6

Finnis's Methodology: Reflections on Practical Reason and Human Action

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I. INTRODUCTION

Finnis agrees with Raz and Hart that the internal perspective is key to elucidating the character of law; however, he states that Hart's internal point of view cannot do the job that it aims to do due to its 'instability'. Finnis then adds that there is a remedy to this 'instability', that is, that law should be understood from the point of view of the agent who possesses practical reason. This is an intriguing position that is difficult to understand if we do not move beyond the narrow view of a humane conception of action.

Finnis (and also to a certain extent Dworkin) advances a methodology in which the practical point of view enables us to identify and determine the subject matter of jurisprudence. Unlike Dworkin, however, Finnis acknowledges that there are both social and evaluative facts that play an important role in any descriptive-explanatory approach. Finnis advocates the view that any description and explanation of what law is should be done from the point of view of the man who possesses practical reasonableness.[1] In other words, practical reasonableness allows us to understand the unique qualities of law and the ways in which it can assist in fulfilling the basic goods in our lives. How does Finnis reconcile a descriptive-explanatory method and the view that there is a privileged point of view which is the point of view of

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[1] 'Practical Reasonableness' is the term introduced by Finnis, see J Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Oxford University Press, 2011) ch 5.

practical reasonableness without falling prey to the strong version of normative jurisprudence advocated by Ronald Dworkin?[2]

Finnis resorts to the Aristotelian idea, later well developed by Aquinas and medieval scholars, of 'focal' meaning or 'central' case, which is the view that the central case of law is the conception of law advocated by the man who possesses practical reasonableness.[3] This methodology enables legal theorists, Finnis argues, to differentiate the defective or marginal legal systems from the ones that approximate the ideals of justice. In other words, multiplicity and unification can be reconciled because both the common belief and the legal-positivist approach that wicked legal systems are law, together with the view that law serves ideals of justice, can be coherently unified.

Finnis is following Aristotle's insight: for Aristotle, a successful criticism of Plato's theory of the forms needed to show that there is multiplicity, but also unity, in key concepts such as 'being', 'good', 'democracy', and so on. The point of view of the man who possesses practical reasonableness, Finnis tells us, will explain why we consider to be law legal systems that do not possess desirable features such as pursuing the common good. Moreover, the legal theorist will simultaneously be able to explain why we consider law legal systems that do embrace the ideals of justice. If Finnis's argument succeeds, then Finnis's new natural law theory, as opposed to Dworkin's strong normative jurisprudence, might be a fruitful path to answer the main question of substantive jurisprudence, that is, what law is.

Finnis's methodological claims are intriguing and complex because one can identify two aspects in his methodology: an explanatory aspect and a practical one. The first aspect involves a descriptive-explanatory methodology; this means that he aims to describe legal concepts but believes that description cannot take place without considering the central case of jurisprudence, the point of view of the man who possesses practical reasonableness. According to this view, the legal theorist needs to explain and describe both the marginal cases of law and the core case of law as conceived by the practical point of view. This task cannot be done, however, without taking the point of view of the participant; that is, the point of view of the man who has habits, social practices, values, intentions, and beliefs in a given community. Finnis emphasises the role of anthropology, statistical analysis, and so on to expand the understanding of the participant's point of view. However, he tells us that such data only helps

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[2] R Dworkin, Law's Empire (Cambridge, Harvard University Press, 1986).
[3] T Endicott, 'How to Speak the Truth' (2001) 46 *American Journal of Jurisprudence* 229.

us to understand the degrees of perfection or defectiveness of the practical point of view and the principles of practical reasonableness in different cultures and social practice. It is the task of the intellect to grasp what is practically reasonable.[4] In other words, what is practically reasonable cannot be derived from the empirical data of human nature and the formation of a concept depends on grasping 'men's practical viewpoint'.

On the other hand, Finnis rejects Dworkin's view that our starting point should be our own moral and political beliefs, since according to Finnis these beliefs can be false or affected by our prejudices. We need to stand outside these beliefs and revise them in order to reach the 'right' reasons.[5]

For Dworkin, by contrast, the practical question needs to be answered in terms of a theoretical question: what I ought to do requires an answer to the question of what I ought *to believe* about the grounds of law. The practitioner, judge, legislator, and lawyer need to engage in an inquiry into the grounds of law that make legal propositions true, and this search is a

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[4] Finnis puts this as follows:

> Descriptive knowledge thus can occasion a modification of the judgments of importance and significance with which the theorist first approached his data, and can suggest a reconceptualization. But the knowledge will not have been attained without a preliminary conceptualization and thus a preliminary set of principles of selection and relevance drawn from some practical viewpoint. . . The methodological problems of concept-formation as we have traced it in this chapter compel us to recognize that the point of reflective equilibrium in descriptive social science is attainable only by one in whom wide knowledge of the data, and penetrating understanding of other men's practical viewpoints and concerns, are allied to a sound methodology about all aspects of genuine human flourishing and authentic practical reasonableness. Finnis (n 1) 17–18.

[5] Finnis asserts:

> Just as there is no question of deriving one's basic judgments about human values and the requirements of practical reasonableness by some inference from the facts of the human situation, so there is no question of reducing descriptive social science to an apologia for one's ethical or political judgments, or to a project for apportioning praise or blame among the actors on the human scene: in this sense descriptive social science is 'value-free'. Finnis (n 1) 17.

See also J Finnis, 'On Reason and Authority in Law's Empire' (1987) 6 *Law and Philosophy* 357. For a criticism of Dworkin's methodology as a failure to see the importance of practical reason, see my article, V Rodriguez-Blanco, 'Action in Law's Empire' (2016) 29 *Canadian Journal of Law and Jurisprudence* 431.

constructive task that requires us to take into account the practitioner's and the theorist's moral convictions.[6] True, it is integrity that will guide the practitioner in constructing the best possible interpretation of what the law is, and the requirement of fit with the bulk of the legal material will enable the practitioner to reach a balance between moral soundness and legal precedent. But it is a theoretically justificatory enterprise, characterised by determining the grounds of law.

The second aspect of Finnis's methodology is the practical one. At the core of Finnis's inquiry is the practical question of what one ought to do according to the principles of practical reasonableness. For Finnis, the theorist needs to explain the practical viewpoint, but once the practical viewpoint has been identified, it impinges on all of us: the theorist and the participant. It is because the practical viewpoint impinges on all of us that we must act according to the principles of practical reasonableness, and the law needs to be shaped according both to such principles and also to the basic values.

From the viewpoint of the theorist, according to Finnis, the explanatory task precedes the justificatory task. There is, however, a mutual interdependence between the explanatory and justificatory enterprises. Practical deliberation requires knowledge of the human situation, but

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[6] Ronald Dworkin asserts in several passages of *Law's Empire* that the interpretive task requires the substantive convictions of the theorist and the judge in order to determine which interpretation best fits the past legal materials and is morally sound:

> Each judge's interpretive theories are grounded in his own convictions about the 'point' – the justifying purpose or goal or principle- of legal practice as whole, and these convictions will inevitably be different, at least in detail, from those of other judges. Dworkin (n 2) 87–88.

