristic” of obligation is *not* social pressure but rather the reasons why social pressure should be brought to bear on those who deviate from their duty. So, when Hart reports from the distance of an observer the second characteristic—rules “are *thought important* because they are *believed to be* necessary to the maintenance of social life or some highly prized feature of it”<sup>31</sup>—one is lead to think that for the participants this must be the primary characteristic. Why? Because, without it, there is *no justification* to pressure those who deviate from their duty or, in turn, to feel shame, remorse, and guilt when one joins the class of deviants. By understanding those reasons, one can grasp Hart’s third characteristic of obligation more firmly than as (merely) another “characteristic” or “factor”: “it is *generally recognized* that the conduct required by these rules may, while benefitting others, conflict with what the person who owes the duty may wish to do” and, hence, obligation is “*thought of* as characteristically involving sacrifice or renunciation.”<sup>32</sup> True, but for the participant, this “third characteristic” is what mediates between the first two as the bridge between the reasons for action established by the law and the *need* to accompany law with sanction.

Reformulating Hart’s three characteristics of obligation and rule without the strictures of the hermeneutic method, one can say that, *as a participant who understands the reasons for action*

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28. *Id.* at 87 (second emphasis added).

29. *Id.*

30. Here again Allan’s invitation to look to the vantage of the legislator is a welcome one: in law-making, the reasons for the proposal-cum-enactment are at the forefront of the lawyer’s mind.

31. HART, *supra* note 3, at 87 (emphases added).

32. *Id.* (emphases added).

*established by a rule*, I and others like me establish and maintain this rule *because* we affirm the need for it and the good of it, a need and good that is common to us and others. We recognize, also, that these reasons for action established for us by the promulgation and maintenance of this (our) rule are not the only reasons for action intelligible to us and on which we are liable to act. We recognize not only the good and the need of this rule *for us*, but also the self-interested want for *me* not to comply with the rule, even if it would benefit *you* just as your compliance benefits me. And because you and I and others like us seek to promote the reasons for action established by the rule over these other reasons, we supplement the law's reasons for action—which each *should* act on but which we correctly predict not all *will* act on—with secondary reasons for action to motivate those in need of further motivation not to deviate from the course of action set by our rule: that is, social pressure and sanction.<sup>33</sup>

Hart's want to maintain a descriptive stance in his understanding of law means that his account of rules privileges what is observable to the reason-giving quality of rules. So, Hart seeks out how the internal viewpoint “displays itself” and is “manifested,” including in the use of rules “as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment.”<sup>34</sup> In turn, the reasons for action established by rules remain underexplored in *The Concept of Law*. Consider how “acceptance” is the noun commonly employed by Hart to account for the internal point of view. We know from Hart's critical review of John Austin's command theory of law that acceptance cannot be reduced to habitual obedience or conformity to patterned behaviour based on self-interest alone (*e.g.*, avoidance of sanctions). However, acceptance oscillates in Hart's usage from the potential richness of a “critical reflective attitude”<sup>35</sup> to the unreflective and uncritical “deference to tradition or the wish to identify with others.”<sup>36</sup> On

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33. Hart reasons along these lines, but with different emphasis, when he says: “‘Sanctions’ are . . . required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not . . . . Given this standing danger [of disobedience by some], what reason demands is *voluntary* co-operation in a *coercive* system.” *Id.* at 198 (emphasis in original). Unfortunately, this framework is absent from Allan's study of vantage.

34. *Id.* at 57, 98. Hart speaks of “criticism (including self-criticism), demands for conformity, and [of] acknowledgements that such criticism and demands are justified.” *Id.* at 57.

35. *Id.* at 57. Hart also employs the expression ‘distinctive attitude to that conduct as a standard’. *Id.* at 85.

36. *Id.* at 257.

this account, there is a live tension between a critical *reflective* attitude and an *unreflecting* inherited or traditional attitude, just as there is a live tension between Hart's appeal to using a rule as a *common standard* and his inclusion of *self-interest* as among the plausible candidates for acceptance.<sup>37</sup> As a result of these difficulties and others, if "one is looking for an account of law's normativity that explains its genuine 'reason-giving' quality, one is bound to be disappointed by Hart's concept of law."<sup>38</sup> To capture law's reason-giving quality, one must differentiate the internal point of view as Hart so successfully differentiated the external point of view. And here, Allan's invitation to look to the citizen, the judge, the legislator, and the bad man provide some promise for interrogating the internal point of view, precisely because one may explore how each participant relates to the reasons for action established by law in a somewhat different way.

