Gardner John, *Law as a Leap of Faith*

Law as a Leap of Faith by Gardner, John

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recent resurgence of interest in Hobbes in philosophy, political science, and history, they say, “there is surprisingly little engagement with Hobbes as a jurist or legal thinker.” This is despite the fact that “there has been a turn in legal scholarship towards political theory in a way that engages recognizably Hobbesian themes, for example: the law and politics of security; the law and politics of fear; and the relationship between security and liberty. It might even be the case that the scholarly surge and the turn to Hobbesian themes are connected in that Hobbes’s focus on security and order as foundational values of civilized society seems particularly apt in unsettled times” (1). However, the essays never return to contemporary discussions of familiar Hobbesian themes. In fact, there is perhaps a surprising lack of attention to some topics one might expect to see; for example, there is no essay devoted to international relations or international law, and there is only scarce mention of these topics within the essays.

What bearing might these essays have on contemporary legal scholarship? The first three essays and the last one help to set the historical record straight (or at least complicate received wisdom). The middle six essays explore the potential inherent in Hobbes’s work, contributing to a more interesting view for contemporary legal scholars to address. While I’m sympathetic to the project of reimagining Hobbes in a more liberal light, however, some questions remain: What is the purpose of retooling Hobbes in this way? That is, what do we want from a kinder, gentler Hobbes? If the interest is in showing how a Hobbesian framework could enrich contemporary legal scholarship, the reader will likely come away a bit disappointed since there is little direct engagement with this scholarship. If, however, the goal is to show the enduring interest and importance of Hobbes for our general understanding of law and the limits of political authority, then this collection succeeds admirably. *Hobbes and the Law* is an important contribution to Hobbes studies and is to be roundly recommended.

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Gardner, John. *Law as a Leap of Faith*.

Oxford: Oxford University Press, 2012. Pp. 314. \$68.00 (cloth); \$30.00 (paper); \$45.49 (ebook).

John Gardner holds the chair of jurisprudence at Oxford, having followed H. L. A. Hart and Ronald Dworkin into the position. As such, he is perhaps uniquely positioned to garner attention for his pronouncements about the nature and operation of law in general. This book is a collection of papers mostly previously published and delivered on topics relating to general jurisprudence. Two chapters, “The Supposed Formality of the Rule of Law” and “Law in General,” have not previously been published. Gardner explicitly disavows any overt intent to advance a novel theory here, saying instead that many of the papers were conceived as a way to correct misconceptions on the part of students (vi).

The first essay, bearing the same title as the book, might at first blush appear to be out of place in that it begins with a treatment of the Euthyphro problem: Does God love the good because it is good (in which case God seems to be ir-

relevant to what we should do), or is what God loves good merely because he loves it? Gardner sees the Euthyphro problem as mirroring the debate between natural law and legal positivism, with the former holding that the law is posited because it is binding and the latter that it is binding because it is posited. While he acknowledges that there are several ways in which the analogy doesn't hold, what seems significant about this particular paper for the general jurisprudent is the effect on legal normativity and validity of what is elsewhere called the internal and (engaged) external perspectives. Joseph Raz, for example, has noted that one can deploy norms in speaking from the point of view of the listener without endorsing those norms oneself (*Practical Reason and Norms* [London: Hutchinson, 1975], 175–76). Musing on the Euthyphro problem leads Gardner to consider the impact those different perspectives on normativity have on legal validity. If all and only legally valid norms have normative force within a legal system and if legal validity is an entirely factual matter of conformity with a basic validity rule, then it is hard to see how legal validity can confer robust normativity. How can mere facts create norms or confer normativity on an artificial set of rules? But if the system's merit is presupposed when seen from inside, the insider can see an ultimate normative source that the theorist is not in a position to endorse. The problem of legal normativity then becomes merely a problem of perspective—it is the theorist's lack of engagement that leads her to see a problem where the participant sees none.