Dworkin explains the role of convictions as follows:

> We can now look back through our analytical account to compose an inventory of the kind of convictions or beliefs or assumptions someone needs to interpret something. He needs assumptions and convictions about what counts as part of the practice in order to define the raw data of his interpretation at the pre-interpretive stage; the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about this. … Finally, he will need more substantive convictions about which kinds of justification really would show the practice in the best light. Dworkin (n 2) 67.

at the same time evaluation from the point of view of the man who possess practical reasonableness determines which descriptions are illuminating and significant.[7]

The concept of law, Finnis tells us, is used in different ways and in different contexts; in spite of this multiplicity, however, 'law' refers to a single concept, and consequently the different conceptions of law refer to a primary source, which is the point of view of the man who possesses practical reasonableness. Hence Finnis's argument shows that multiplicity can be unified by a central case of law. Let us scrutinise the two key roles of the 'central case' identified by Finnis.

First, Finnis begins with the idea that a descriptive-explanatory method needs to be aware of the different conceptions and self-interpretations of the people whose conduct and dispositions shape the concept to be investigated.

The complete understanding of the actions and practices entails an understanding of the point of the action or practice. The agent who executes the action or the participant who participates in the practice gives the action or practice its point or value. Therefore, only through understanding the self-interpretations of participants does the theorist understand the attributed value or point.[8] The theorist is confronted, however, by the problem of a variety of conceptions about the value or point of the practice and action. The point of a practice changes from person to person and from society to society.[9]

How can the theorist organise these conflicting and different self-interpretations and conceptions? Theorists in the human sciences resort to the identification of a common factor

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[7] Finnis asserts that there is an interplay and interdependence between evaluating with the view of acting reasonably well and describing and he puts this as follows:

> There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is very unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant. Finnis (n 1) 19.

[8] ibid 13.
[9] ibid 15.

that will unify the variety of conceptions about the point or value of a practice and action. This strategy is criticised by Finnis, and we now turn to this point.

The unifying role constitutes the second role identified by 'central case' methodology. Finding an answer to the multiplicity of conceptions and self-interpretations about the point of actions and practices means searching for a common factor that covers all these different self-interpretations and conceptions.[10] Kelsen, according to Finnis, is aware that the point or function of an activity is fundamental to the success of the descriptive-explanatory task of the subject matter. Kelsen, Finnis tells us, advances the view that the theorist needs to find one thing in common or the one feature that characterises and explains the subject matter.[11] This view presupposes that the concept 'law' is connected to one single feature.

Raz and Hart, Finnis tells us, break the 'naïve' methodology of Austin and Kelsen and argue that Austin and Kelsen are mistaken on the function attributed to law. Hart explains the concept of law by appealing to the practical point of the components of the concept. Both Raz and Hart emphasise that law provides reasons for actions and aims to guide the conduct of the legal participants. They also believe, according to Finnis, in the idea that these different conceptions have a principle or rationale that unifies them.[12]

Finnis criticises Kelsen because he presupposes that there is a common factor or one thing in common to all the different conceptions of law. But he also criticises Raz and Hart: although they abandon the idea that there is one thing in common to all instances of the concept of law, they adopt an *unstable* or unsatisfactory 'practical point of view'.[13] Finnis uses the term 'practical point of view' to refer to a point of view that addresses decision and action.[14] Thus Raz[15] adopts the 'ordinary man's point of view' and in a later work Raz refers to the 'legal point of view'[16] whereas Hart adopts the 'internal point of view', namely, the point of view of the man who uses the rules as a standard for evaluating his own and others' actions. Raz's and

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[10] There is a parallel motivation in Aristotle's introduction of the idea of 'focal meaning'. Aristotle aims to show, contra Plato, that the concepts of 'being', 'goodness', or 'friendship' do not stand for one single essence but for different essences and properties. However, they can be unified and therefore they can be the subject of investigation by one discipline, ie, metaphysics in the case of the concept 'being'. See T Irwin, 'Homonym in Aristotle' (1981) 34 *The Review of Metaphysics* 523, 540.
[11] Finnis (n 1) 6.
[12] ibid 10.
[13] ibid 13. We discuss this key point later in this and subsequent sections.
[14] ibid 12.
[15] For a discussion on the differences between Raz's and Finnis's methodologies, see J Dickson, *Evaluation and Legal Theory* (Oxford, Hart Publishing, 2001).
[16] J Raz, *Practical Reason and Norms* (Oxford, Oxford University Press, 1999).

Hart's practical points of view, Finnis tells us, represent steps forward from Austin and Kelsen, who presuppose the man who merely acquiesces in the law because of fear of punishment.

However, Finnis finds both Raz's and Hart's internal points of view *unstable* and unsatisfactory because they cannot explain the distinction between different points of view such as that between the anarchist and the ideal law-abiding citizen. Legal theorists need a principle or rationale that will enable them to discriminate between points of view and to identify what is significant or relevant when organising the different self-interpretations and conceptions of law.

In the current literature, Finnis's criticism of Hart's and Raz's methodology have ignited discussions about the differences between central or focal cases of law[17] and defective instances of law.[18] Finnis's criticism of Hart's internal point of view focuses on its problematic character for unifying the different self-conceptions and self-interpretations of law. However, a further explanation of the problematic character of Hart's internal point can be found in the following quotation:

> But all this is unstable and unsatisfactory because it involves a refusal to attribute significances to differences that any actor in the field (whether the subversive anarchist or his opponent the 'ideal law-abiding citizen') would count as practically significant.[19]

In other words, Finnis, tells us, that the participant of the legal practice, for example, the citizen, the judge, the lawyer, are engaged with the law and are interested in distinguishing between a good and a *not so* good norm, between a just directive and unjust directive, between a rational court-decision and a non-rational court decision. Hart's internal point of view refuses to make further distinctions between the peripheral and central cases of law and this brings *instability* to the concept.

Hart's internal point of view as unstable can be traced to a more fundamental criticism, that is, Hart's internal point of view cannot be used to understand the point of human actions and therefore we cannot rely on Hart's internal point of view to identify *significance differences that any actor in the field can make*. In the 'methodology' literature, this argument on instability is overlooked and its premises has not been carefully examined. In this chapter, I will try to

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[17] For an alternative view on central case or focal meaning, see my article V Rodriguez-Blanco, 'Is Finnis Wrong?' (2007) 13 *Legal Theory* 257.
[18] Murphy develops a defence of Finnis's methodology, see M Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge, Cambridge University Press, 2006). By contrast, Julie Dickson engages in a distinction between direct and indirect evaluation and argues that Finnis's methodology is close to the former. See Dickson (n 15).
[19] Finnis (n 1) 13.

show that the idea that the internal point of view is unstable is both key to understanding the limits of Hart's legal theory and sheds further light on the view that law should be conceived in terms of a central or focal case.

We could infer that for Finnis, placing practical reason at the core of the concept of law provides the anchor that gives stability to the concept of law and enables us to grasp it correctly. But why does practical reason constitute the paradigmatic or 'central case' of law? Why should it have priority over other internal points of view, for example, the point of view of the bad man or woman, or the point of view of the legal anarchist? Furthermore, why does it provide stability? What kind of stability is Finnis talking about? Finnis,[20] Grisez[21] and Tollefsen[22] have defended the priority of the practical reason viewpoint using Aquinas's conception of intentional action and the four orders of nature. However, the sceptical theorist, the critical legal theorist or the Holmesian bad woman remain indifferent to this defence and are unpersuaded by the arguments of Finnis, Grisez or Tollefsen. Furthermore, they do not seem to understand the verdict of instability advanced by Finnis against Hart's internal point of view.

