Comments on *The Vantage of Law*

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I. Introduction

In *The Vantage of Law*, Allan raises three main topics for discussion: the separation of law as it is from law as it should be, legal adjudication and bills of rights. According to Allan these broad topics are 'related'[1] and each is used as a testing ground for the hypothesis that the quality of argument in legal theory will be enriched by reference to an expanded range of vantages (that is, paradigm points of view). Allan wants to move theorists beyond Hart's 'descriptive sociologist' and, even more emphatically, beyond Dworkin's Herculean judge.

The central theme of the book is that consideration of the identified jurisprudential topics from an expanded array of vantages is likely to encourage the conclusion that the scope for moral deliberation and decision in legal adjudication should be minimised. This is most clearly seen, according to Allan, when the various issues are considered from the vantage of the concerned citizen. For example, bills of rights are said to 'appear least attractive from the concerned citizen's vantage'.[2]

The Vantage of Law provides readers with numerous insights into many discrete topics. The book does not build an overarching argument. Rather the general theme is illustrated through consideration of a number of issues that fall within Allan's three broad topics. In these comments I will:

(1) raise a couple of questions about the methodological premise of the book;
(2) contrast Allan's concern with keeping law 'as it is' and law 'as it should be' separate with what I understand to be Hart's primary concern with the so-called separability of law and morality; and
(3) conclude with some brief comments on Allan's arguments against the adoption of statutory bills of rights.

II. Why does 'vantage' matter?

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1 James Allan, *The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights* (Ashgate, 2011) 10.

2 Ibid 170.

Allan begins from the premise the consideration of a number of vantages can enrich our understanding of many debates in legal theory. I have no doubt that this is correct in relation to some jurisprudential questions. For instance, a contrast between the perspectives of Holmes' bad man with that of a participant who adopts the 'internal point of view' may serve to illuminate coercive aspects of law and the legal system. Although Hart was no doubt correct to emphasise the internal point of view, it is also clear that not all participants in a legal system adopt a practical attitude of rule-acceptance.

However, although consideration of a variety of jurisprudential issues from differing vantages may bring new insights, there are reasons to be cautious about the methodology as a general strategy of argument. Here I raise two concerns:

1. Not all vantages are likely to be illuminating; indeed, some may be largely distracting. More particularly, we need a clearer articulation of how and when 'vantage' is supposed to matter and whether the illumination brought by the methodology differs according to whether the question is a value-laden yet essentially descriptive one or a first-order normative question. The question of how the consideration of paradigm points of view will illuminate arguments about institutional design and what the law should be requires further elaboration. Of course, one can think about the likely consequences of the introduction of particular legal rules or institutions, and how these consequences may be different for different social actors or groups. However, this type of analysis does not encourage asking what a typical citizen, judge or bad man *might* think, but rather leads to more detached consequentialist lines of inquiry. The notion that there are different points of view has, of course, led some political theorists to develop methodologies that (imperfectly) encourage us to consider what it is like to walk in the shoes of persons who are situated differently from us. Yet this is clearly not the sort of analysis that Allan has in mind. At times Allan seems to be interested in what a person considering an issue from a particular vantage would be likely to think. But how this inquiry contributes to debates about the desirability of particular legal arrangements remains unclear.

The limits of the 'vantage' methodology become most clear in Allan's discussion of the 'law professor's' vantage on bills of rights. Allan claims that bills of rights are more likely to be thought justifiable when considered from this vantage. Arguably, however, the idea of there being a *paradigm* law professor, whose vantage we can accept as representing an interesting or relevant point of view, is more distracting than illuminating. For example, Allan's Law Professor is not only a moral realist, but a dogmatic one.[3] Yet how exactly the question of whether we should adopt a bill of rights is illuminated by conjecture as to whether such a figure would 'be more likely to support a bill of rights' or not remains to be explained. Nor is it apparent what it means to say that 'any law professor seeking to construct a theory of law out of a theory of adjudication will be better off' if there is a bill of rights.[4]

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3 Ibid 160.

4 Ibid.

If Allan's aim is to explain a fact about the actual levels of support within legal academia for bills of rights, then this fact would need to be demonstrated and, second, alternative explanations for it would need to be considered. If it is a fact that law professors tend to support bills of rights, is this really a consequence of law professors being dogmatic, moral realists or searching for something interesting to write about? In any event, the main difficulty is that a consideration of what a paradigm law professor is likely to think about the bill of rights debate (or any normative or moral question) is of doubtful relevance to reaching conclusions about that debate.

2. The construction of multiple vantages cannot tell us what the empirical consequences of judicial moralising will be. At best, they may indicate what consequences particular categories of persons may care about. 'Vantages' may thus be of assistance in helping frame relevant questions, but they should not be asked to do too much work in developing answers.