"Legal Positivism: 5½ Myths" delves into misinterpretations of the sources thesis, the positivist idea that legal validity depends only on whether a given putative legal norm comes from the right place and was made in the right way, and not on the merits of the norm. Since legal positivism is the dominant view among analytic legal philosophers, those who have some interest in the theory or what theorists have to say on the subject on legal validity, but who are not themselves in that camp, would do well to consult this paper to avoid misinterpretations. Those already steeped in the literature will not find the ball advanced significantly by this paper, as it is aimed more at outsiders and students. Gardner points out (21) that the sources thesis does not preclude seeing the merits of the norm as causally relevant to its adoption; a legislator may be attempting to approximate a moral norm in fashioning a given law. However, for a positivist, that causal relevance has no necessary impact on the legal validity of the norm. As to the reasons for the misinterpretations of legal positivism, Gardner has two diagnoses. The first is that the sources thesis does not provide any practical guidance as to what someone seeking to understand the law of a particular community might say on a given matter. This is misunderstood by those who think that legal philosophy must have practical implications about what the state of the law is or what it should be saying on a particular subject. The other diagnosis is that legal practitioners are used to thinking of norms in terms of their sources since they are trained to search for an authority behind any normative claim. They see the sources thesis as trivial and search for something else that legal positivism must be saying.

"Some Types of Law" explores the various ways in which laws are made, in order to undermine the argument that some laws are not made by agents and hence "are not artefacts" (54). (If the reader will forgive the shameless self-promotion, the claim that laws are artifacts is a main one I defend in an up-

coming book from the same publisher.) The first kind of lawmaking is legislation. Three features distinguish it from other kinds of lawmaking: the fact that it is expressly made, the fact that it is intentionally made, and the fact that it is made by one agent (which includes a univocal body). The second kind of lawmaking is customary law, which is neither expressly nor intentionally made, nor is it made by a unitary agent (but rather by many). This kind includes Hart's rule of recognition (the basic rule determining legal validity). A third kind of lawmaking is case law, which is not expressly made in that the legal norms are made by being deployed in argument rather than openly declared; it may or may not be intentionally made (in that judges may be unaware of how their new legal norms change or conflict with previous ones), but it is made by one agent.

The central question of "Can There Be a Written Constitution?" hinges on the recognition that what serves as the constitution of a given legal jurisdiction is what is "received by its official users" (97). Hence the canonical written form of any document may be immaterial to its use as a constitution, which is simply the set of rules used to determine the institutions and offices of government. To borrow from Hart, the idea is that the ultimate validity rules cannot themselves be legislated since we would then need a superior rule to tell us to recognize that piece of legislation (meaning the legislated rule is not, in the end, ultimate). But if the constitution is supposed to be this ultimate set of rules, then a canonical written form might seem to have the same problem. Gardner argues they can be written for the following reasons: First, ultimate validity rules confer a duty on law-applying officials to conform their decisions to what is to be recognized as law under those ultimate validity rules. But written constitutions can still allocate legal powers to the system's highest legal bodies (rules of change and adjudication in Hart's terminology). Second, the ultimate rules of validity are not themselves fully understood as legal rules (since they are constitutive of validity for legal rules, they do not share in all the properties of legal rules). Hence the ultimate rules of validity are not the constitution but lie beyond it. So there's no problem with having a written constitution. Finally, the argument against written constitutions assumed that the highest legislative and interpretive bodies were themselves creations of constitutional custom. But if it is conceptually possible for the powers of these highest bodies to be themselves endowed by an originally still higher institution (e.g., a monarch or constitutional convention), yet not revocable (perhaps because the higher institution thereupon ceases to exist), then space is opened for a written canonical instrument that records that endowment.