I will explain why this instability arises though I will not rely *exclusively* on the notion of intentional action, which I have defended elsewhere, advocated by Aristotle, Aquinas, Anscombe, Grisez, Finnis and Tollefsen, and the four orders of nature. My key argumentative strategy is a negative one, that is, to show that Hart's model of action cannot account for the point of human actions in law.

I will defend four claims:

(a) Understanding a human action in law involves understanding what that action aims to achieve ie, its point.
(b) Hart's internal point of view cannot be used to understand the point/s of the action. His position only shows what the mental state, ie, belief, of the agent who performs an action might be when she follows the rule of recognition and/or legal rules in general.
(c) Understanding the internal mental state of the action is not understanding the point of the action.
(d) Understanding the mental state of the agent might or might not provide an understanding of the point of the action, but if it does so it can be considered mere fluke. Therefore, Hart's internal point of view is *unstable.*

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[20] J Finnis, 'Law and What I Truly Should Decide' (2003) 48 *American Journal of Jurisprudence* 107; J Finnis, *Aquinas* (Oxford, Oxford University Press, 1998).
[21] G Grisez, 'The First Principles of Practical Reasons: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2' (1967) 10 *Natural Law Forum* 168.
[22] C Tollefsen, 'Aquinas Four Orders, Normativity and Human Nature' (2018) 52 *Journal of Value Inquiry* 243.

I will presuppose that (a) is uncontroversial as the 'point' of an action can be construed widely to include motives, interests and values. In order to show that mental states, that is, beliefs, cannot capture the point of an action and its eventual content (b), I will use a theory of intentional action defended by Anscombe. I will argue that when we observe an action from the third-person perspective we do not capture the mental state of the performer, nor provide an interpretation of the bodily movements which are the physical marks of the action. We are trying to 'see the point' of the action to give meaning to it. If we cannot see the point/s of the action it is because we are not exercising certain capacities[23] and dispositions, that is, practical reason and practical imagination, and these capacities are learned through language-games embedded in human forms of life.

Arguably, we are blind to some aspects of the point of an action. It is tempting to theoretically replace this blindness with a theory of mental states, for example the belief that an action corresponds to the type of action that is legal, or other fictions that obscure the understanding of human actions. Finally, I will argue that the instability is produced because we need to rely on *remembering* our mental states and we might or might not be able to remember our beliefs about legal rules. I might remember my mental state of belief in the rule of recognition or legal rules in general, but this is *mere fluke*. There is no route that guarantees my remembering and grasping the meaning or point of an action. By contrast, in order to 'see the point of an action', whereby certain capacities and dispositions are exercised, we need to exercise the capacity of recognising actions learned in language-games. We should not obscure the 'point of an action' with fictions like mental states as in doing so we lose the agent and the action itself.

The chapter is divided into two parts: in the first part I use Anscombe's theory of intentional action to shed light on 'seeing the point of a human action' and I discuss learning the *logos* of social practice as the exercising of our capacities within specific forms of life. In the second part I delve further into Finnis's criticism of the instability of the internal point of

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[23] I understand capacities as the abilities of human beings to engage in different operations. In Aristotle and Aquinas, capacity is understood as the actuality of a potentiality. One key capacity is the ability of human beings to act in the world and bring about things, values, state of affairs. This would also include dispositions, as learned capacities are dispositions, see T Aquinas, *Summa Theologiae*, T Suttor (ed), vol 11 (Cambridge, Cambridge University Press, 2006). A full discussion of capacities and dispositions will go beyond the central argument of this chapter. For a discussion of capacities as actualisation of potentialities with special focus on practical reasoning, see ch 4 of my monograph V Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Oxford, Hart-Bloomsbury, 2016).

view and defend the Finnisian claim that the exercise of our capacity of practical reason is the central case of human action and therefore of human action in law.

II. 'SEEING THE POINT OF AN ACTION' AND A THEORY OF INTENTIONAL ACTION

Our actions are not merely physical movements or the representations of one or more mental states; our actions have an inner dimension that gives them unity. More precisely, this unity results from the agent's choice and intention.

The choice that expresses itself in the physical realm in certain movements makes it a certain kind of action or constitutes its nature or species.[24] This being so it is incumbent upon us to ask how this inner dimension can be intelligible to third persons. For example, when I see someone sitting at a desk and tracing lines on a sheet of paper with certain features, I can understand that she is writing a letter *if and only* if I grasp what she intends to do. This inner dimension is intelligible because of the *logos of intentional actions* – in other words, the reasons behind actions – can be understood through the specific context of the exterior performance. I understand the letter writer's intentions, for example, because I recognise objects with the typical features of stationery and envelopes on her desk and I know what is required by the practice of writing letters.

Anscombe discusses this relationship between the exterior performance of actions and the institutional facts or contexts in which they occur in her 1958 article 'On Brute Facts'.[25] In what my co-author and I have termed her 'institutional transparency thesis', Anscombe argues that while a factual description of an action 'A' *is not a description of the institution behind* 'A',[26] the *existence* of a factual description of action 'A' does *presuppose* an institution A. Put in the context of intelligibility, to understand the inner dimension (ie, intention or choice) of a third person's actions requires understanding the social or institutional context in which those actions occur. To understand that the utterance of certain words by someone is a promise, for example, I need to know how promises are institutionalised in my community, even if – and

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[24] In what follows, I develop an argument which I had outlined (with Pilar Zambrano) in V Rodriguez-Blanco and P Zambrano, 'One Myth of the Classical Law Theory: Reflecting on the "Thin" View of Legal Positivism' (2018) 31 *Ratio Juris* 9.
[25] GEM Anscombe, 'On Brute Facts' (1958) 18 *Analysis* 69.
[26] ibid 72.

this is the transparency thesis – I do not need to think about that while I promise or when I recognise a promise. Furthermore, the intelligibility of these actions occurs not at the level of the theoretical but at the level of the practical.

To explain further, we must ask what the *institution behind the description* is. Anscombe offers an example, 'I owe the grocer five pounds for the potatoes he has supplied to me', that we can use as a starting point.

Let us say that I order five kilograms of potatoes from the grocer, the grocer loads the potatoes into his delivery van, drives to my house, rings my doorbell, unloads the potatoes from his delivery van, and he gives me a bill for five pounds. You observe both my actions and those of the grocer. You conclude, as an observer, that 'I owe the grocer five pounds'. You reach this conclusion, but how? Do you reach this conclusion because you ask me what am I doing and I tell you? But you would only ask this question when what I am doing is unintelligible to you. You understand both the way I move my body and the reasons *why* I am moving my body *as a unity*. Unless you already possess the concepts necessary to understand the reasons *why* I move my body – concepts such as 'supplying', 'owing', and 'five pounds' – simply observing the way the grocer and I move our bodies as I receive the potatoes and the bill for five pounds does not tell you that 'I owe the grocer five pounds for the potatoes he has supplied.' The obligation of owing only becomes intelligible to you if you already understand the action of supplying as the reason for the obligation of 'owing'. In that case, you already grasped the concepts of supplying, owing, and five pounds prior to the bodily movements between the grocer and myself. You, me and the grocer had previously learned that set of concepts within the context of the social institution of *buying and selling*. We learned that set of concepts when we were young and learned that the exchange of goods in our society creates obligations. We learned *as a unity* the bodily movements and the *reasons why* we buy, sell, and satisfy our obligations in the exchange of goods. My bodily movements, the bodily movements of the grocer, and the reasons *why* we perform those actions, in other words the *logos* of those actions, are understood as a whole in Anscombe's example. Your understanding, as an observer, of the unity of bodily movements and reasons why those bodily movements were performed does not describe the institution of buying and selling. Rather, this background institution provides you with the basis by which you determine the intentions behind the bodily movements that stamp a *logos* on those bodily movements.

