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Gardner on Law and Morality

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Escapable Law:
Gardner on Law and Morality

Leslie Green*

1. Escape from law

THE LAW tells us what we ought to do, legally speaking. Why care about that? We usually have moral reasons to care about what the law thinks, since we need to know whether its demands are justified. We often have prudential reasons, since those charged with applying and executing law can make trouble for us. We sometimes have role-based reasons to care: it may be our job or station to teach, study, or enforce legal norms. And a few people have reasons of personal taste or interest—they are the kind of people who find law and its ways intrinsically interesting. All these reasons and others mingle and meld. But unless we have *some* sort of non-legal reason to attend to the reasons law says we have, it would be fine to take no interest in law at all.

According to John Gardner, this reflects a deep truth about law and an important distinction between law and morality.[1] We can always ask for a non-legal reason for acting in conformity with (or caring about) legal norms, but we do not need, and in fact cannot have, a non-moral reason for acting in conformity to moral norms. Morality is 'inescapable' whereas law is not, a contrast Gardner formulates in this pair of propositions:

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[1] John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), 148-176.

- *(IM) Engagement with moral norms is an inescapable part of rational, and hence human, nature.*
- *(EL) Engagement with legal norms is not an inescapable part of rational, and hence human, nature.*

I want to explore this contrast as way of helping us understand a familiar idea: morality judges law, but law does not judge morality. It always counts against a legal norm that it is immoral. It does not count against a moral norm that it is illegal. Think of America's fatal attraction to guns. From a moral point of view, the important thing to know about the Second Amendment to the US Constitution is that it should be repealed. If that Constitution is politically unamendable then that is a morally important thing to know about the United States. But whether a clever lawyer could advance some 'theory' of the Second Amendment according to which, 'properly interpreted,' it requires the states to ban private guns is a question of interest only to law professors. It is not merely that any such argument would, for the foreseeable future, be politically impotent. It would be morally distracting. The correct response to the cry, 'That would be unconstitutional!' is sometimes 'So what? The Constitution is immoral.' The correct response to the cry 'That is immoral!' is never, 'So what? It's constitutional.' There is something seriously defective in a person who takes no interest in morality, whereas one might be faultlessly uninterested in the law's view of things. At any rate, I will take that much for granted. My interest is in how far it is explained by Gardner's distinction between 'escapable' and 'inescapable' norms. My reservations mostly flow from uncertainty about what it is for any norm to be 'inescapable', but I have independent doubts about his explanation of the normativity of law. In brief, it seems to me that a legal norm is not quite what Gardner says it is; that moral

norms, contrary to (IM) are not the objects of our necessary 'engagement'; and that the paradigm case of law involves norms in more complex ways than Gardner here allows. But my doubts on each of these points are genuinely hesitant. There is much here, and elsewhere in Gardner's jurisprudence, that I agree with, and many years of discussion that has been illuminating, pleasurable, and often just plain fun, have taught me not to be hasty or confident in our disagreements.

2. What is a norm?

The law contains norms and so does morality. That is one important thing that law and morality have in common. Another is that legal systems necessarily contain, or at least support, some of the norms that morality contains: murder is both immoral and illegal. So what are their differences? With respect to law, we can distinguish questions about what norms we actually have and what they require from questions about how we ought to address the norms we have and whether we ought to have other norms, or any norms, instead. These questions are complex and inter-related, and any plausible account of 'what norms we actually have' will presuppose some (other) norms and values.[2] But it would be incredible to hold, as a general proposition, that an unjustified norm is no norm at all. In the special case of moral norms, however, Gardner affirms that this otherwise incredible position is the unvarnished truth. Unlike norms of, for example, fashion or cookery or law, moral norms are such that their justification conditions exhaust their existence conditions. 'An unjustified moral norm is an oxymoron; an unjustified legal norm is always a live

[2] For example: how much inconsistency among several legal norms should we be prepared to tolerate before doubting our understanding of what a given norm requires?

possibility.'[3] Gardner's core idea is that to ask of a moral norm 'why should I do that?' is already and inescapably to 'engage with' morality, for it is simply to ask whether morality really does require the action in question. This 'asking whether' is nothing other than working within morality itself. Some people take for granted that law is normative but wonder how morality could be. Gardner takes for granted that morality is normative but wonders how law could be.

