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## On Gardner on Law in General

Kimberley Brownlee\*

There is an informal club of students, young academics and more established academics who regularly check John Gardner's website to see if he has posted new papers in progress or forthcoming articles. I have been a card-carrying member of this club for close to ten years, and many of Gardner's papers are old friends, such as 'The Mark of Responsibility', 'Reasons for Teamwork', 'The Wrongdoing that Gets Results', and 'In Defence of Defences'. The papers collected in Gardner's newest book – *Law as a Leap of Faith* – include pieces that are good friends, such as 'Legal Positivism: 5½ Myths', which has helped me not to perpetuate as many myths about legal positivism in my teaching as I otherwise would have done.<sup>1</sup> There are also some newer acquaintances, such as 'Can there be a Written Constitution?' and 'How Law Claims, What Law Claims', and, most excitingly, there are some previously unpublished papers: 'The Supposed Formality of the Rule of Law' and 'Law in General'. It is a treat to have Gardner's work on law in general compiled in a single volume. This not only makes accessible some of his contributions to edited collections, but also gives the reader a chance to examine his output in this area in a single view.

In his Preface to *Law as a Leap of Faith*, Gardner rejects the neat divisions of ideas into competing camps that is common in legal philosophy and that imitates the adversarial trial – *natural law v. legal positivism, Hart v. Dworkin, Raz v. Finnis*. Gardner describes himself as an intellectual squirrel who scours through rival positions for nuts of truth that he can snatch up (sometimes from under the hedgehog's nose) and hoard away in these essays. Gardner professes not to have a theory of law. Indeed he says, with characteristic modesty, that the reader will struggle to find any conspicuously novel ideas about law in the book. Many of the papers were written originally with pedagogical objectives in mind, and as such the novelty lies, he says, in *how* the ideas are explained and combined. It is true that many of the chapters are framed to give centre stage to the ideas of a key figure in legal philosophy, such as Hart, Fuller, Raz, or Kelsen, and to support their intellectual efforts with respectful exegetical, clarificatory and interpretive

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<sup>1</sup> John Gardner, *Law as a Leap of Faith*. (Oxford: Oxford University Press, 2012), v.

work. But, in doing so, Gardner often presents the very best versions of these thinkers' ideas, and in many places that leads to, or reveals, ideas that they themselves did not advance and could not claim credit for having. It would be a mistake, therefore, to accept fully Gardner's denials of novelty.

In what follows, I focus, first, on what Gardner calls in his Preface the 'signature essays of the volume', which are Chapter 2 'Legal Positivism: 5 ½ Myths' and Chapter 6 'Nearly Natural Law', and I consider these pieces along with Chapter 9 'Hart on Legality, Justice, and Morality'. I then turn to one of the previously unpublished papers, Chapter 11 'Law in General', which engages directly with the central theme of all of these essays, namely, what we can say about law in general.

### THE SIGNATURE ESSAYS

Both 'Legal Positivism 5 ½ Myths' and 'Nearly Natural Law' are unbundling papers, Gardner says, that ironically preserve the textbook classifications of 'natural law theory' and 'legal positivism' that they also seek to transcend. 'Legal Positivism 5 ½ Myths' is an illuminating discussion that clarifies the commitments of legal positivists, who are united in their endorsement of what is often called the sources thesis, which, roughly, is that the validity of law depends on its sources, not its merits. Myths about this positivist tradition have been perpetuated by its critics and sometimes fuelled inadvertently by its defenders. The five myths that Gardner highlights concern the rule of law, adjudication, judicial legislation, interpretation and the so-called 'no necessary connection thesis' between law and morality. The half myth concerns the value of positivity.

Gardner's treatment of these myths and of the relation between law and morality more generally gives the student of legal philosophy an intellectually satisfying opportunity to combine some ideas herself because Gardner's discussion inclines the mind toward certain ideas that he does not address explicitly. Let me note two such ideas.