Because the action is practical it should be understood as practical. We can say that the action is 'practical' because it is about the intentions of the grocer and the buyer. The grocer

and buyer intend to produce a certain state of affairs and they know *why they are doing what they are doing*. The grocer knows why he loads five kilograms of potatoes into his delivery van, drives to my house, rings the doorbell, and unloads the potatoes at my house. As the buyer, I know why I am ordering the potatoes, why I am receiving them from the grocer, and why I am receiving the bill for five pounds. Additionally, we both know *what* the other is doing and why they are doing it because we both understand the background institution of buying and selling that allows us to make our bodily movements intelligible.

Would, Anscombe asks, the same bodily movements in a film where one actor supplies the potatoes and another actor receives the potatoes be different from the example above? In the example above, as the buyer, I *owe* the grocer five pounds, whereas in the film we would not say that the actor playing the buyer owes the actor playing the grocer five pounds because the *intention* of the agents is different. Despite the actors' bodily movements in the film, they do not intend to create a purchasing contract or the obligation to satisfy such a contract. When the grocer hands me the bill in the example, I am the buyer and the grocer and I do intend to create such a contract; therefore, I understand that *I owe* the grocer five pounds. And the observer, who understands the difference between the background institutions in each situation, understands the difference between those two situations.

To further understand this subtle and difficult point we need to understand Anscombe's conception of intentional action which rejects actions as a two-link, causal-effect chain composed of an interior act, that is, mental states such as beliefs and desires that *cause* an action, and the exterior action that is the *effect* of the interior act. Like Aquinas, Anscombe does not separate the physical action and the answer to the question *why* the agent is acting in the way he or she is acting. If the question why cannot be applied to the physical action, then more than likely the action was not intentional. Which is to say that there are not two actions, an interior and an exterior, but only one action. Different perspectives can analyse that action, but the exterior action is one and the same as, and not essentially different from, the interior will. The one action is its performance and manifestation.[27]

What, then, is the choice or will that is performed and manifested by the exterior action? To answer, we must determine whether or not a distinction exists between the intention to act, in which case my will is operant and involved in the action, and a voluntary action. Of course,

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[27] T Aquinas, *Summa Theologiae*, T Gilby (ed), vol 17 (Cambridge, Cambridge University Press, 2006) q 17, a 4.

actions can be voluntary; for example, talking, walking, jumping, and so on, are voluntary actions. Actions can also be involuntary; for example, my body's respiratory functions and my digestive system are involuntary actions. But for voluntary actions specifically, do all voluntary actions involve the will? Put more concretely, do all voluntary actions involve a choice?[28]

Consider two different examples. In one, I move my arm but instead of my arm moving my foot moves. In another, I move my arm and my arm in fact moves. My actions are voluntary in both examples; however, my action does not perform my choice in the first example. My choice is to move my arm, and in this first example my choice is not satisfied. If you were observing me in these two instances you would observe my foot move and then you would observe my arm move. How would you be able to determine whether or not my choice was satisfied in each instance? We can make a distinction, then, between a merely volitional act, that is, an act initiated by a person, and a wilful act, that is, a volitional act that actually fulfils a choice. That said, how can a third-person observer know whether the act is volitional or wilful? Observers could see that I move my foot and arm, but they cannot know my choice so they cannot, from observation alone, know that my arm moved intentionally.

Arguably, the way to determine whether or not an action is willed is to ask the agent to describe the action. For example, we see John moving his hand and hitting Mark, and we ask John whether his motion – which was clearly volitional – was intended to hit Mark or whether the hitting was accidental. But, even if the agent's description is the best way of determining whether or not the action is willed, agents are only very rarely asked to describe their actions because, in most cases, the institutional background or language-games in combination with the physical movements of the action are sufficient to make such a determination. If John hits Mark while they are standing in a ring wearing shorts and boxing gloves, we know that the hitting was intended. The agent's description of her choices may even become irrelevant, as in the context of the law, where the institutional background makes these choices intelligible.

A theoretical engagement with human action is closer to an explanation than to a form of understanding. In theoretical or metaphysical knowledge, actions are individuated through a cognitive process that focuses not on identifying *choices* performed in actions but on identifying actions as effects of previous events. Donald Davidson, in his account of intentional action,

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[28] See T Aquinas, *Summa Theologiae*, T Gilby (ed), vol 18 (Cambridge, Cambridge University Press, 2006) q 18, particularly, aa 2 and 7; Finnis, 'Law and What I Truly Should Decide' (n 20) 65–66; M Rhonheimer, *Perspective of the Acting Person: Essays in the Renewal of Thomistic Moral Philosophy* (Washington, Catholic University of America Press, 2008) 41.

defends this causal theory of action and the correlative theory of the interpretation of concrete actions.[29]

Many scholars have assumed that Davidson and Anscombe hold similar views regarding intentional action because Davidson uses some of Anscombe's ideas and because of the difficulty and complexity of Anscombe's work, which does not rely on a general theory or system.[30] However, Anscombe's and Davidson's accounts of intentional action and of the interpretation of action are, in fact, fundamentally different.

For Davidson, intentional actions are understood in terms of the reasons that the agent gives when describing what she did. The goal is to rationalise the action. Furthermore, the agent can be said to have a reason if: (a) the agent has a pro-attitude toward the action; and (b) the agent believes (or knows, remembers, notices, perceives) that his action is of that kind.[31] Davidson calls this pairing of belief and desire a primary reason and he claims that 'a primary reason for an action is its cause'.[32]

In Davidson's account, beliefs and desires are mental events that (may) *cause* an exterior action, which is a subsequent and corresponding event. The relationship between mental events and actions is causal, specifically a kind of causal relationship between facts.[33] So, my desire to flip a switch and my belief that my action is of that kind causes the action *I flip the switch*. Furthermore, observation of the action allows us to induce the cause. Even though we only observe the effect, that is, the action, which in this case is the flipping of the switch, we can induce the cause, that is, the mental events that caused the effect. This cognitive process, which allows us to individuate the nature of various actions, is not fundamentally different from the cognitive process which explains physical events.

Davidson denies that there are psychophysical laws that connect actions and reasons, saying that if there are laws, they ought to be neurological, chemical or physical.[34] In the last 40 years, his account of intentional action has exerted great influence. In that time, practical reasoning has tended to be assimilated into intentional action as a mental state.[35] The

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[29] D Davidson, 'Actions, Reasons and Causes' (1963) 60 *Journal of Philosophy* 685.
[30] J Annas, 'Davidson and Anscombe on the "same action"' (1976) 85 *Mind* 251.
[31] Davidson (n 29) 685.
[32] ibid.
[33] ibid.
[34] ibid.
[35] See, eg, J Wallace, 'Practical Reason', in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford, 2020) plato.stanford.edu/archives/spr2020/entries/practical-reason/: 'Practical reasoning gives rise not to bodily

assimilation of practical reasoning as a mental state offers two advantages over competing accounts like Anscombe's. One, this assimilation allows neo-Humeans[36] to advance the Humean view that desires or pro-attitudes motivate and explain intentional actions. Two, this assimilation is compatible with a descriptive, scientifically-neutral understanding of action as caused by mental events. Despite these advantages, Davidson's view contains a notable flaw; namely, it has no way to guarantee that the causal link between a reason and the corresponding action is right.[37]

There are other problems that affect the standard model of intentional action. If an intention to act is a mental state, it entails that I can remember my mental state and can reflect upon it. Unfortunately, however, it seems that the memory of or ability to reflect on my intention as a mental state can vanish. If intentions are purely mental states that can vanish, we might not remember them correctly, they might not endure, and then our intentional action might also vanish.