### III. DIFFERENTIATING THE INTERNAL POINT OF VIEW

Hart's willingness to differentiate the external point of view was welcome, for it clarified the central case of the observer's viewpoint for understanding *as fact* what the participants understand *as reason*. Absent from Hart's study, however, is a similar examination of the internal point of view.<sup>39</sup> Hart reports the range of reasons-qua-motivations participants will have for acting in accordance with law—"calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."<sup>40</sup> However, beyond reporting this range, Hart does not identify a central case of the internal point of view as he had identified the hermeneutic method as the central case of the external point of view. And yet, because the hermeneutic method is parasitic on

37. This is carefully charted in Michael A. Wilkinson, *Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law*, 30 OXFORD J. LEGAL STUD. 441, 452, 455 (2010).

38. *Id.* at 453; see also JOHN FINNIS, *On Hart's Ways: Law as Reason and as Fact*, in COLLECTED ESSAYS IV: PHILOSOPHY OF LAW 245–46 (2011); Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1166 (2006); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1173–1209 (2006).

39. A careful review of the different uses of the internal (and external) point(s) of view by Hart is undertaken in Thomas Morawetz, *Law as Experience: Theory and the Internal Aspect of Law*, 52 SMU L. REV. 27 (1999), especially *id.* at 33–37.

40. HART, *supra* note 3, at 203.

the internal viewpoint, this omission explicitly to search out the focal meaning of the internal point of view is, perhaps, surprising even given the descriptive undertaking Hart set out for himself. For, given the range of participant viewpoints *out there*, which one(s) should be selected by the non-extreme external observer? Which should be reported? Which best allow(s) us to understand and describe law? In other words, “[h]ow does the theorist decide what is to count as law for the purposes of his description?”<sup>41</sup>

Although Hart does not *discuss* which internal point of view should be favoured, he can be taken to have *shown* his reader which should be favoured. For in Hart’s study of secondary rules he leaves the chair of the observer. He invites his reader to see the *reasons why* one would introduce secondary rules and the *need* for any community of persons larger than “a small community closely knit by ties of kinship, common sentiment, and belief” to do so.<sup>42</sup> Hart identifies—himself and not through the mouth of a participant under observation—as *defects* the uncertainty, the static character, and the inefficiency of “the simple social structure of primary rules.”<sup>43</sup> In turn, he identifies how each defect can be “remedied” by “supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind.”<sup>44</sup> Hart’s discussion outlines reasons why communities of persons have reason to choose to create a legal system and maintain it; why the rule of recognition gives one reason for acting in accordance with the primary rules it identifies (for the good of certainty); why rules of change give one reason for acknowledging the law-making acts of a legislature (for the good of change); and why rules of adjudication give one reason to comply with judicial authority (for the good of efficiency). Hart’s point of view here is “his, yours, and mine, not because they are his, yours, or mine, but because it seems true to him, you, and me, that there is *value* in having the rules at stake, *reason* for having them.”<sup>45</sup> This

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41. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 4 (2d ed., 2011). Earlier on the same page, Finnis asks: “*How, then, is there to be a general descriptive theory of these varying particulars?*” (emphasis in original). As outlined above, this same question burdens Allan’s stipulated, but unexplained selection of viewpoints.

42. HART, *supra* note 3, at 92.

43. *Id.*

44. *Id.* at 93, 94.