One modest idea is that legal formalism, defined non-maliciously in terms of a closed system of legal rationality and the application of legal rules, is not a species of legal positivism. This idea follows naturally from dispelling the myth of positivistic adjudication, according to which legal positivists supposedly think judges should resolve cases before them only by applying valid legal norms and never reach beyond those norms to consider the merits of any case. In reply to this myth, Gardner observes that, in virtue of law's positivity, there will be

unavoidable gaps in law.<sup>2</sup> The unavoidable gaps in law arise, first, when a legal norm is neither applicable nor inapplicable, but indeterminate in its application, and second, when two conflicting legal norms apply with no third norm to resolve the conflict. Such gaps are endemic to law in all legal systems, Gardner says, thanks to the positivity of law (35). This means that inevitably, given positivity, judges must sometimes do what legal formalists disdain, which is go beyond the constraints of the legal application of rules to interpret and reflect on the merits of the case before them.<sup>3</sup>

A second set of ideas that Gardner inclines the reader to consider concerns the thesis that there is no necessary connection between law and morality.<sup>4</sup> Despite the myth, this thesis is not one, Gardner says, to which legal positivists, even of the harder varieties, are committed. The No Necessary Connection thesis is absurd (Chapter 2) and transparently false (Chapter 9), and no credible legal philosopher has defended it as it stands (48). A contrasting view of the thesis's popularity is taken by Jules Coleman, who says that the NNC thesis is undeniable and virtually no one – positivist or otherwise – has rejected it.<sup>5</sup>

The disagreement over positivists' commitment, or not, to the NNC thesis turns on how we interpret the thesis. On one, narrow interpretation from David Lyons, the thesis says that there is no necessary connection between law and moral rightness, goodness, or justifiability.<sup>6</sup> This interpretation supports the view that positivists, and indeed all legal philosophers, must endorse the thesis. On a more expansive, competing interpretation, which Gardner favours, the thesis says that there is no necessary connection between law and morality at all including conventional morality, formal moral notions such as *norm*, *duty*, *right* and *wrong*, and moral badness, as well as moral goodness or rightness. This broad interpretation does make it absurd to deny the possibility of necessary connections between law and morality. Gardner says, for instance, that there is a necessary connection between law and morality whenever law and morality are necessarily alike. And, if nothing else, they are necessarily alike in both necessarily comprising some valid norms (48). And, in Chapter 6, he says that every legal issue, however superficially technical, is a moral issue because its resolution inevitably has morally important consequences

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<sup>2</sup> Gardner states: 'There are inherent limitations on the abilities of agents to anticipate future cases in which the norms they create may be relied upon, and to shape the norms they create in such a way as to settle across the board which cases they apply to...In so far as legal norms are the creations of agents [ie posited norms]...these inherent limitations inevitably give rise to some gaps in the law.' (34)

<sup>3</sup> Michelle Madden Dempsey has noted in correspondence that this statement is true only if judges are to decide every case validly brought before them.

<sup>4</sup> This 'no necessary connection thesis' is sometimes called the 'separation thesis' or the 'separability thesis'.

<sup>5</sup> Jules Coleman, *The Practice of Principle*. (Oxford: Oxford University Press, 2001), 152. Cited in Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *N.Y.U. Law Review*, 1035.

<sup>6</sup> David Lyons, 'Moral Aspects of Legal Theory' (1982) 7 *Midwest Studies in Philosophy*, 223.

for someone (161). And, again, in Chapter 9, he says that law is necessarily connected to morality in being the kind of thing that can be judged by moral standards and found wanting, unlike fish, arthritis, colour, gravity and spelling (222).

But, we might wonder whether this more expansive interpretation of the thesis is the one to adopt. In particular, we might wonder what counts as a *necessary connection* in this context. Leslie Green says that *connection* is not a technical notion in this debate; it is any sort of relation. And, connections matter because they illuminate. We do not fully understand law, Green says, until we understand how it relates to things like social power, social rules and morality.<sup>7</sup>

Yet, a non-technical notion of *connection* is unsatisfying. If a connection is *any* sort of relation, then differences, contrasts and disconnections are all connections. The relation between two things might be that they are wholly unrelated. (Logically speaking, such a relation is an equivalence relation; ‘A is unrelated to B’ is equivalent to ‘B is unrelated to A’.) So, if there is anything interesting in the idea of a necessary connection between law and morality, it must lie in the notion of *necessary*.

A necessary connection, Green says, is (for Hart at least) a relation that cannot fail to hold. However, the fact that two things are necessarily related in the sense that they are necessarily disconnected or that each has a certain property by nature does not entail that they are necessarily related in an illuminating way. The fact that houses, airplanes and souls all have windows does not tell us much about houses, airplanes, or souls. The same goes for the claim that, if nothing else, law and morality are necessarily alike in that they each comprise some valid norms. This common feature is not particularly illuminating because, as far as norms go, law is quite a different beast from morality.<sup>8</sup> Amongst other things, as Gardner argues in Chapter 6, moral norms get their normativity from their merits, not their sources. Moral norms always have a claim on our attention as matters of rationality. Laws do not. Moral norms are inescapable: we cannot rationally disengage from morality. Legal norms, by contrast, are escapable: we can disengage from legal norms and assess whether or not they are worth following. So, there is not much in the thought that morality and law are necessarily connected in this respect. But, perhaps

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<sup>7</sup> See Green (n 4), 1041.