In conclusion, putting human actions on the same level as physical/theoretical or metaphysical events, or putting the understanding of human actions on the same level as the explanation of effective causal relationships, fails to guarantee the individuation of actions.

As previously discussed, the best way to determine if an agent willed an action is to ask the agent themselves for a description of the action. We can prompt a description of the action by asking the agent *why* they performed an action.[38] Prompting a description in this way is known as the 'why-question methodology' and is the key method in Anscombe's *Intention* for clarifying the connections between our actions and our practical reasoning.[39] Fully understanding this methodology requires accounting for several considerations:

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movements per se, but to intentional actions, and these are intelligible as such only to the extent they reflect our mental states'.

[36] See G Harman, *Change in View* (Cambridge, MIT Press, 1986); G Harman, 'Willing and Intending', in R Grandy and R Warner (eds), *Philosophical Grounds of Rationality* (New York, Oxford University Press, 1986); S Blackburn, *Ruling Passions* (Oxford, Clarendon Press, 1988); M Smith, *The Moral Problem* (Oxford, Blackwell, 1994).

[37] Chisholm was the first scholar to write about deviant causal chains, R Chisholm, 'Freedom and Action', in K Lehrer (ed), *Freedom and Determinism* (New York, Random House, 1966). Other, more radical scholars go further and deny that intentional actions are causes, see, eg, J Dancy, *Practical Reality* (Oxford, Oxford University Press, 2000).

[38] GEM Anscombe, *Intention*, 2nd edn (Oxford, Blackwell, 1963).

[39] Anscombe's exposition follows Aquinas's explanation of intentional action very closely. Notably, Kenny argues that Aquinas' model would be better understood more as a Gestalt psychology. A Kenny, *Aristotle's Theory of the Will* (New Haven, Yale University Press, 1979).

(a) paradigmatically, an intentional action is a sequence of actions aimed toward the action's final end;
(b) we know that the explanation finishes because the last step is described in terms of good making characteristics that make intelligible and illuminate as a coherent whole the successive steps of the action;
(c) we have only one action, not different actions, and that one action is unified by the action's final end as a reason for the action, understood with regard to good-making characteristics;
(d) the reason must be a reason that might be genuinely offered to others as a justification, and this reason must also be the same as the reason that the agent gives to themselves.

With these considerations in mind, we can now explain the why-question methodology.

Anscombe begins *Intention* by stating that the subject of the book should be studied under three headings: expression of an intention; intentional action; and intention in acting,[40] and that all these should be understood as interdependent. Thus, an expression of an intention cannot be understood as a prediction about my future acts nor as an introspective explanation of an intention such as desires, wants, and so on. If I utter 'this afternoon I will go for a walk' as an expression of an intention, the utterance cannot be understood as a forecast of the future. Indeed, the intention is rightly expressed by the utterance, even if it then turns out that as a forecast it would have been false, since a friend comes to visit and I cannot leave home. Nor can the utterance be an expression of desires or wants. I might intend to walk even if I have no desire whatsoever to do it: for example, I might need to walk to a friend's house to return a book, even if I would rather do something else. Anscombe tells us, however, that people formulate expressions of intentions about the future, and they usually turn out to be correct.[41] How is this possible?

To answer this question, she tries to explain the way in which we can identify intentional acts and separate them from non-intentional actions. Doing this requires taking the logical step of trying to understand what it means when I say that 'I have acted with an intention.' For Anscombe, acting intentionally means acting for a reason or being able to provide *reasons for actions*, with the understanding that the question *why* can be said to apply to such actions.[42] All of which is to say that we act intentionally when we act for reasons, which in turn entails us to be responsive and sensitive to a framework of justification for our actions. If I perform an action

[40] Moran and Stone explain the transformation of these three headings in the post-Intention literature. R Moran and M Stone, 'Anscombe on Expression of Intention', in C Sandis (ed), *New Essays in the Explanation of Action* (New York, Palgrave MacMillan, 2009) 37.
[41] Anscombe (n 38) ss 3–4.
[42] ibid ss 4–6.

Φ, am asked why I have performed Φ and give a genuine answer, for example, 'I was not aware I was doing Φ' or 'I did not know I was performing Φ,' the action cannot be said to be intentional or directed by reasons. The action might be voluntary, but it is not intentional.[43] On the other hand, if the answer takes one of these forms: 'because Φ' or 'in order to Φ,' then it might be a prima facie case for an intentional action, which is to say an action directed by reasons. Reasons demonstrate themselves, so to speak, in intentional actions, and reasons demonstrate that they operate as a part of the practical reasoning of an agent.

The problem for the understanding of action is whether or not, when asked *why* we have performed an action, we are in control of the truthfulness of intentions. A further problem presents itself: whether or not we can give a plausible answer without relying on the testimony of the agent of the action.

Anscombe notes that a set of contextual conditions allows us to determine whether or not the agent has given their genuine intentions in response to the question *why*.[44] This set of contextual conditions are those concepts learned at a young age through social context. For example, we learn that money is necessary to purchase goods and that if we order goods for home delivery then we owe the seller money. In our example of a film scene in which a grocer delivers potatoes, we know from the contextual conditions that when the actor-buyer says he owes the actor-grocer five pounds, the actor-buyer's words are not genuine. Or given the example from Anscombe's *Intention*, if a person poisons a river with toxic waste and we ask 'Why?', and the person answers 'I am just doing my job', then we can determine whether or not this action is in fact a part of his job and whether or not the contextual conditions make it true, and, if not, then we have a reason to suspect that his response is not genuine.

Intentional actions, or actions performed for reasons, require a sequence of steps or actions and, therefore, a sequence of reasons that explain each action-step. If somebody writes a letter and has a reason to do it (eg, greeting a friend), she does so by taking a sheet of paper and a pen and by tracing letters with the pen on the paper. Writing the letter is her reason for tracing lines on the sheet and the latter is her reason for taking the sheet from the drawer. This being the case the question arises of how we can know when the explanation is complete and the agent can stop giving justifications. Anscombe argues that the justification stops when the agent describes the endpoint of the action with regard to what is desirable or good for itself.

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[43] ibid s 17.
[44] ibid s 25.

The endpoint of the action is, then, a state of affairs, a fact, an object, or an event that the agent appears to consider desirable or good. The state of affairs, fact, object, or event is considered by the agent to be a good sort of thing. This explanation is commonsensical and arguably the most *naive explanation of our actions*.[45] For example, when the potatoes are delivered to my house, the grocer does not say he is delivering them because he is in the mental state of desiring to deliver potatoes and has the mental state of believing and remembering that this is that kind of action. On the contrary, in order to deliver the potatoes, the grocer loads the potatoes into his delivery van, drives to my house, parks the van in front of my house, exits his van, unloads the potatoes from the van, rings my doorbell, and takes the potatoes to my kitchen. The sequence of action steps obtain intelligibility and unity in the good-making reason that, for instance, the grocer sells potatoes that he buys from farmers, that he wants to earn money, and so on.

