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# OFFICIALS AND SUBJECTS IN GARDNER'S *LAW AS A LEAP OF FAITH*

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ABSTRACT. In his collection of essays, Law as a Leap of Faith, John Gardner lucidly develops a powerful account of legal positivism, primarily via a careful interrogation of H. L. A. Hart's work, with a particular focus on Hart's most important text, The Concept of Law. In this essay, I raise a question regarding the significance of legal subjects' understanding of themselves as legal subjects. I claim that as Gardner fills out the picture of what it takes to have an ideal legal system, we will find that there is no requirement that subjects have any understanding of themselves as legal subjects, much less an understanding either of what the law requires of them or of the legal status with respect to officials that the law gives them. In particular, I argue that Gardner's account of the law is too focused on the perspective of officials, and leaves out the perspective of legal subjects. This manifests what I call a unidirectional legal optic: the view of the law is the view from a single perspective, namely the perspective of the official. This is not an accurate picture of the law and so should not be presented as the paradigmatic account of law.

In his collection of essays *Law as a Leap of Faith*, John Gardner lucidly develops a powerful account of legal positivism, primarily via a careful interrogation of H. L. A. Hart's work, and with a particular focus on Hart's most important text *The Concept of Law*.[1] In several essays, Gardner expands on Hart's positivism, unwinding many of its more complicated features and resolving tensions within by carefully engaging Hart's key critics, including Ronald Dworkin, John Finnis, and Lon Fuller. In particular, Gardner skillfully shows how much Hart's and Fuller's accounts of law share. Where there is deviation between the two accounts, Gardner brilliantly develops the dialectic.

[1] All citations, except where noted, are from John Gardner, *Law as a Leap of Faith* (Oxford: OUP, 2012).

Upon completing *Law as a Leap of Faith*, one cannot help but to step back and marvel at how the book contains some of the most mature and philosophically sensitive accounts of legal positivism we have seen in at least a generation.

The central idea behind Gardner's account of legal positivism, then, is, following Hans Kelsen, that the law is a distinctive technique of social control. The legal philosopher's task, as Gardner sees it, is to explain what features of that technique are distinctive of law. That is, the legal philosopher's task is to explain *what features make a technique of social control a distinctively legal mode of social control*. The answer, roughly speaking, is that the legal technique of social control involves officials who take themselves to be governed by rules of law-making-through-legislation and law-making-through-law-application. These rules are the famous rules of recognition (or as a set: the rule of recognition). The rule of recognition allows officials to identify each other as officials, and, importantly, it allows them to identify when officials are acting *officially*, i.e., in their capacities as members of the legal institution.

So, according to Gardner's interrogation of Hart, and so Gardner's own theory of the law, as well as drawing heavily on both Kelsenian and Razian insights, legal institutions are conceptually prior to individual laws.[2] Consequently, analysis of *the* law will not be revealed in the first instance by analysis of *a* law. The beginning of one's inquiry might be, ''What is a law?'' But the first (correct) answer to this query will be, ''Something that is a creature of a legal institution.'' The focus of inquiry thereby moves immediately from the individual law (or collection of laws) to legal institutions. Thus, for example, we discover insight in Austin's account of law-as-a-command-of-the-sovereign by noting that it shifts our philosophical attention to the nature of sovereignty, which in its modern form is a legal institution and *not* because it introduces talk of commands. Hart was still correct to criticize Austin's account of law-as-command, but Hart also followed Austin in treating understanding of social practices—institutions—as the key for understanding the law.

[2] The rule of recognition, if understood as a law, is the only law that escapes this one-way dependence relation, although the dependence relation remains, but it is just a two-way relation without ontological or conceptual priority: a legal institution depends upon the rule of recognition that partially establishes it, and a rule of recognition depends upon the legal institution it (partially) establishes. Take away one and the other no longer exists.