Some philosophers find the normativity of law (or fashion, or cookery) too obvious to merit study. They nonetheless disagree amongst themselves about what such normativity amounts to. Their idea that the normativity of law is somehow a trivial or evident matter sits uneasily with the fact that they offer various explanations of what it is and of the difference between it and what they mysteriously call 'real' normativity: conventional norms vs. moral norms, rule-implying norms vs. reason-implying norms, shallow normativity vs. deep normativity, and so on. That there are so many different, crisscrossing distinctions may be a sign that things are not so obvious after all, not even in law.

On Gardner's view, 'Some norms apply to us inescapably, just because we are rational beings.'[4] He holds that these include the norm of non-self-contradiction, the norm that one should act only for an undefeated reason, and all moral norms. Gardner is a bold moral rationalist: 'Being subject to morality is an inescapable part of being rational in much the same way that being subject to logic is an inescapable part of being rational.'[5] Of course, morality is not 'inescapable' in the sense that we cannot fail to conform to it. People act immorally all the time, out of selfishness, ignorance,

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[3] Ibid., 161.
[4] Ibid., 149.
[5] Ibid.

stupidity, or contempt. Morality is inescapable in the sense that we are all subject to it and attempts to reason our way beyond it just entangle us further in morality itself.

Where does that leave law? Gardner asks, 'If a norm is such that its existence doesn't already entail that we have reason enough to engage with it, in what sense is it a norm?' And he replies, 'The simple answer is that something is a norm if it can be used as a norm.'[6] To explain the 'normativity' of law is to explain these potential uses. I think this simple answer is a bit too simple.

To say that 'something is a norm if it can be used as a norm' cannot be to offer an analysis of 'norm', for it overtly uses the term 'norm,' and if we had no idea of what it is to *use something as a norm* we would be no further ahead. But Gardner is surely presupposing a familiar understanding of what a norm is, namely, something used to guide action, belief, emotion etc., something that aims, as we sometimes say, for a world-to-mind 'direction of fit'. To use a norm is to try to bring some aspect of the world into line with some idea of how the world should be. To follow a norm is to guide one's own conduct by it; to apply a norm is to guide one's own evaluation of other's conduct by it.[7]

So far, so good. But does this show that 'something is a norm if it can be used as a norm'? I don't think so. In general, the fact that *x can be used as a K* is not enough to make *x* a *K.* If I run out of garden twine I can use dental floss instead, but that doesn't make dental floss garden twine. It isn't merely that this occasional, perhaps idiosyncratic, use lacks the ontological power to convert (generic) dental floss into (generic) garden twine; it fails

[6] Ibid., 154.

[7] The second is my own rendering of the idea of norm application, not Gardner's.

to do so in this individual case as well. Even with respect to functional kinds, there are normally modal as well as functional features that make something of that kind. A fountain pen has identifying functions, but those are not enough to pick out fountain pens from the pile of ballpoints, felt-tips, and so on. Purely functional kinds (e.g. 'leader', 'backstop') are rare exceptions to this.

Where do norms fit in? It seems to me that anything that serves as someone's guide to action is a norm: directives, rules, principles, recipes, plans, and maps; but also breadcrumbs (when the trail indicates our way home), rocks (when the cairn signals the summit), and shrubs (when the hedge marks a boundary). As the last three examples show, what makes the difference is the use to which someone puts the object in question. But none of these is more norm-like than any other, and there are no structural features that they have in common. Anything that can guide conduct by being offered or taken as a reason for something or other can be a norm. Norms are a nearly-pure functional kind.[8] So there is no doubt that laws, or at least some laws, can be norms. That is so whenever a law is itself a guide to action.

We need, however, to bear in mind the significance of 'itself'. Laws can be normatively relevant without being normative. For example, a law could indicate the presence or validity of some other, non-legal, guide to action. The fact that a wise and trustworthy legislator enacted a prohibition on assault may be reliable evidence that there is a law-independent reason to refrain from assault. Or law could be a norm-supporter without itself

[8] 'Nearly pure' because, unless we understand 'guide' as already implying 'by rational causation', we need to add that further, modal, requirement. A hedge that separates two plots simply because it is physically impassible does not function normatively. A hedge that is recognized on both sides as marking a boundary which one should not cross functions normatively.

being normative. Through propaganda or compulsion, the law can make religious, moral or social norms more effective. And law can influence conduct without involving norms at all. It can shape action by 'goading' rather than guiding, by changing people's preferences or altering the outcome set over which they must choose.[9] When law works in such ways, its subjects need not be aware of it, let alone be guided by it. Sometimes that is a good way for law to work—by stealth. (I return to the significance of this point at the end.)