Let us recall the difference with the actors in the film scene of buying and selling potatoes. From the point of view of the agents, it was their *intention* to attain a specific good that differentiates the actions of the actors in the film from the actions of the grocer who delivers potatoes to my home. In the scene, the actors do not intend to buy and sell potatoes, therefore we cannot say that the actor-buyer owes five pounds to the actor-grocer.

To return to our initial discussion, how can the intention/choice of the agent become intelligible to an observer and allow the observer to individuate that intention/choice? Intelligibility requires: (i) that both the agent and observer hold a mutual understanding of what good-making characteristics may be intended or chosen by the agent in performing an action; and (ii) that the good-making characteristics intended by the agent are manifest in the action. The first condition requires that good-making characteristics do not exist purely through convention, nor are discoverable through empirical methods, but are, at least to some extent, the objects of human intelligence. Were the good-making characteristics not objects of human intelligence, the agent would not even be able to name them. The second condition requires that the intended good-making characteristics of an action be a specific instance of the good-making characteristics of the institutional background or social practices that give actions their final form or *logos*.[46]

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[45] See Grisez (n 21) 177.
[46] ibid 174. These arguments are further developed in P Zambrano, 'Fundamental Principles, Realist Semantics and Human Action' (2015) 46 *Rechtstheorie* 323.

With these conditions in mind, the primary aim of the why-question methodology is to highlight the articulation or structure of an intentional action.[47] In our potatoes example, the grocer does not think and reflect on why he is doing what he is doing at each concrete action step. Rather, the grocer understood the sequence of action steps necessary for buying and selling and the good-making characteristics that explain *why* we human beings buy and sell in the social context.

The concern, then, is not to discover the propositional attitudes – the desires and beliefs that explain buying and selling – nor even to explicitly describe the institution of buying and selling, nor to discover the nature of the human action in terms of a given good. The concern is to understand whether or not the action is intentional and to understand what choice the agent intends in the performance of the action. Putting the testimony of the agent aside for the moment, it is only possible to understand the agent's choice when his action is understood as a specific instance within a social practice and justified by the good-making characteristics of that social practice. Only once those understandings are in place can the observer grasp the intentional action as a unity of physical movements and the answer to the question *why*, or the grounding *logos* of the action.

III. RESCUING THE CONCEPT OF LAW: FINNIS'S DEFENCE OF PRACTICAL REASON AS THE CENTRAL CASE

Having unpacked the idea that intentional actions become intelligible due to institutional transparency and the language-games in which they are inserted, and the idea of a *logos* in the form of values and good-making characteristics that underlie intentional actions, which presupposes the exercise of our capacity of practical reason, we shall now examine whether this conception of intentional action sheds any light on Finnis's criticism of Hart's internal point of view.

Finnis aims to establish that Hart's internal point of view is unstable and that a remedy for such instability is the recognition that the central case of law arises from women and men exercising their practical reasoning capacities as they engage with the law. But there is a lack

[47] C Vogler, 'Anscombe on Practical Inference', in E Millgram (ed), *Varieties of Practical Reasoning* (Cambridge, MIT University Press, 2001).

of clarity as to *why* there is instability and *how* our capacity as practical reasoners provides an adequate solution to the diagnosed instability.

Hart tells us that when women and men see legal rules from their *internal* aspect, there is an acceptance of such rules and this entails that:

1. The behaviour in question is seen as the general standard to be followed by the group.
2. There is a critical attitude among the women and men towards this pattern of behaviour. The general standard applies to all participants in the social practice and there is consequently ample use of critical expressions in normative language such as 'you ought to', 'that is right', etc.[48]

These two key features enable us to distinguish legal rules from habits and orders backed by threats. Interestingly, Hart also distinguishes between the idea of social rules as having an *active* aspect, that is, the internal perspective, and a passive aspect, that is, orders backed by threats. It is worthwhile quoting his explanation in full:

> It is the strength of the doctrine which insists that habitual obedience to orders backed by threats is the foundation of a legal system that it forces us to think in realistic terms of this relatively passive aspect of the complex phenomenon which we call the existence of a legal system. *The weakness of the doctrine is that it obscures or distorts the other relatively active aspect, which is seen primarily, though not exclusively, in the law-making, law-identifying, and law-applying operations of the officials or experts of the system. Both aspects must be kept in view if we are to see this complex social phenomenon for what it actually is* (emphasis added).[49]

Unfortunately, the internal aspect as mere acceptance of a standard and reflective criticism is not sufficient to establish the 'active/passive' distinction that Hart is so eager to show as evidenced in the paragraph above.[50] When we accept legal rules and these rules are observed as the standard and any deviation can be the subject of reflective criticism, then there is only a difference of degree but not in *kind* of our engagement with the law. According to Hart, the action of the legal participant is captured by an observer through the following mechanism: she recognises a pattern of external behaviour that criticises any deviation of the standard that has previously been accepted by the participant. If this is so, I would like to argue, then it is a mere fluke if the observer can connect the mental state, that is, desires and beliefs of the legal participant with the observed pattern of behaviour, of the legal participant. *This is the core of the so-called instability of Hart's internal point of view.* Let me explain.

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[48] HLA Hart, *The Concept of Law* (Oxford, Oxford University Press, 1994) 54–61.
[49] ibid 61.
[50] See J Gardner, 'Legal Positivism: 5 and ½ Myths' (2001) 46 *American Journal of Jurisprudence* 199 for an attempt to defend the 'active' element of Hart's legal theory. For a criticism of this position, see Rodriguez-Blanco and Zambrano (n 24).

The mental state of belief, that is, acceptance of the legal rule, produces a pattern of behaviour, but we cannot be certain that this particular pattern of behaviour is always accompanied by the *correct* mental state of belief, that is, understanding the point of the action of the participant and engaging with the action because of its point. Consequently, and unsurprisingly, then, the anarchist and the bad woman could have a certain pattern of behaviour and have the belief of acceptance because they can accept the legal rule *for any reason or motive*. However, neither the anarchist nor the bad woman would see any valuable point in actions that engage with the law, nor can we make intelligible why they reject the law unless we understand that they *have chosen* to do so. But once we introduce the notion of 'choice' we need to think about an intentional action that is guided by a *logos* as good-making characteristics from the point of view of the agent, for example, the anarchist gives prevalence to his radical autonomy and freedom and this gives a point to his actions against the law. Furthermore, once we introduce 'choice' and reflect on the intelligibility of the choice, then the idea of a pattern of behaviour becomes theoretically unnecessary. It does not do any work as all the work is done by our understanding of intentional action. Let me explain this point further.

Hart's idea that we accept legal rules from an internal perspective presupposes an inward-looking approach to action as opposed to an outward-looking approach. The latter examines intentional actions as a series of actions that are justified in terms of other actions and in view of the purpose or end of the intentional action as a good-making characteristic, for example, to put the kettle on in order to boil the water, in order to make tea *because* it is pleasant to drink tea. The former examines the mental states that rationalise the actions; however, at the ontological level, it is argued that these mental states cause the actions. The mental states consist of the belief/pro-attitude towards the action.

If the 'acceptance thesis' is the correct interpretation of Hart's central idea concerning the internal point of view towards legal rules, then criticisms that are levelled against inward-looking approaches of intentional actions also apply to Hart's internal point of view and its 'acceptance thesis'. The main criticism that has been raised against the idea that the belief/pro-attitude pairing can explain intentional actions is the view that it cannot explain deviations from the causal chain[51] between mental states and actions.

[51] The first person to discuss deviant causal chains was Chisholm (n 37).