In this essay, I do not dispute this approach. Gardner, I believe, is entirely correct in following the tradition of focusing on the nature of legal institutions. The question I raise, though, is whether Gardner's understanding of legal institutions is too narrow. In particular, I raise a question regarding an apparent lacuna in Gardner's account of legal institutions: he seems to consider *legal officials*' Janus-faced self-understanding as *both* legal officials and legal subjects to the exclusion of *legal subjects'* understanding of themselves as legal subjects.[3] This, I argue, is an error. In particular, as Gardner fills out the picture of what it takes to have an ideal legal system, we will find that there is no requirement that subjects have any understanding of themselves as legal subjects in that particular legal system, much less an understanding either of what the law requires of them or of their legal status with respect to officials. It follows that Gardner's account of the law may be too focused on the perspective of officials, and so may incorrectly leave out the perspectives of legal subjects. This manifests what I call a *unidirectional legal optic*: the view of the law is the view from a single perspective, namely, the perspective of the official. The unidirectional legal optic incorrectly renders otiose incorporation into a theory of the law the ways in which the feedback between subjects' understandings of the law and officials' understandings of the law can and do shape legal institutions. Consequently, Gardner's account of law, built entirely on the unidirectional legal optic, is not an accurate picture of the law. It should not be at the heart of a paradigmatic account of law.

I've expressed my thesis in bold terms. But, I should stress here that it is not meant to be an *objection* to Gardner's view. Rather, I present my discussion here as a provocation to Gardner to *expand* his account of the law. Nothing I say below strikes deeply at his magisterial summary, development, and defense of Hartian positivism as the best account of the law.

There are many different ways to control people. For example, one can physically move someone's limbs, one can threaten someone with violence, one can indoctrinate someone, or one can give someone a rule to follow. According to the legal positivist, the distinctive way that the law controls people is through rules, and in

[3] Wherever I use the term "subject" to refer to a person I will mean someone who is not an official, or is not engaging with the law as an official. All officials are subjects even when engaging with the law as officials, but I am not referring to these officials when I use the term "subject".

particular through rules created by the activities of legal officials (including the activity of applying a rule). Thus, Gardner writes, ''the law exists when there are law-applying officials with the authority to rule on particular matters in purported application of the legal rules.''[4] More or less the entire legal positivist project is the project of defending and elaborating this claim.

Thus, while the law is quite similar to other techniques of social control, such as religious and civic education, in that it aims to control via norms, it is distinct from these techniques of social control in that there is a special class of people—officials—who are responsible for the creation and application of those norms. Gardner breaks down some of the specifics of this picture of the law in his approving summary of Hart's views about some necessary although not jointly sufficient conditions for the existence of law:

> …(a) legal systems are systems of norms, not systems of (say) predictions, incentives, commands, or beliefs; (b) the norms of any legal system are all made… by human agents acting individually or collectively (Hart calls them 'officials'); (c) each legal system contains a 'rule of recognition' that identifies its officials of inherent jurisdiction (of whom all officials are delegates) and specifies by which actions which of these officials of inherent jurisdiction can make legal norms; (d) each legal system has some officials of inherent jurisdiction who at least sometimes make legal norms by applying other legal norms; and (e) in each legal system the rule of recognition is a legal norm that is made by the norm-applying actions of these latter officials, insofar as they add up to a practice of treating certain agents (including themselves) as officials of inherent jurisdiction who make legal norms.[5]

Notice that criteria (a) and (b) are easily met by many different forms of social control. For, these criteria that, if met, just make a mode of social control a technique that employs human-made rules. For example, these conditions are met by almost all religions, including the non-hierarchical ones. What makes a technique of social control a *legal* technique, that is, the conditions that when met allow for the existence a legal system, are features (c)–(e). These are the features associated with the rule of recognition and the way in which it interacts with the agents and the norms who are mentioned in conditions (a) and (b). The work of the legal positivist, then, comes in developing features (c)–(e).

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[4] *Law as a Leap of Faith*, p. 209.