I shall assume that Gardner's treatment of normativity involves a property of law itself, in the sense just explained. I hope it is not merely nitpicking, then, to resist his idea that something is a norm if it *can be* used as a norm. The fact that pumpkin seeds can be used as weights and measures does not show that *they are* weights and measures. Seeds do not become norms until someone uses them in a normative way.

With respect to law, there are two reasons that people sometimes doubt the actual-use criterion of normativity. One is that legal norms can exist without being followed, and so without one of the familiar symptoms of rule-following, namely acceptance of the followed norm as a standard. The second is a special case of the first: legal norms can come into existence with immediate effect, as with a newly-enacted statute, before any subject or official has had a chance to engage with them at all. We need to pause to see why neither gives a reason to doubt the role of actual use in constituting legal norms.

(a) Acceptance and Approval

Gardner rightly cautions us against thinking that we use norms only when we follow them ourselves. We also use norms when we apply them to others, not only in the

[9] W.D. Falk, 'Goading and Guiding,' (1953) 62 *Mind* 145.

sense of enforcing them against others, but also in working out what, according to those norms, others should do. A vegan uses dietary norms in abstaining from animal products; a thoughtful host uses them in advising his vegan guest to avoid the soup. Gardner follows Joseph Raz in thinking that Hart's account of the normativity of law was deficient in focusing on norm-use as norm-following, a deficiency that led Hart to think that those who use norms necessarily accept the norms they use.[10] But the thoughtful host need not accept the vegan's dietary norms and need not even accept the norm that *vegans* ought always to avoid animal products. (He may think vegans ought to be a bit more lenient then they typically are.) All the same, he does use the dietary norms in question, and uses them to guide conduct.

Is Hart really unaware of the advisory mode of norm-use? He holds that, if a social rule exists, *at least some people* in the group whose rule it is must treat it as 'a general standard to be followed by the group as a whole'[11], but this need not be all people in that group. Perhaps those who use the rule only to advise others are not among those who treat it as a general standard. More important, however, is that what Hart means by the 'acceptance' of a norm is not always what his critics mean. He is clear that those who do regard a rule as a general standard to be followed need not do so on any particular ground. Their reasons for thinking it should be followed may be purely conformist, instrumental, or tactical. Hart's 'acceptance' is not 'approval'. Hart holds that part of the meaning of normative statements in the law is explained by the mental states they standardly express, but he does not treat 'acceptance' as the name of

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[10] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 153-157.

[11] H.L. Hart, *The Concept of Law, 3rd ed.*, eds P. Bulloch and J. Raz, Intro L. Green (Oxford: Oxford University Press, 2012), 56.

a mental state. It is a portmanteau term covering a wide range of mental states. Here, Hart parts company with the emotivists and expressivists of his own philosophical generation. They held that evaluative terms express 'pro-attitudes' or 'con-attitudes' on the part of those who use them sincerely. In its crudest version, the view has it that to say that handguns *ought* to be banned is simply to express the attitude of *being in favour of* banning handguns: 'Hooray for banning handguns!' as the vulgar emotivist might render it. Though Hart's morality is non-cognitivist, it cannot be captured by those forms of emotivism and expressivism. Consider a sentence of the form, 'Legally speaking, you ought to V.' On Hart's view, even when such a sentence is true, a sincere utterance of it does not commit the speaker to thinking, 'You ought to V', either all things considered or even presumptively. The operator, 'Legally speaking…' flags what follows as coming from a certain limited perspective only. If it nonetheless expresses acceptance of the norm that follows, it is only 'acceptance' in Hart's special, technical sense of that term. It is similar to the way in which we might accept something for sake of argument, without approval or endorsement of the accepted proposition.

Does Hart think that sincere statements of this sort nonetheless express approval of the most basic ground rules which, in a given legal system, make it true that, 'Legally speaking, you ought to V'? No: even that is going too far. It isn't just laws that can be wicked, so too can constitutions, and so can the basic social and political norms underpinning constitutions: even a rule of recognition can be a moral disaster. ('The *Führer's* word is law.') But this does not show that there can be legal norms that no one accepts. It shows that there can be acceptance of a legal norm without approval of it. Hence, absence of approval, which is fairly common on the part of law-users, is no reason to doubt that it is someone's

actual use of something as a guide to action that constitutes it as a legal norm.