Let us suppose that you intend to kill your enemy by running over him with your vehicle this afternoon when you will meet him at his house. Some hours before you intend to kill your enemy, you drive to the supermarket, you see your enemy walking on the pavement and you suffer a nervous spasm that causes you to suddenly turn the wheel and run over your enemy. In this example, according to the belief/pro-attitude view, there is an intentional action if you desire to kill your enemy and you believe that the action of killing your enemy, under a certain description, has that property. Ontologically, the theory would establish that you had both the desire to kill your enemy and the belief that this action has the property 'killing your enemy'. Thus, this mental state has caused the action and there is an intentional action. The problem with this view is that it needs to specify the *appropriate causal route*. Davidson has made much effort to specify the 'attitudes that cause the action if they are to rationalise the action':[52]

> And here we see that Armstrong's analysis like the one I propose few pages back, must cope with the question *how* beliefs and desires cause intentional actions. Beliefs and desires that would rationalise an action if they cause it in the right way -through a cause of practical reasoning, as we might try saying-may cause it in other ways. If so, the action was not performed with the intention that we could have read off from the attitudes that caused it. What I despair of spelling out is the way in which attitudes must cause actions if they are to rationalise the action.

In the following paragraph, Davidson seems to fear that the idea of attitudes causing action might lead to infinite regress:

> A climber might want to rid himself of the weight and danger of holding another man on a rope, and he might know that by loosening his hold on the rope he could rid himself of the weight and danger. This belief and want might so unnerve him as to cause him to lose his hold, and yet it might be the case that he never *chose* to loosen his hold, nor did he do it intentionally. It will not help, I think, to add that the belief and the want must combine to cause him to want to loosen his hold, for there will remain the *two* questions how the belief and the want caused the second want, and how wanting to loosen his hold caused him to loosen his hold.

Here we see Davidson struggling with his own proposal.[53] He asks how attitudes must cause actions if they are to rationalise actions. Davidson's model of intentional action does not help us to determine whether there is an intentional action, it only helps us to determine the *conditions* that would explain the existence of an intentional action. The intentional action is

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[52] D Davidson, 'Freedom to Act', in D Davidson (ed), *Essays on Actions and Events* (Oxford, Clarendon Press, 1980) 79.

[53] For an illuminating discussion of this point see C Vogler, 'Modern Moral Philosophy Again: Isolating the Promulgation Problem' (2007) 106 *Proceedings of the Aristotelian Society* 347.

already *given*. A similar criticism is applicable to the 'acceptance thesis' and to this we now turn.

Let us suppose that I intend to go to the park in my car, however, I read a sign at the entrance of the park that states 'Vehicles are not allowed to park in the park'. I turn the wheel of my vehicle, reverse it and park a few streets away. You ask me *why* I turned the wheel of my vehicle, reversed and parked a few streets away from the park. I answer that I carried out these actions because there is a rule that states 'Vehicles are not allowed to park in the park'. According to the 'acceptance thesis', my desire to follow the pattern of behaviour indicated by the rule and my belief that turning the wheel of my vehicle, reversing it and not parking in the park is the type of action or *pattern* of behaviour indicated by the rule. However, let us suppose that I desire to avoid parking in the park and have the respective belief. In other words, I accept 'not parking in the park'. On my way to the park, however, whilst following directions to the park, I take a wrong turn and end up parking just outside the park entrance. Even though the two criteria of the 'acceptance thesis' have been met, this was not a case of following the legal rule by acceptance since I comply with the rule *by accident*.

The problem with the 'acceptance thesis' is that it does not consider the action from the deliberative point of view, that is, as it is seen from the point of view of the agent or deliberator. In the self-understanding of his own actions, the agent does not examine his own mental actions, rather he looks outwards to the vehicle, the park, the sign and so on. The reasons for his actions, that is, turning the wheel to reverse the vehicle, then parking outside the park to follow the rule, are self-evident or *transparent* to him. But then, an objector might advance, what is the good-making characteristic of a rule that is the goal of the action of avoiding parking in the park. My reply is as follows. When the driver is asked why he is turning the wheel and reversing the vehicle, his answer will be 'because it is the rule'. But this is still not completely *intelligible* unless we *assume* or *know* that the driver is a law-abiding citizen or that he believes in the general fairness of legal rules, and so on. We can still ask him 'why, because of the rule, do you do this?' His answer would need to be in terms of reasons as good-making characteristics for him, in order to make intelligible his intentional action. He will probably reply that he has reasons to follow the legal rule because it is the best way of preserving the peace of the park, or that he has reasons to follow legal rules in general because it is the best way of preserving

coordination[54] among the members of a community. In a nutshell, the agent or deliberator needs to provide the reasons for the action in terms of good-making characteristics and the end or reason of the action provides the *intelligible form of the action.*

Furthermore, in evil or benevolent regimes, if we follow Hart's model, officials criticise any deviation from the rules and expect rule-following as standard but we can observe this same pattern of official conduct in both evil and benevolent regimes. In Hart's methodology we are thus not able to differentiate between evil and benevolent regimes, or this differentiation becomes irrelevant as long as there is a pattern of conduct and any deviation from the standard of conduct is criticised. This seems paradoxical as the lay woman who engages with the intelligibility of action within the specific legal language-game, as illustrated in the example 'buying and selling potatoes', is able to make this basic distinction but the legal theorist equipped with Hart's methodology is not. As a result, criticism of the participant in the social practice who deviates from the standard is random, unintelligible and/or arbitrary because it is not guided by the *logos* as good-making characteristics or values which determine *the choice of the participant.*

The idea of legal action produced by a legal agent engaged with the logos as good-making characteristics and exercising her capacities in circumstances of known institutional contexts and language-games, sharply contrasts with the idea that we understand legal action through grasping the pattern of action that reflects criticism of the deviation to the legal rule. The view defended by Hart reduces the richness of the *active aspect of the actions* of legal participants and offers a change in degree-but not in kind-to the passivity represented by law as orders backed by threats.

An objector might argue that we could understand the acceptance of norms and actions by participants to the legal practice as a 'detached point of view', which is neither deliberative, nor theoretical, but rather a 'third point of view'. However, this 'third point of view' is, like the deliberative one, a practical point of view; the difference lies in the fact that it is formulated from a third-person perspective.[55]

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[54] See GEM Anscombe, 'On the Source of Authority of the State', in GEM Anscombe (ed), *Ethics, Religion and Politics: Collected Philosophical Papers of GEM Anscombe*, vol 3 (Oxford, Blackwell, 1981) for an argument of authority as practical necessity.

[55] Following T Aquinas, *Summa Theologiae*, Gornall (ed), vol 4 (Cambridge, Cambridge University Press, 2006) I, q 14, a 16, we could say that the 'detached viewpoint' is only partly deliberative (practical) and partly theoretical. But if it is deliberative, it is only in a 'secondary' sense. I have argued that the 'detached point of view' is not

Following Raz, the objector might say that I have presented a very narrow interpretation of the practical point of view and have reduced the 'detached point of view' to the deliberative point of view. According to Raz, the 'detached point of view' has two core features and should be characterised as follows:

> First, they are true or false according to whether there is, in the legal system referred to, a norm which requires the action which is stated to be one which ought to be done; secondly, if the statement is true and the norm in virtue of which it is true is valid, then one ought to perform the action which according to the statement ought legally to be performed. Such statements are widespread in legal contexts. It should be emphasized again that statements from a point of view or according to a set of values are used in all spheres of practical reason, including morality. Their use is particularly widespread when discussing reasons and norms which are widely believed in and followed by a community. There are always people who accept the point of view and want to know what ought to be done according to it in order to know what they ought to do.[56]

Let us first think about examples outside the law as suggested by Raz. When you give advice to a friend who, for example, is vegetarian you do not, according to Raz, consider your reasons for actions, but rather her reasons. You probably love meat, but you give advice to your friend within the framework of her normative system, that is, her vegetarianism.