[5] *Law as a Leap of Faith*, pp. 179–180, footnotes removed.

Some skeptics of positivism have resisted this picture by arguing that there is more to law than human-made norms. Morality, or at least political morality, has some purchase, they say. First, blatantly unjust norms cannot qualify as laws, since whether something is a law depends upon its not being immoral on its face. Or so say some natural lawyers. Others who reject the unification of law and morals find morality in an ideal of the *rule of law*. The rule of law is a set of virtuous practices in the administration of law. In particular, while the rule of law is on this picture a *technical* ideal—good lawyers and good cops are effective lawyers and effective police—it is not *only* a technical ideal. The rule of law is also a *moral* ideal, for it embodies a commitment to certain principles of political morality such as, for example, a principle that says that all persons are moral equals.

One of the most suggestive critics of positivism along these lines was Lon Fuller. In particular, Fuller developed an account of the 'internal morality of law' that challenged Hart's emphatic denial that morality necessarily played any role in shaping a legal system.[6] Many have read Fuller as developing such a robust account of the connection between law and morality that they take him to be a kind of natural lawyer. Gardner disagrees and does so through his very careful and insightful reading of Fuller. In his delicate and piercing interrogation of Fuller's text, Gardner shows how many of Fuller's finest points were both less critical of Hart and more conservative than the claims made by prominent natural lawyers like John Finnis.

On Gardner's interpretation, Fuller's critiques of Hart are as much invitations to draw out the positivist picture a bit more carefully as they are postulations of a substantive and uniquely legal morality.[7] In this way, Gardner deftly parries Fuller's critical remarks by turning them against the very person who wishes to employ them against Hart and the positivist project. In particular, Gardner's development of Fuller's defense of a more robust conception of the rule of law becomes, more than anything, an exploration of the conditions that need to be met for conditions (c)–(e) to be fully realized.

In particular, Gardner analyzes Fuller as focusing on conditions (d) and (e) as they are manifested in the *rulings* made by officials.

[6] See especially Lon L. Fuller, *The Morality of Law*, revised edition (New Haven: Yale University Press, 1969).

[7] See especially chapter 8 in *Law as a Leap of Faith*.

Fuller, Gardner holds, is concerned with the failure of officials to apply the rules properly. The vision (Gardner says) Fuller aimed to develop is a vision of officials humbly and conscientiously applying legal rules with sufficient appreciation of the constraints and demands that these and other legal rules place on them. In short, according to Gardner, the central feature of Fuller's 'critique' of Hart amounts to Fuller urging Hart to appreciate what is required in a *well-functioning legal system*. Only after developing this critique does Fuller go on to argue that a well-functioning legal system cannot be put to evil uses. This is the claim Hart explicitly denies, and Gardner sides with Hart here. But, it is not, Gardner argues, at the heart of Fuller's insights about the law, much less his commentary on Hart. For, much of the substantive theory Fuller develops in response to Hart neither presupposes nor entails this falsehood that well-functioning legal systems and their laws cannot be vastly and horribly morally odious.

We now come, then, to critical features of a well-functioning legal order. Gardner enumerates them in the context of an example of a riot. The question posed is whether the rioters' willful and spectacular disregard for the demands of the law is evidence of a lack of rule of law. Gardner answers that mayhem in the streets has nothing *conceptually* to do with the absence of the rule of law. Even daily rioting that grinds the city to a halt is not, in itself, a breach in the rule of law. Rather, the rule of law—the well-functioning of a legal system—depends upon the actions of *officials* and not in any way on the beliefs and behavior of the rioters or the subjects more broadly. Thus Gardner writes (I interpolate four numerals indicating what I take to be Gardner's features of a well-functioning legal order):

> If the relevant populations are lucky enough to live under the rule of law, the rioters [1] should be able to find out, before and afterwards, what the law has to say about their actions, and [2] the law should be such that, once they know what it says, they can judge when they are violating it and find a way of to avoid doing so. [3] They should be able to rely on what the law has to say to predict and plan for the official response. And [4] they should be able to use to the same law to challenge—with public funding and official support if needed—any illegality by police, magistrates, government ministers and so on.[8]

[8] *Law as a Leap of Faith*, p. 213.