45. John Finnis, *Describing Law Normatively*, in *COLLECTED ESSAYS IV: PHILOSOPHY OF LAW* 36 (2011). But note that this is said with respect to: “Of course, he [Hart] begins by saying that, to understand these [power-conferring] rules (and their distinctness from obligation-imposing rules), we must look at them ‘from the point of



discussion *from the internal point of view* confirms what is implied throughout Hart's external-hermeneutic methodology: the primacy of the internal point of view which engages with and understands the need for, good of, reasons why communities should have law. In other words, Hart can be taken to have demonstrated what the central case of the internal point of view should be: a point of view which understands how law establishes reasons for action.<sup>46</sup>

Now, it is well known that Hart did not set this task for himself and his discussion of secondary rules takes some distance from the methodology otherwise employed in his scholarship.<sup>47</sup> Nonetheless, against the standard of evaluation employed in his discussion of secondary rules, one can discriminate between internal points of view, as Hart had discriminated between external points of view. As suggested above, when Hart discusses (rather than assumes) the internal point of view, it is presented as "an amalgam of very different viewpoints,"<sup>48</sup> ranging from a "critical reflective attitude"<sup>49</sup> to mere "deference to tradition or the wish to identify with others."<sup>50</sup> These various and varied attitudes are shared by those who "accept and voluntarily co-operate in *maintaining the rules*,"<sup>51</sup> which requires "the acceptance of the rules as *common standards for the group*" and not merely "the *relatively passive* matter of the ordinary individual acquiescing in the rules by obeying them for his part alone."<sup>52</sup> And yet, there is a passivity across the whole range of internal points of view reported by Hart: they each and all are reported as "maintaining rules that Hart's account treats as *out there*, available for acceptance and maintenance."<sup>53</sup> This is a less fully-developed account of the internal point of view than one which explores, as Hart's discussion of the reasons to transition from the pre-legal to the legal world explores, the reasons one has *to introduce* and *to choose* law. Once chosen and introduced,

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view of those who exercise them'." *Id.*

46. I do not here engage with the questions whether these reasons are conclusive or all-things-considered and whether they are, without exception, moral reasons. On the latter, see Hart's discussion of the "minimum content of natural law": HART, *supra* note 3, at 193–200.

47. On which, see the careful study in Perry, *supra* note 24. On the question of Hart's method in introducing secondary rules, see *id.* at 322–23.

48. FINNIS, *supra* note 41, at 13.

49. HART, *supra* note 3, at 57.

50. *Id.* at 257.

51. *Id.* at 91 (emphasis added).

52. *Id.* at 117 (emphasis added).

53. Finnis, *supra* note 38, at 240 (original emphasis removed, emphasis added).

“rules will of course have to be maintained,” but as Finnis invites us to see, this very maintaining, if it attends to the reasons for action established by the rules, can be “understood as a kind of (re)novation of the making.”<sup>54</sup> The reasons for adopting and establishing a rule will be (key among) the reasons we have for maintaining that rule, a lesson that comes through in Hart’s account of the reasons we have for introducing, *and therefore also for maintaining*, rules of recognition, of change, and of adjudication. In so maintaining the rules, we can understand ourselves to be engaged in “a kind of extending of the law-making activities of the rulers, an extending by a kind of interior personal re-enactment, person by person, of the ruler’s or rulers’ legally decisive adoption of their own legislative or other law-positing proposals.”<sup>55</sup> To recall Allan’s various participants, one might say that legislator, citizen, and judge jointly participate in law if they appeal to the reasons for action identified and acted on by the responsible legislator.

On this account, the internal point of view of the participant who understands the reasons why rules should be introduced has priority over the more passive participant who maintains rules found “out there.” The “practical viewpoint that *brings law into being* as a significantly differentiated type of social order *and maintains it as such*” will be the more central case of the legal viewpoint.<sup>56</sup> Why? Because with this viewpoint, the reasons for action established by law will be central, reasons that communities of persons evaluate and engage with when determining whether to bring law into being and to maintain it. And, tracking Finnis’s account, that viewpoint is the viewpoint of those who are *practically reasonable*, who in deciding and choosing what to do, adopting commitments, and acting in general understand legal obligation as presumptively a moral obligation and the establishment and maintenance of legal order as “a moral ideal if not a compelling demand of justice.”<sup>57</sup>

My present aim is not to defend that understanding of the focal meaning and central case of the internal point of view, but rather to argue in favor of doing with the internal viewpoint

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54. *Id.*

55. *Id.*

56. FINNIS, *supra* note 41, at 14 (emphasis added). See also John Finnis, *Grounds of Law and Legal Theory*, 12 *LEGAL THEORY* 315, 335–36 (2007). Throughout, it should be recalled that the discussion proceeds on the understanding that one is attending to the study of general jurisprudence and not to the study of the law of England and Wales circa 1961.