"How Law Claims, What Law Claims" defends Raz's and Robert Alexy's idea that law makes claims against critics who say a nonperson cannot make claims. Gardner follows Raz's more recent elaborations that the claims law makes are made by its officials on behalf of law (which is one reason it doesn't have to be made by officials genuinely believing those claims; 131). I am left wondering about Raz's earlier point that the law must be making claims independently of officials in order to account for the possibility of customary law (which may lack officials) making them (Joseph Raz, *The Authority of Law* [Oxford: Oxford University Press, 1979], 29). Perhaps Gardner would respond that customary law makes its claims through nonofficials; it is generally a more widely distributed social pressure reinforcing customary legal norms. As against the Hartian view that legal obligations are *sui generis* (although he does not mention Hart in this

context), Gardner notes that a legal obligation which does not even purport to be a moral obligation would not be falsifiable since it would be a legal fiat. Hence, the idea that law makes claims upon us entails that legal rights and responsibilities are claims of moral rights and responsibilities. This is a provocative idea but also risks giving ammunition to those who would combine a denial of law's power to claim with a denial of any possibility of legitimate practical authority for law.

"Nearly Natural Law" is an important paper for setting out the similarities and remaining differences between natural law and legal positivism. Recent decades have seen a rapprochement of sorts, with modern natural lawyers complaining (rightfully) that many legal positivists have long mischaracterized the more sophisticated versions of their view. Modern thinkers like John Finnis and Mark Murphy are clear in saying that an unjust (or irrational) law is a defective law, rather than one that somehow voids its membership in the class of law (Finnis, *Natural Law and Natural Rights* [Oxford: Clarendon, 1980]; Murphy, *Natural Law in Jurisprudence and Politics* [Cambridge: Cambridge University Press, 2006]). This may leave the difference between natural law and legal positivism to seem like a quibble: Is an unjust (or irrational) law legally defective (i.e., defective qua law; 164) or merely morally defective? Gardner takes even this quibble away; law has moral objectives, and hence an unjust law is legally defective. Yet there is still important space between the two theories, captured by the distinction between what it is to say (following Hart) that the law is "defeasibly morally obligatory" and (following Finnis) that it is "presumptively" morally obligatory (171–72). The former is a conceptual claim about law, saying merely that the central case is the successful case. It has no further implications about how often that central case will be seen or whether people should be acting on the assumption that any instance of law they encounter will be a successful case. The latter takes an extra step that we ought to treat law as morally binding unless and until we have reason to do otherwise. While Gardner doesn't, we can take this realization one step further by saying that the mistake Finnis makes with his stronger claim is a slight reversion to seeing success as a membership condition in the class of law (a position he and Murphy explicitly reject). To argue from the central case of success to the presumption of success is to say that we can presume that any member of the class of law is fulfilling its moral purpose. The main motivation for that is the (mistaken) Aristotelian view that something understood in terms of its function must be successfully performing that function in order to be a member of the class. Against this, Gardner has elsewhere pointed out that for something to have a function, it must be capable of failure ("Law's Aims in *Law's Empire*," in *Exploring Law's Empire*, ed. Scott Hershovitz [Oxford: Oxford University Press, 2006], 207–24, at 216).

In "The Legality of Law" Gardner begins by noting a methodological advance Hart made over John Austin and Hans Kelsen, who thought the best place to start an inquiry into the nature of law is to understand what makes something a law and then to generalize. Hart realized that laws come in systems of norms and that some of those norms might not be laws. Hence it makes sense to start with legal systems rather than individual laws. They agreed that law is a genre of artifacts (and that laws are artifacts; 180). But that does not entitle us to conclude that everything belonging to the genre is itself an artifact; a legal system is not

merely a collection of artifacts and yet still belongs to the genre (181). This leads to the conclusion (offered against Dworkin but valuable on its own) that there are at least two ways a given artifact can fail to be a legal norm: either it is not the right kind of artifact to count as a legal norm or it simply fails to conform to the validity criteria of any extant legal system. Gardner then reminds us of the distinction between seeing law as a genre of artifacts and as a practice, an ambiguity in law that is common in other practices which also produce artifacts (like artistic endeavors). The practice of law goes beyond the artifacts of law in that the practice involves the use of nonlegal norms (both in application and in making legal arguments) and in that legal practitioners are bound by role-related moral norms that are not themselves legal but regulate their legal work (190).