<sup>8</sup> Michelle Madden Dempsey has said in correspondence that this connection does tell us that law is not merely a prediction of what judges will do (Holmes); it does challenge the legal realists’ view that law is nothing more than a sheer exercise of political/social power; and it tells us that law makes claims in terms of ‘oughts’ and ‘shoulds’ rather than merely describing outcomes, all of which is illuminating. I do not doubt that knowing those things about law is illuminating. However, I do doubt that knowing that law is *necessarily alike* to morality in comprising valid norms is illuminating since the kinds of norms, the bases of those norms, and the rational force of those norms are all different in these domains. We might doubt whether ‘norm’ is being used too loosely when it is applied to both domains in the same way that ‘window’ is used loosely, or at least differently, when it is applied to both airplanes and souls.

the point is, for both Gardner and Green, that not all necessary truths are important truths. The necessary likeness or likenesses between law and morality may just be pretty unimportant truths.

Gardner would not be happy with this suggestion since he does not regard all of the necessary connections between law and morality as unimportant. The fact that law can be judged by moral standards is not an unimportant necessary connection, he says, because, without it, all moral debates about law become unintelligible (222).<sup>9</sup>

In reply, while this *implication* of the connection for moral debates about law is undeniably important, the connection itself seems to be trivial and unilluminating.<sup>10</sup> Is much revealed conceptually about the nature of *law* by noting that it can be judged by moral standards? This fact about law does not distinguish it from the many other things that can fall under the gaze of morality, which, despite Gardner's claims, could include spelling (given the potential moral hazards of miscommunication) and fish (in environmental ethics and animal ethics) and, if we take a theistic view, arthritis (as one person's cross to bear) and, indeed, gravity (as a pre-condition for life and hence for morality).

Both Gardner and Green identify other necessary connections between law and morality that they take to be non-trivial, such as the fact that law and morality have overlapping scopes and that law is morally risky, but which turn our attention away from the issue that really matters, which is that law is by nature morally fallible. Therefore, of the two interpretations of the NNC thesis noted here, Lyon's narrower one is preferable because it plausibly captures the core sentiment of the NNC thesis to which legal positivists are attracted: the fact that something is law does not necessarily say anything in its favour morally speaking. And, since Lyon's interpretation does not deny all necessary connections between law and morality it is acceptable to Gardner, Green, and others, who have the harder task of showing that the expansive interpretation of the NNC thesis warrants the amount of attention it has received.

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<sup>9</sup> To dispel further the myth that legal positivists are bound to the NNC thesis as he interprets it, Gardner shows that the legal positivist sources thesis (LP\*) is both narrower and broader than the No Necessary Connection thesis. LP\* is narrower than NNC because, first, it's concerned only with the conditions of legal validity, and not all of law, and second, it focuses on one connection that is sometimes thought to hold between law and morality and it denies it. That is, it denies that the validity of law depends on its merits. This does not mean, Gardner says, that law's moral merits might not depend on law's validity. They might. LP\* is broader than NNC because, first, it focuses on the relation between law and *any* of its merits (not just moral merits), and second, the scope of LP\* is not limited to *necessary* connections between law and its merits. It applies to contingent connections too. (49-50) Of course, it doesn't follow from showing that the sources thesis and the NNC thesis are not equivalent that legal positivists are not committed to the NNC thesis (on its most plausible interpretation).

<sup>10</sup> We can draw a distinction between *instrumentally important connections* and *inherently important connections*. The former are important only in virtue of their implications. The latter are important because we cannot understand the concept of *law* without them. So, inherently important connections between law and morality are those that we must appreciate to understand properly the concept of *law*.

Having examined the ‘signature essays’ of Gardner’s volume, let me now comment briefly on the final chapter entitled ‘Law in General’.

## LAW IN GENERAL

In this final chapter, Gardner states that one of the major tasks of philosophy of law is to explain how law can vary from jurisdiction to jurisdiction. Other so-called forms of social control such as ‘morality, religion, force, and terror’ (Dworkin’s list) do not cleave along similar jurisdiction-specific lines. And, this, Gardner says, pushes us to consider the sociological dimension of law, a dimension that Dworkin dismissed as being of little practical or philosophical significance.