(b) New laws

A newly enacted statute may contain a valid legal norm before anyone has tried to obey it or apply it. It is a legal norm provided that it satisfies the tests in the relevant legal system for the existence of such norms. Does this support Gardner's view that something is a norm if it *can be* used to guide conduct (never mind whether it is *actually* so used)?

Here, we need to remind ourselves of the variety of things people do with rules, and the variety of people who do them. It isn't right to say that the newly enacted statute is something no one has yet made use of. True, no subject has yet followed or obeyed it, and no judge has yet applied it. But lots of other people have already made use of it. Importantly, Parliament has already used it to guide the behaviour of its own officials, of its subjects, and of judges and others who have a duty to apply law. These uses distinguish the new statute from merely possible statutes, from repealed statutes, and so on.

But there is an important feature shared by Gardner's view and mine. That something can be used to guide action is a *necessary* condition of it being used as a norm. Not everything can be used that way. For one thing, we cannot use something as a norm unless we can know what it is and what it requires. Pumpkin seeds could be used as money because we can identify and count and exchange pumpkin seeds. Thoughts could not be used as money. Rules and directives can be used as norms only when we can identify them and know what would count as compliance with them. To be useable as a norm it must not only be the case that *there is* ('metaphysically', 'in principle'…) something that counts as compliance; we must be able to know what that is.

Suppose, as some people hold, that all vague predicates really have sharp boundaries, though we can never know where they fall. On this view, there is some hidden-to-us sharp line between people who are mentally competent and those who are incompetent, between conduct that is reasonable and conduct that is unreasonable, and so on. Assume that is true. If we nonetheless *cannot* know where those lines fall, we cannot use them as norms for anything. If we need guidance on these matters we will have to rely on something else instead, for example, on the say-so of someone to whom we give the power to 'draw a line' as lawyers often say. But that person no more *knows* where to draw it than we do since, by hypothesis, there can be no knowledge of its location. Happily, however, there can be knowledge of where he *actually* draws it, and not just 'in principle' but in fact as well. This is one reason that legal decisions are valuable to us.

I pick vagueness as an example because we are all skeptics about the borderlines of vague concepts, even those who believe that 'logically' or 'metaphysically' they must exist. But some people are also skeptics about morality, even about the clearest cases of what some call 'moral properties'. Gardner has no sympathy for their views. But just suppose—*etiamsi daremus…*—that they are right, or that they are right with respect to certain classes of moral judgments. In that case, moral standards cannot be used as norms either, and for the same reason. We can be guided by our *beliefs* about what is right and wrong, or by our society's *rules* about what is right and wrong, but we cannot be guided by what is (really) right and wrong, for we cannot be guided by what we cannot know. Already that marks a difference between legal and moral norms, for there is no room for doubt that legal norms guide conduct, and so no doubt that the law is not only knowable, but also actually known.

3. Terms of engagement

I turn now to Gardner's claim that moral norms, unlike legal norms, are inescapable. He says we should no more expect an independent justification for moral norms than we should expect one for the equally inescapable norms that we must eschew self-contradiction, or never act for a defeated reason.[12] This difference between law and morality is one reason that, as I said above, we can sometimes look on the majestic rights and duties proclaimed in constitutional law with complete indifference, refusing to engage unless there is some further, non-legal, reason to do so.

That there are some differences between the normativity of law and morality is clear. H.L.A. Hart identifies four features as distinguishing legal from moral obligations.[13] (1) We regard conformity with moral obligations as of great importance, but we acknowledge that conformity to legal obligations can be trivial or even noxious. (2) Legal obligations are subject to deliberate control—they can be punctually enacted or repealed—but moral obligations are not. (3) Moral obligations are subject to the principle that 'ought implies can', at least to the extent that morality regards inability to conform as an excusing condition. Not so in law, where absolute liability, though sometimes deprecated, is occasionally imposed. Finally, (4), we typically resort to different means in securing conformity to legal and moral norms. Law makes prominent use of threats and offers; moral

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[12] Other philosophers are inclined to 'level down'. Brian Leiter writes, 'Even in the theoretical domain, there is no real normativity, that is, no norms of belief or epistemic value the agent *must* adhere to …' 'Normativity for Naturalists ' (2016) 25 *Philosophical Issues* 64, 75. And, more generally, see Charles Côté-Bouchard, 'Is Epistemic Normativity Value-Based?' (2017) 56 *Dialogue* 407.