III. Thinking through the separation of law and morality

Allan draws an explicit connection between his project and Hart's, *The Concept of Law*.[5] As I understand him, Allan is primarily interested in whether or not law 'as it is' should be kept separate from law 'as it ought to be'. He claims that in ch 9 of the *Concept of Law* Hart argued that people *should* separate law and morality. He says that 'Hart argued that it is good to keep separate law and morality, "law as it is" and "law as it ought to be"'.[6]

An alternative way to characterise Hart's argument in ch 9 is, however, available. On this characterisation, Hart was arguing for a *broad*, rather than *narrow*, concept of law. This argument responds to a quite distinct question to that which appears to be Allan's main concern, namely, the extent to which law should incorporate moral principles and tests. On that question — ie e Allan's question — Hart arguably does not contend for a particular position at all (or perhaps his answer is 'it depends'). Consider, for example, the fact that Hart did not argue against judicial discretion (rather he shows an awareness that rules bring both advantages *and* disadvantages).[7]

Although Allan's efforts to get away from debates within positivism are laudable, Allan's reading of Hart arguably distracts us from an important lesson of

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5 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1992).

6 Ibid 3.

7 Ibid 130. One might assume he would have taken a similar position in relation to administrative discretion. Incorporating moral principles into law or conferring discretions on judges or other officials can be understood as making a power-conferring rule.

Hart's positivism — a lesson which is of relevance to Allan's arguments. A large concern of Hart's in *The Concept of Law* was to emphasise (1) the moral fallibility of law, and (2) the fact that there are features of law as an institutionalised system of rules which *may well* result in law which fails to live up to moral standards.[8] Once law is understood in this way, law's fallibility is a risk that requires a level of regulation. That is, once we understand the risks associated with an institutionalised system of rules legal mechanisms that enable or encourage the review and revision of significant legal determinations present as a response to these risks.

If one believes in some form of limited government (an idea which is core to the liberal tradition), then it will be desirable to develop mechanisms and institutions to prevent and correct undesirable legal outcomes when they occur. Rights-based judicial review is an institutional device that allows legislative decisions to be revised and revisited and may thus be conceptualised as one institutional mechanism (among others) for responding to the fallibility of law. Much the same may be said about other means through which judges may be empowered to make limited moral judgments in the course of adjudicating disputes (such as the common law method of law-making or statutes that expressly confer power on judges to make moral choices). Further, even if it is argued that judges should be given some (perhaps even significant) moral resources to assist them in their task of legal adjudication, this does not mean that one cannot (with Hart) prefer a broad conception of law which acknowledges that judicial decisions (even where authorised by law) are morally fallible. Just as citizens can choose to disobey legislative directives, they can also disobey judicial decrees and orders. And just as judges can disobey the legislature, the members of the executive can disregard or disobey the judiciary.[9]

IV. Vantages on statutory bills of rights

Finally, I would like to say something about Allan's views on statutory bills of rights. I agree with Allan that the question of whether or not a bill of rights operates in practice as a *strong* or *weak* limitation on legislative power is not merely a matter of legal form. That is, it is possible that statutory bills of rights in practice operate as *de facto* constitutional constraints. Nevertheless, the reason why s 33 of the Canadian *Charter*[10] (which enables the legislature to override judicial determinations) has been so little used or why declarations of incompatibility under the *Human Rights Act 1998* (UK) have not met with a more robust Parliamentary response may have little to do with the

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8 See Jeremy Waldron, 'All We Like Sheep' (1999) 12 *Canadian Journal of Law and Jurisprudence* 169; Leslie Green, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687; see especially Hart, above n 5, 117, 210.

9 Thus, when Allan claims that Hart's argument about whether or not good consequences flow from the separation of law and morality is too restricted and circumscribed — because it does not consider the consequences of enabling judges more or less scope to 'infuse their own moral views into law' (Hart, above n 5, 41) — the claim misfires because it elides two separate questions.

10 *Canada Act 1982* (UK) c 11, sch B pt I.

way they have been drafted.[11] The issues are not so subtle that politicians and concerned citizens cannot understand that there can be reasonable disagreements over the application of rights. In this context, it is worth noting that parliaments can respond to how the interpretive rule under a statutory bill of rights is understood by judges. Moreover, statutory bills of rights may also enable legislatures to exert more control over how judges apply common law interpretive approaches aimed at the protection of principles that judges determine to be fundamental common law rights. For this reason, a concerned citizen might hold the view that a statutory bill of rights could be part of a range of mechanisms designed to respond to law's fallibility in a way which is either not inconsistent with democratic principles or that does not come at too high a price in terms of those principles.

11 Cf Goldsworthy's consideration of Waldron's critique of bills of rights in the context of the Canadian *Charter*: Jeffrey Goldsworthy, 'Judicial Review, Legislative Override and Democracy' (2003) 38 *Wake Forest Law Review* 451.