A related question, Gardner says, is: How does the law of any jurisdiction get to do what law gets to do, namely, require and permit things? For that matter: How does the law of anywhere get to do anything? And, do other so-called forms of social control get to do those things too and, if so, are they doing the same things of requiring and permitting things? These questions bring us to the heart of the sociological question about law: Is it helpful to compare law to other forms of social control, like morality and religion, and in particular is something slippery going on when a legal system is classified as a ‘structure of governance’ or a ‘form of social control’? Gardner’s reflections on these questions raise questions of their own. Let me note three of them.<sup>11</sup>

First, we might think: What else is law if not a form of social control? But, Gardner doubts whether law can helpfully be classified as a form of social control and he says that Hart showed us why by showing that law is capable of serving a variety of social functions, one of which is getting people to do or avoid things ‘irrespective of their wishes’, but another of which is providing people with facilities to realise their wishes (272). More importantly, though, Gardner continues by saying that it is no part of law’s nature that it *must* be used as a form of social control. This is a meaty claim, and Gardner leaves the reader to wonder why it’s *no part of law’s nature* that it must be used as a form of social control. For one thing, showing that law can serve other social functions does not show that social control is not one of its functions by nature. For another thing, to claim that social contract is not part of law’s nature, Gardner must have an idea of what law’s nature is despite his declarations in the Preface that he has no theory on the nature of law.<sup>12</sup>

Second, it is difficult to disagree with Gardner’s observation that the sociological question has significant philosophical interest, despite Dworkin’s claims to the contrary. But

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<sup>11</sup> For a critical discussion of other parts of this chapter, see Nicola Lacey (forthcoming).

<sup>12</sup> To be fair, having an idea about the nature of law is not the same thing as having a theory of law.

Gardner says something stronger than this. He says that anyone interested in jurisdictional boundaries should begin by thinking about *social* boundaries (rather than geophysical, chromosomal, or territorial boundaries). Yet, is this entirely right? Even though what is recognised as law necessarily depends on social rules, that may not be all that it depends on (generally). Why are not territorial boundaries as relevant as social boundaries to thinking about jurisdictional truths given the (albeit contingent) historical fact that legal jurisdictions are territory-based?<sup>13</sup>

Third, Gardner gives an answer to the charge often levelled against Hart's account that it cannot make sense of the EU as a system of law. Gardner argues that the EU has its own ultimate rule of recognition that differs from and conflicts with the ultimate rule of recognition of the legal system of each of its member states.

According to EU law, in particular, EU law is supreme and the law of each member state holds sway only subject to it and by its leave. And according to English law, by contrast, English law is supreme and the law of the EU holds sway only subject to it and by its leave...(285).

Despite this, Gardner says, the divergence between the EU and the English rules of recognition and their constitutional arrangements leads to little day-to-day conflict because each is pretty good at giving effect to the other by dexterous use of its own constitutional arrangements. But, be that as it may, we may wonder what this answer on behalf of Hart does for the idea of jurisdiction-specific truths. Do we not end up swimming in paradoxes of the variety that it both is true and not true of England that some norm is a legal norm? If such paradoxes do not trouble us because they have little effect on the practical running of legal systems, then the idea of jurisdiction seems to have little relevance and at least some of the questions about jurisdiction-specific truths seem to cease to be philosophically interesting.<sup>14</sup>

My comments in this discussion do not do justice to the depth and sheer intellectual power of Gardner's reasoning. Like Gardner's first book *Offences and Defences*, his newest book

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<sup>13</sup> The question of how there can be jurisdiction-specific truths about what is law seems to be linked to the problem of particularity in political philosophy, that is, how the parameters of the law's reach are to be set and its claimed right to rule restricted to a specific jurisdiction. And, that problem is usually framed in territorial terms.

<sup>14</sup> Michelle Madden Dempsey has suggested in correspondence that this not a paradox, but rather a case of two legal norms existing, but (1) one or more of the legal norms is neither applicable nor inapplicable; or (2) both norms apply, but they conflict, and there is no third legal norm to resolve the conflict (35). But, even if that is so, we are left to ask: What is the truth that is specific to the English jurisdiction in such cases?



*Law as a Leap of Faith* is a thoroughly satisfying collection of papers that are rich in reflections and in natural, but non-obvious argumentative moves. In this volume, Gardner shows that excellent work can be done on law in general without embracing what Ernest Weinrib calls a ‘comprehensive theoretical position...[with] broad philosophical vistas.’<sup>15</sup>

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<sup>15</sup> Ernest Weinrib, ‘Why Legal Formalism?’ in Robert P. George (ed.), *Natural Law Theory*. (Oxford: Oxford University Press, 1992), 352. Cited in Gardner (2012), v.