[13] H.L.A. Hart, *The Concept of Law*, 173-180.

pressure is an appeal to conscience or to the 'intrinsic' wrongness of delicts.

These four indicia do mark differences between legal and moral obligations. But they are relatively superficial. For one thing, each is a matter of degree. This is obvious in (1) and (4), but it is also true in (2) and (3). There are indeed no 'rules of change' in morality, but there are ways to intentionally direct the evolution of a society's moral norms by differential reinforcement and legitimation of standards. And if it is true that moral wrongs must be voluntary, the voluntariness of conduct is a matter of degree and the defenses that may be recognized or declined are various, so the boundary around 'absolute' or 'strict' liability is somewhat fuzzy. Another reason these differences are superficial is that in Hart's theory they contrast with two deep, conceptual connections between law and morality. Hart says there can be no law without rules, and there can be no rule without constancy in applying that rule. But constancy in rule application, he controversially argues, is one kind of justice ('formal' justice). So, necessarily, every legal system does some justice. Second, Hart thinks that no system of rules is a legal system unless it is oriented to certain tasks to which morality is also, by its nature, oriented: the basic requisites for human survival. Both justice and the 'minimum content' of morality involve obligations, so just in virtue of its factual, positive features, law has necessary connections to morality.[14]

These features take the role they do because Hart is concerned to distinguish law on the one hand from *both*

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[14] Hart, *The Concept of* Law, 206-207; 193-200. This is one of several reasons we should not say that positivists think there is 'no necessary connection' between law and morals. See Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035; and John Gardner, *Law as a Leap of Faith*, 48-51.

social morality *and* ideal morality on the other. For Hart, social morality is not merely a bunch of beliefs *about* morality; it is a society's morality (though most complex societies do not have just one). What is more, he thinks of moral obligations as largely ameliorative, as addressing problems thrown up by the human predicament. Much of the morality of obligation would not *be* an ideal morality unless it was practiced; otherwise it could not address the problems that call for morality in the first place. That is why, in addition to his famously 'broad' concept of law, Hart also advances a broad concept of morality as including social morality, some of which contributes to the ideal.[15]

Is the morality of obligation, or this positive fragment of it, escapably or inescapably normative? We must not think of the morality of obligation simply as a set of customs that are morally justified. In Gardner's metaphor, these are customs that are fully 'absorbed' into morality.[16] They are not justified by (other, independent) moral standards, they have become moral standards. They include *mala prohibita* in the fundamental sense, things that really are *mala* (not just thought to be or treated as such) because they are *prohibita*. Morality contains such standards because, over a wide range, there is no uniquely correct way of instantiating general moral principles, yet some such way is needed if the principles are to function as moral norms at all. This is well understood in cases where the conventional aspect of morality is obvious on its face: what counts as showing respect for persons, what constitutes a promise, and even what counts as providing the necessities of life.[17] But the

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[15] Hart, *The Concept of Law*, 169.

[16] Gardner, *Law as a Leap of Faith*, 162.

[17] Adam Smith says the bare necessities include 'whatever the custom of the country renders it indecent or creditable people, even of the lowest order, to be without'. (*Wealth of Nations*, V.ii.k.3, 869–70).

positivity of justified moral standards is in fact pervasive: even assault and murder have boundaries that are partly conventional.

This raises some difficulties for the way Gardner deploys the escapable/inescapable distinction. Law is said to be rationally escapable because it has existence conditions that do not include all of its justification conditions; morality is inescapable because an unjustified moral norm is not a moral norm at all. But moral norms that are necessarily positive have something of each in them. *Qua* moral they are inescapable, for they exist only if they are supported by what is most reasonable. But *qua* positive, they are escapable, not because it makes sense to ask (e.g.) whether suffering is to be avoided, but because the operative norms of what constitutes suffering could be different from what they are, and in that space it is intelligible to ask for a reason why we should continue to work with these instantiations rather than other ones.

Various answers are familiar. It may be said that these are the standards that are incorporated into our culture, and there is no reasonable prospect of modifying them while realizing moral value. It may be said that they are too entrenched as part of human nature. It may be said that they to be followed just because they are ours. But then these considerations provide at least partial answers to the question that Gardner treats as unaskable: why should I do what morality requires? Even if it were a mark of irrationality to expect a non-moral explanation for the duty to respect persons, it is perfectly reasonable to ask for a non-moral explanation of why we, or I, can or must show respect in this way, or why we should go on showing respect in the ways that we do. And we can rationally decline to engage with these moral norms, at least when they are partly constituted by non-unique social norms.