"The Supposed Formality of the Rule of Law" begins with a defense of Lon Fuller's conception of the rule of law against critics who accuse him of 'legalism'. Fuller's view is not legalistic, as he admits that the "inner morality of law" is only one part of the ideal we have for law, the other being that it conforms to "external morality." Another criticism is that it is formalist, a notion that Fuller seems to endorse but not in the way that the critics understand it. It does not emphasize "form" in the sense opposed to "content"; Fuller's criteria do ground judgments about the content of laws (e.g., that the law not demand the impossible). It is not formalist in the "procedural" sense as opposed to "substantive" since Fuller's criteria function largely independently from questions of legal procedure, and some may give rise to substantive rights. Instead, Gardner suggests that Fuller joins Hart and Kelsen in seeing law as what Les Green calls a "modal kind" (206; quoting Green, "The Concept of Law Revisited," *Michigan Law Review* 94 [1996]: 1687–1717, 1709). To say it is a modal kind is to say that it is distinguished by the way it pursues its purposes rather than what those purposes are. For Gardner, this explains why questions about whether Fuller's conception of the rule of law is formalistic or legalistic are confused: The inner morality of law focuses on the operation of law, the means it employs. My problem with that idea is that what makes the law unique (distinctive from other social phenomena) is neither its functions nor its modality (consider how many other normative social systems employ authoritatively posited and interpreted rules) but rather the institutionalization of otherwise nonunique means to nonunique ends. As an institutional kind, what individuates it is its uniqueness as a formal institution for the generation of other formal institutions, codifying and setting forth the criteria for what John Searle calls the "deontic powers" associated with the special statuses it confers through posited norms (*Making the Social World* [Oxford: Oxford University Press, 2010], 8–9).

"Hart on Legality, Justice, and Morality" reiterates that it is a mistake to say that Hart believed in no necessary connection between law and morality. Gardner notes Hart's distaste for the usual notion of legality as an ideal for law, worried as he was that it would lead theorists to think that it was an ideal to which law necessarily lives up. (Both Fuller and Dworkin are mentioned as committing this sin.) For Hart, having a legal system is necessary but not sufficient for the ideal of legality. One concession Hart does make to this view is that for law to live up to its nature as a system of rules, it must be possible for the rules to guide behavior rather than merely to govern by threats. Gardner diverges from Hart in seeing that the ideal for law is related to it as a central case (following Finnis and Raz in

seeing failures as limit cases), while Hart apparently thought that the ideal functioned as a rival concept of law to that which the positivists expounded upon. Once this connection between law and legality is established, Gardner elaborates (while critiquing) Hart's view that the notion of legality as the application of a general rule contains the "germ . . . of justice" (232; quoting Hart, *The Concept of Law*, 2nd ed. [Oxford: Clarendon, 1994], 202). While he clearly held that the rule of law was a component of justice and that justice was central to any moral system, Hart had conflicting things to say about whether the rule of law constituted a morality of law. Emphasizing, as Hart did, that the rule of law is compatible with great evil, Gardner speculates that the complication comes from Hart's belief that the rule of law must be an incomplete ideal for law.

"The Virtue of Justice and the Character of Law" examines the ubiquitous linkage between law and justice. In order to do this, Gardner embraces a classical view of morality as being composed of diverse and potentially competing virtues, of which justice is one. (A modern view searches for a single overarching virtue, holding that all moral questions can be rationally commensurated). Classically, justice is a virtue of allocation; it focuses on the method of allocation rather than what is being allocated. The mere fact that law is a system of rules does not yet then explain why justice is its prime criterion, since rules can be generated and judged by a number of other moral criteria. Furthermore, the use of justice as the criterion for law may put pressure on law to be less rule bound in instances in which following the rule leads to a less just result. Instead, Gardner notes, it is when the benefits and burdens of rules must be "rationed" that questions of justice necessarily enter (256). Mostly, this doesn't arise in the direct application of a legal rule by an individual to inform her behavior. But when its application must be adjudicated among actual or potential disputing parties, it is unavoidable. It is therefore in the centrality of adjudication to law that we find the key to justice's importance.