My reply to this objection is as follows. In the example used by Raz, being vegetarian is good and you tell your friend, when you go to a restaurant that she has to eat either the spinach or the cabbage (the only vegetables on the menu) because both are good things to eat *qua* being vegetarian and *qua* being human. In this example you can tell her 'you'd better have the cabbage as you are vegetarian'. There is no further question about why that advice has been given. The goodness of eating either cabbage or spinach is obvious in the context. Thus, it is given as a good-making characteristic and is transparent to both of you. It is, I argue, parasitic on the deliberative viewpoint. The reasoning might be as follows:

(I) Cabbage is good for vegetarians

You are vegetarian

Cabbage is on the menu

Let us order cabbage!

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deliberative in the primary sense and therefore cannot lead us to action, see V Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Oxford, Hart-Bloomsbury, 2016) ch 5.

[56] Raz (n 16) 177.

The dependence or parasitic relationship of the 'third point of view' on the deliberative viewpoint is also apparent in examples very different from premise I. Franz Stangl[57] was the commander of Treblinka. When he first was appointed as head of a euthanasia clinic, he was morally repelled by the actions of the Nazis. But then he was afraid that he would lose his job and career. He began to think that euthanasia was a necessary evil and it was a favour to those killed. Let us suppose that Stangl was my friend in 1943 and that before he began his process of self-deception, he asked me for advice on what he should do. According to Raz, I could have replied to Stangl 'according to the normative system of National Socialism, you ought to continue being head of the clinic'. But, according to Raz, like a vegetarian who has accepted the normative framework of being vegetarian, Stangl has already accepted the normative point of view of National Socialism. His question is like the question of a chess player: given the rules of chess, how ought I to play? He has already accepted the rule.

In response to my assertion 'according to Nazi law, you ought to remain head of the euthanasia clinic', Stangl might sensibly have asked 'why should I?' The why is directed to the action that I have given as advice. He has asked for advice in terms of a reason for action, not just in terms of an action *simpliciter*, for example a voluntary action that is done for no reasons, and my answer also needs to be in terms of reasons for actions. When people look for practical advice, they are seeking for reasons. Children do this all the time. They ask parents, teachers, relatives and friends how to do this and this, and why should they do this and this. They learn that some ends are valuable and worth pursuing and others are not. To give advice to Frank Stangl in terms of reasons for actions, as in the case of the vegetarian friend, I need a premise like (I) vegetables are good. What kind of premise can play this role? My argument is that only a premise that is (a) transparent and (b) that describes the action as a good-making characteristic could play this role. In this case, the premise 'legitimate authority is a good sort of thing' can play the role of premise I. The reasoning could be as follows:

(II) Legitimate authority is a good sort of thing[58]

Nazi law has legitimate authority

A Nazi official has commanded that 'you ought to remain head of the euthanasia clinic'

Let us obey the command!

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[57] Example given by E Stump, *Aquinas* (London, Routledge, 2003) 355, to explain the interrelation between intellect and will in *Aquinas*. See also G Sereny, *Into that Darkness. An Examination of Conscience* (New York, First Vintage Book Editions, 1983).

[58] I use 'good' as an attributive adjective instead of an attribute predicate, following P Geach, 'Good and Evil' (1956) 17 *Analysis* 32.

But here my advice is mistaken. I know that Nazi law has no legitimate authority because it is not an instance of 'legitimate authority as a good sort of thing'. The second premise is false. It is similar to the case of vitamins and oranges as follows:

> Vitamin C is good for the immune system
> This synthetic orange without vitamins is a good sort of thing
> You have a cold, you ought to boost your immune system
> Let us eat this synthetic orange!

As in the case of Nazi law, my advice is mistaken because my reasoning is defective as the second premise is false. Stangl has no reason to surrender his judgement. If my advice stops at the moment of expressing 'from the legal point of view, you ought to obey the law', my advice is incomplete. He can legitimately demand reasons for actions; namely an answer to the question 'why'. Then I need a premise like I or II.

The kind of active engagement with the law is phenomenologically distinctive. There is reflective criticism not because of deviation from the accepted standard, but rather because a breach of legal rules undermines the *logos as values or good-making* characteristics that underlie the legal rule or the law in general. For Finnis, it undermines the aim of the common good that the law aims to achieve. The complexity of the active aspect of the law entails a *change in kind* and cannot be grasped by the two key features of the internal aspect adumbrated by Hart. Consequently, for Finnis, there is a need for a more complex way of identifying the action that engages with the law.

IV. CONCLUSIONS

During the last 50 years, legal philosophical debates in the English-speaking world have concentrated on Dworkin's criticism of Hart's Concept of Law, including the much-debated distinction between semantic and theoretical disagreements. In my view, this concentration of intellectual resources on a single debate has been at the cost of understanding a more arresting and insightful critique by Finnis, which would have taken legal philosophy into a realm of inquiry on practical reason and theory of action in law. Arguably, debates on normative ethics and jurisprudence cannot be soundly understood without understanding *what action is* and more specifically what right and good actions are. Had Finnis's critique been taken seriously, legal theorists would have been ahead of the game in debates on normative questions and much

clarity would have been gained on the nature of law and its relation to agency, reasons for actions and goodness.

Finnis, tells us, that the participant of the legal practice, for example, the citizen, the judge, the lawyer, are engaged with the law and are interested in distinguishing between a good and a *not so* good norm, between a just directive and unjust directive, between a rational court-decision and a non-rational court decision. Hart's internal point of view refuses to make further distinctions between the peripheral and central cases of law and this brings *instability* to the concept.

Hart's internal point of view as unstable can be traced to a more fundamental criticism, that is, Hart's internal point of view cannot be used to understand the point of human actions and therefore we cannot rely on Hart's internal point of view to identify *significant differences that any actor in the field can make*. In the 'methodology' literature, this argument on *instability* is overlooked and its premises have not been carefully examined. In this lecture, I have shown the premises that explain the idea that the internal point of view is unstable, which are both key to understanding the limits of Hart's legal theory and sheding further light on the view that law should be conceived in terms of a central or focal case.

At the core of Finnis's inquiry is the practical question of what one ought to do according to the principles of practical reasonableness. For Finnis, the theorist needs to explain the practical viewpoint, but once the practical viewpoint has been identified, it impinges on all of us: the theorist and the participant.

The complete understanding of the actions and practices entails an understanding of the point of the action or practice. The agent who executes the action or the participant who participates in the practice gives the action or practice its point or value.

I have shown that Hart's internal point of view depends on a flawed conception of human action which relies on mental states, that is, beliefs, desires, attitudes, that cause actions. The study demonstrated that this theory cannot explain the point of human action and practice that Hart was so eager to emphasise. I have contrasted Hart's conception of human action to Anscombe's view on action which relies on the 'why-methodology', reasons for actions as good-making characteristics and contextual conditions in which we learn the *logos* of social practices. The latter has illuminated Finnis's point that only if we locate law as practical reason as the central case of law, we are able to identify *significance differences that any actor in the field can make.*