This suggests an ambiguity in the idea of a norm with which one cannot fail to 'engage'. In earlier writings, Gardner uses 'engaging' to pick out the sort of activities that are necessary for law to exist: ordering, practicing, recognizing, ruling on, tolerating etc.[18] He says that legal positivism is the view that a norm is valid 'solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, endorsed it, or otherwise engaged with it.'[19] That sort of engagement need not be explicit; a judge also engages with legal norms in implicitly relying on them, or in using some of them in an argument in the interpretation of others.[20] Nonetheless, such engagements are all causally effective, datable actions or series of actions. Learning to detect what, in a given legal system, are law-making engagements is a crucial part of learning its law. Now, if engagement with morality is inescapable it cannot be engagement of the sort Gardner has in mind when he explains the positivist thesis. Moral 'engagement' is atemporal. There is no sensible answer to the question 'When did it start being wrong to lie?' If our relationship to moral norms is a kind of engagement, then it is an engagement that can be utterly passive.

I am not denying that there is a difference here between norms in morality and in law. In addition to the superficial differences that Hart notes, there is the fact that ideal morality has universal jurisdiction. Never mind whether we engage with it or not, everyone is *subject* to morality and nothing anyone can do can extricate themselves from that. Most positive norms, in contrast, have a functional, personal, spatial or temporal jurisdiction. That is, *according to those very norms* there are activities, people, places or times to which they do not

[18] Gardner, *Law as a Leap of Faith*, 20.
[19] Ibid.
[20] Ibid., 42, 86.

apply. We can extricate ourselves from their reach by extricating ourselves from their jurisdiction. But morality applies to all activities, all people, all places, and all times, though sometimes it does so only on certain conditions, or under certain presuppositions, or in particular contexts. It seems strained to think of morality's universal applicability as of as some kind of 'engagement' on our part.

4. The paradigm case of law

Just as much as everyone else, legal positivists are concerned to understand what some call the 'central' case of law.[21] The idea that they do so in order to police the boundaries of 'law' is, however, a myth that attests mainly to the illiteracy of those who propagate it. As Hart says, 'Very often the ordinary, or even the technical, usage of a term is quite 'open' in that it does not forbid the extension of the term to cases where only some of the normally concomitant characteristics are present.'[22] So it is with 'soft law', 'Masonic law', 'transnational law', 'indigenous law', and all the other para-legal systems.[23] They are not paradigm cases of law, but they are 'law' all the same.

An interesting feature of Gardner's thought is that, in one respect, he views the paradigm case very nearly as the natural lawyer thinks of it: laws and legal systems

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[21] The term was introduced to jurisprudence by John Finnis, in *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1979) but the similar notion of an 'ideal type' is found already in Max Weber.

[22] Hart, *The Concept of Law*, 15.

[23] On 'soft law' see Dinah Shelton, ed, *Commitment and Compliance: The Rule of Non-binding Norms in the International Legal* System (2000); on 'Masonic law' see Roscoe Pound, *Masonic Jurisprudence* (1919). on 'transnational law' see Roger Cotterell, 'What is Transnational Law?' (2012) 37 *Law & Social Inquiry* 500; on 'indigenous law' see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (2002).

have a constitutive aim, and that aim is connected with morality. Moral rectitude is not only a good aspiration for law, it is an essential aim without which a normative system would not be a legal system. Still, much law is morally defective, and so even if these are 'conceptually' deviant cases of law, they are very common cases, and if they are not in all pertinent respects 'fully' law, they *are* still law—they are not, for example, marginal cases in the way the para-legal systems are marginal law. Indeed, it is precisely because deviant law *is* law that it is appropriate to hold it up to the standards by which we judge *law*, and so to expect it not only to conform to general morality, but also to the law-specific ideals that comprise the 'rule of law': we expect it to be clear, consistent, prospective, actually enforced and so on. But Gardner helpfully distinguishes the conceptual-theoretical claim that law is *defeasibly* morally obligatory, i.e. that immoral law is a deviant case of law, from the moral-political claim that we should treat law as *presumptively* morally obligatory, i.e., that we should take the rough with the smooth and always approach law ready to obey it unless there are countervailing considerations.[24] That practical stance is only one of many that we might take towards defeasibly obligatory law, and if it is the one we should take we had better have sound moral reasons for doing so.