57. FINNIS, *supra* note 41, at 14.

what Hart did with the external viewpoint: to identify the more central from the less central. In so doing and recognizing (as Allan recognizes) the different viewpoints that can reasonably be identified as internal and thus eligible for observation from the external point of view, one can understand the reasons for affirming that there is “a mutual though not quite symmetrical interdependence between the project of *describing* human affairs . . . and the project of *evaluating* human options with a view, at least remotely, to acting reasonably and well.”<sup>58</sup> After all, the lesson of Hart’s hermeneutic external point of view is the importance of attending to an internal point of view and, given that “any given social phenomenon can be accurately described in an indefinitely large number of ways,”<sup>59</sup> the observer will evaluate which participant’s viewpoint, among the near endless candidates for observation, will be prioritized for his and our understanding of law.

With the internal point of view thus differentiated, one can acquire a better understanding why one and others should favour law.<sup>60</sup> Understanding how law establishes reasons for action means understanding law’s *practical point* or *purpose*. Another of the permanent acquisitions of jurisprudence articulated by Hart was the identification of “the different social function which different types of legal rule perform[,]” evaluated against his more general evaluation that law is “used to control, to guide, and to plan life out of court.”<sup>61</sup> Hart reviewed the different functions served by duty-imposing and power-conferring rules and the remedying functions served by secondary rules. Attention to the internal point of view—and especially the internal point of view of the practically reasonable participant—brings law’s practical point to the surface of analysis. For the participant confronts the questions: Why should I and we now adopt this rule? Why should I and we now maintain the rule then adopted by acknowledging, complying with, applying, and enforcing it? Why should we recognize those persons with law-making and law-applying authority? The

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58. *Id.* at 19 (emphasis added).

59. Perry, *supra* note 24, at 327.

60. One could add: defeasibly. That is, this understanding would have to take seriously the “moral risk” of alienation from social rules introduced by legal systems. See Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008); Wilkinson, *supra* note 37.

61. HART, *supra* note 3, at 38, 40. Compare Hart’s claim in his Postscript: “Like other forms of positivism my theory makes no claim to identify the point or purpose of law and legal practices as such.” *Id.* at 248.

questions begin with *why* because they are all oriented to rules over which human choice was exercised and, thus, are all oriented to the practical point of law. Once that question of practical point is firmly held in one's study of law, one arrives at the understanding that law's multifaceted practical points will yield multifaceted judgments about what counts as law, with more and less central cases of law.<sup>62</sup> The point, viewpoint, and focal meaning of law are all deeply interrelated.

To return to Allan's nine viewpoints, we might re-organize his ranking of primary, ancillary, and even more peripheral vantages. If our concern is better to understand how law establishes reasons for action, then we might welcome a study that situated, as primary, the viewpoints of practically reasonable citizens, judges, and legislators. The bad man would rank as a diluted instance of the citizen's viewpoint and one from which we could develop but a peripheral understanding of law. Allan's other actors—law professor, moral philosopher, omniscient being, and sanctimonious man—might warrant study, but not more centrally than our primary participants. And the visiting Martian would not be counted among the viewpoints we would seek to study: his observer's perspective would be our own, so long as our task was one of seeking to describe how others understand the point of law against the reasons for law and, so, the more and less central instances of legal systems that realize those reasons.

### CONCLUSION

Allan's study invites us to pay special attention to who speaks on behalf of the internal point of view. The invitation is a welcome one and, in this review, I have sought to take that invitation seriously and to explore it in the light of Hart's *The Concept of Law*, being Allan's declared inspiration. I have sought to show how, by attending more closely to Hart's exploration of the internal and external points of view and to the pathways for further study and reflection charted by them, Allan could have situated law's reasons for action at the heart of his accounts of vantage and legal systems. Despite these reservations, Allan's study is important for the invitation it

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62. This point is forcefully made in Finnis, *supra* note 45. His challenge in the essay is to "the assumption that in relation to human things constituted by human choices, *like law*, you can answer the question 'What is it?' before you tackle the question 'Why choose to have it, create it, maintain it, and comply with it?'" *Id.* at 45 (emphasis added).

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makes and for its insistence that understanding and point of view are more related than we too often care to notice in our study of law, judging, and bills of rights.