The final paper, "Law in General," also makes its first appearance here. Gardner defends the methodological claim that we can learn something about law everywhere it is found, its necessary characteristics. He begins by defeating Dworkin's division of jurisprudential issues into the "sociological" (what is a legal system) and the "doctrinal" (what makes a given legal proposition true in a given jurisdiction), showing that any answers to the latter must depend on answers to the former. Hence Dworkin's dismissal of the former is unfounded (270–71; quoting Dworkin, "Hart and the Concepts of Law," *Harvard Law Review Forum*, 119 [2006]: 95–104 at 97–98). Gardner then turns to Hart's oft-quoted claim that he was doing "descriptive sociology" (275; quoting Hart, *The Concept of Law* [Oxford: Clarendon, 1961], v). While Hart later seemingly embraced the descriptive part of that characterization at the cost of the sociological, Gardner believes that it would have been better to have done the opposite. Hart's project was "classificatory" (or "conceptual") rather than descriptive or evaluative, providing the theoretical groundwork for others to ask the right questions in doing their sociological investigations (276–77; with what I take to be a swipe at Brian Leiter, e.g., "The Naturalistic Turn in Legal Philosophy," *APA Newsletter on Law and Philosophy*, Spring 2001, 142–46, for his Quinian view that conceptual questions can be eliminated entirely). Against the view that Hart was misguided in his universalist aspirations to capture law wherever it may arise, Gardner notes that we must understand

something about law in general to be able to say anything about law in particular since we would need to be able to classify particular instances as law (279). He replies to those who criticize Hart's view for being too focused on the nation-state and missing the developments on the international stage such as the law of the European Union. It is Hart's emphasis on the social aspect of law that represented such an advance over previous theories, and legal sociologists need to make the same reliance. If anything, Hart is clearer about his notion of the social basis of law in a customary rule followed by relevant officials since it doesn't rely on a controversial conception of society. Hence, there is no problem accommodating European Union law within Hart's theory. Furthermore, Hart has no problem accommodating customary legal systems, so long as there is a mechanism for identifying law-applying officials. Gardner concludes by defending Hart against methodological objections that only a functionalist theory can be sociologically useful, that he smuggled into his theory an evaluation that law is superior to other forms of social arrangement, and that it was not sufficiently attentive either to noninstitutionalized normative arrangements or to what other cultures might conceptualize as law.

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Gibbard, Allan. *Meaning and Normativity*.
 New York: Oxford University Press, 2012. Pp. 336. \$55.00 (cloth).

In this book, Allan Gibbard develops a 'normativist' and expressivist account of meaning, according to which meaning ascriptions concern how we ought to use language and are explained as complex plans for using language in certain ways. The book, which is in significant part based on articles that Gibbard has published on the topic over the past two decades or so, is the clearest and most thorough examination of this combination of ideas to date. Gibbard does not much discuss other normativist views or the criticisms of normativism but rather focuses on outlining his own distinctive approach. A part of the project is to use expressivist metanormative theory to offer insights into issues in philosophy of language; another part is to continue developing Gibbard's influential expressivist metanormative theory through examining the implications for expressivism of the idea that the concept of meaning would be normative.

The book is rich in original ideas and arguments, and the topics canvassed or commented on are significant and bewildering in their number: Gibbard offers, for instance, normativist-expressivist explanations of the concepts of synonymy, analytic and a priori equivalence, and reference; a solution to Kripke's Wittgenstein's 'skeptical paradox'; commentary on Paul Horwich's use-theoretic view; an explanation for objective oughts in terms of subjective ones; updates on his expressivist view; an articulation of the difference between expressivism and non-naturalist realism in metanormative theory; and a response to Mark Schroeder's discussion of the Frege-Geach problem. It is a compact and difficult book, but serious students of the relevant topics should find its study rewarding, and clearly it is essential reading for anyone working on meaning and normativity.