This is an enormously helpful clarification. It puts order in the often ambiguous and sometimes evasive idea of the 'central case' of law, and it shows the ways that idea is, and (mostly) is not, relevant to what is usually called 'the problem of political obligation'. All the same, I am not sure why Gardner concedes that, in its central case, law *is* defeasibly morally obligatory. Or, more precisely, that the defeasibly-morally-obligatory is the central case of all mandatory legal norms. That is

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[24] Gardner, *Law as a Leap of Faith*, 172

certainly not the only way that law could have a constitutive moral aim.[25] Even in its (conceptually) paradigm case, law can and does work in other ways as well, and so can norms of ideal law.

Hart offers a more parsimonious view of the paradigm case. Law is a more-or-less effective system of primary and secondary rules that are administered by institutions, and that aim to secure the minimum content of morality. (They must aim, but they may miss.) All questions about the moral force of these rules, including questions about whether we have any obligation to obey any of them, or whether judges have a moral obligation to apply them, are deferred as questions of political morality, not only in the deviant cases, but also in the central case. There is a constitutive aim to law, but it is nothing other than what follows from the minimum content thesis.

Some think there is no deferring the moral questions. They maintain that some affirmative account of a prima facie, or 'presumptive', duty of obedience is an essential part of any sound theory of the nature of law. The reasons usually given for introducing this further constraint on a theory of law are quite unconvincing. The most influential is some version of Hume's idea that any account of political morality must 'save the appearances', together with the claim that everyone in fact believes that decent law has all the authority it claims and is thus entitled to our obedience. To entertain any more exigent requirement (for example, that the law enjoy consent, or secure fairness) would inevitably lead to the conclusion that much law—even much decent law—does not merit the authority it claims for itself. Hume, like Bentham after him, thinks that a dangerously anarchic idea, and starkly

[25] I suggest an alternative in Leslie Green, 'The Morality in Law,' in L. Duarte d'Almeida, J. Edwards, and A. Dolcetti, eds, *Reading HLA Hart's 'The Concept of Law'* (Oxford: Hart Publishing, 2013), 177-207.

at variance with common sense. He writes, 'nothing is a clearer proof, that a theory of this kind is erroneous, than to find, that it leads to paradoxes repugnant to the common sentiments of mankind'.[26]

In an area as untidy as moral and political judgment we are unlikely to be able to save all the appearances, so it may be that the apparent authority of law is something that will have to go. But there is a more fundamental objection. There is no real evidence that 'the common sentiments of mankind' actually do vindicate a general duty to obey law, or even that they did so in Hume's day. One can think that revolution is too risky, that anarchy would be a disaster, that legal norms require respectful attention, or that one should not lightly disobey, without anything like the assumption that all law is entitled to a prima facie duty of obedience that is binding unless defeated.

An alternative view has it that the central case of law is simply the standard case as actually constituted by our thought and practice, a legal system with all the usual working parts and oriented, possibly successfully, possibly not, to its constitutive aims, including the aim of supporting morality. And law can support morality in many ways, including in ways that are not defeasibly morally obligatory.

Gardner says that every legal norm is a putative or purported moral norm, for it is a norm for addressing moral problems. 'If the legal norm does that job well, then in the process it is absorbed into morality. It becomes a moral norm as well as a legal one.'[27] That is why he says that, when it does its job well, it is 'nearly natural law'. But *how* does law do that job when it does it well, or for that matter when it does it best? Why assume,

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[26] David Hume, 'Of the Original Contract, in his *Essays, Moral Political, and Literary* ed. E.F. Miller (Indianapolis: Liberty Classics, 1985), 486.
[27] Gardner, *Law as a Leap of Faith*, 162.

with some natural lawyers, that law *is* at its best, at its healthiest, when it is such that each of its mandatory norms becomes a moral obligation of obedience?

We would not have found ideal law if its most important obligations, say those in the 'minimum content', were such that we had reason to resist them. But there are many other possibilities. Normative guidance is only one way that law contributes to society, and if this is its (conceptually) paradigm way, it is not always its (morally) best way. Consider sexual assault. Does law's contribution to sexual morality go best when it prescribes sound norms about consent, and everyone *takes those norms* as their reason for responding properly to their partner's interests? Someone who worried more about whether he violated the law rather than whether he violated his partner would be having 'one thought too many', as Bernard Williams used to say. In this area it is better that law should indirectly, and often non-normatively, affect the social norms that regulate sexual interaction.

In jurisprudence, we are used to distinguishing primary legal norms that aim to guide conduct from secondary, plan-B, norms that guide responses to conduct that fails to satisfy the primary norm. In areas like sexual interaction, however, it is not only the secondary enforcement but also the primary obligations imposed by law that should be seen as Plan B—as fallbacks, morally speaking. Things are not going well, sexually or legally, when men need guidance from the duty not to commit rape. The point is quite general. We also want people to avoid assault, to refrain from discrimination, and to deal fairly, not because of a lively awareness of the normative force of law, but because it would hardly occur to them to do otherwise. Law has a role to play in securing that smooth-running state of affairs, but not only by securing

a duty of obedience.[28] In some cases, law is at its best when it helps shape our social world in a way that is relatively invisible.

When the best way for law to support morality is non-normatively, does it follow law is not working in a law-like way? Stated most generally, the moral ideal for law, even in the paradigm case, is simply that it should help *get the moral job done*, not that it should get the job done in some particular way. Law's normativity is, at most, one feature of the paradigm case. Something that *only* goads people into action would not be a legal system as we know it; but something that *also* goads them can be not only a legal system, but even a central case of one. Neglecting this truth has given a lot of contemporary jurisprudence an air of sanctimonious unreality.

A final point about ideal law. If we do think law is at its best when it does its job normatively, by setting norms to guide people and, in setting them well, becoming one with morality, we must also think that law is at its best when people know the laws that apply to them. As I said above, no one can be guided by a norm that he does not know. Is the best case of law one in which people know the laws that apply to them? That is an impossible ideal. No one can know all the legal obligations they have, even at a moment in time; we have many other, better, things to think about. But there is a more plausible ideal in this neighborhood. This is the view that the law should be *knowable*, that is, law should be such that its subjects should be able to know what it requires of them. If law really *cannot* be known, says Hans Kelsen, it cannot address its subjects as rational agents, and if it guides them *solely* in non-rational or sub-rational ways, it guides action only in the way a mousetrap 'guides' a mouse.

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[28] Leslie Green, 'Should Law Improve Morality?' (2013) 7 *Criminal Law and Philosophy* 473.

Kelsen does not think of this as a moral ideal for law, he thinks it is an aspect of law's nature as a normative system. But there is an ideal that it serves, namely, fairness as one element of the rule of law. Other things being equal, it is wrong to try to rule people by law if one does not, or cannot, supply them with a law whose requirements they could know, and know up front, in advance. And that is another reason for valuing the necessary positivity of legal norms. Those, at least, can actually be known.

5. Conclusion

The title of the essay that I have been discussing is 'Nearly Natural Law'. Gardner is teasing us there. Apart from his idea that even positive law has a constitutive moral aim, there isn't much in this paper, or in his broader philosophy, to give comfort to natural lawyers in the jurisprudential sense of that term. Like his jurisprudential forbears, Bentham, Kelsen, and Hart, Gardner has a coolly skeptical view of law and its moral pretensions. But in the second, independent, sense of the term 'natural law', i.e. a doctrine about morality itself, Gardner is indeed very nearly a natural lawyer. He shares with Aristotle, Locke, and Kant the idea that morality is a universal, objective aspect of natural human reason. Indeed, morality as he sees it nothing other than the domain of what we have most reason to do, and its demands have supreme authority to command action. Seeing morality that way sets up a number of contrasts with law, including the ones I have been examining here. It would be churlish to complain that Gardner has not established that morality has the character he attributes to it: even Locke never quite got around to proving, as he promised he would, the existence and authority of natural law. Still, I wonder how much of Gardner's view can carry over into a different, more skeptical, view of

morality. Offhand, it seems that we could still acknowledge the priority of morality over law, and think that morality judges law and not the other way around, without signing up to Gardner's moral rationalism. Of course, showing that we do not need the 'inescapability' thesis to explain what we all know about the relative importance of law and morality is not itself a reason to doubt that thesis. But those doubts have been raised many times in the history of philosophy, so often that we can hardly regard them as plainly and obviously wrong. I think they still deserve a good answer. Perhaps, in his retirement from the Oxford Professorship of Jurisprudence, John Gardner will now turn his formidable talents to putting those doubts to rest.