Add on to this list the following condition: [5] officials in dealing with the rioters will apply the law as they understand it and in the manner that the law requires them to apply it, showing, as Gardner puts it, "dispassionate professionalism" and "respect for procedural propriety."[9]

In the block-quoted passage above, Gardner writes as if from the perspective of the subject and not the official. But, this is a rhetorical illusion. Gardner's requirements are entirely matters of official behavior and so must be understood as from the perspective of the official. The rule of law is manifested when officials, *qua* officials, appreciate these demands they face and then live up to those demands. Whether subjects in fact know the law, whether they in fact understand whether they are violating it, and whether they in fact rely on the law or use the law are totally immaterial to the rule of law. What matters is that officials have set things up and run things in such way such that subjects can (in some sense of this modal term to which I shall return) do all the things just listed.

Here, then, we can begin to appreciate that Gardner's account of the law focuses more or less exclusively on officials and their relationships to the legal system's norms. This is how we must read Gardner when he writes:

> …the law is, more specifically, the enterprise of subjecting human conduct to the governance of rules *and rulings*. Law exists only when there are law-applying officials with the authority to rule on particular matters in purported application of the legal rules.[10]

Legal systems exist when there is a certain technique of social control involving rules, rulings, and officials properly related to those rules and rulings. The *rule of law* exists when those officials go the extra mile and perform beautifully as legal actors. The beauty of this performance is determined by the internal demands of a legal system, and so the internal demands of being an official in a legal system. It is not fixed by the substantive demands of justice or the requirements of some other political virtue. (Of course, it may be that officials act beautifully as legal officials because of their

[9] *Law as a Leap of Faith*, p. 210.

[10] *Law as a Leap of Faith*, p. 209—italics in original.

commitment to justice, although that commitment may just as well get in the way of their properly discharging their roles as officials.[11])

Both legal systems and the rule of law exist in virtue of the behavior of officials. In more formal terms, legal systems and the distinctive virtue of legal systems supervene entirely on the behavior and attitudes of officials. The behavior and attitudes of subjects are not part of the supervenience base. The only perspective that is conceptually implicated in a theory of the law is therefore the perspective of the official. Hence, I describe Gardner's account of the law as manifesting a unidirectional legal optic involving only the practical perspective of the legal official. The official's view is the official view.

In light of this conclusion, Gardner's approving summary of Hart's take on the relationship between the legal system and its subjects is striking:

> Hart shared with both Austin and Kelsen the view that no system qualifies as a legal one unless, in large measure, it is effective across a general (non-official) population… the kind of effectiveness required for this purpose is relatively easy to come by. It does not require the population in question to know about, let alone to use, the ultimate rule of recognition that is used (and thereby created) by the officials of the system. The wider population need not even engage with the legal system as a system of rules.[12]

Once we appreciate that according to Gardner the law is entirely a creature of legal officials, we must read this passage as saying that there is no conceptual requirement on the existence of a legal system that its subjects even understand themselves, much less understand themselves correctly, as subjects of that particular legal system. After all, to understand oneself as subject to a particular legal system, one must have a grasp of its contours. One must, at the very least,

[11] One way to think about it is by analogy to a team sport. Suppose that seven players from each team must be on the field to play the game. The seven players must work together to win. If any one player fails to work as part of the team, he may play badly. But, he is still an active player on the field. One way to fail to work as part of the team is for a player to focus on *winning* instead of focusing on *teamwork*. The player fails to play beautifully because he is so focused on winning he is not properly playing his part. The focus on the ultimate goal gets in the way of good playing. But, the failure to focus on good playing, and even the realization of very bad playing, does not make the person any less an active player on the field. Similarly, the single-minded pursuit of justice may keep someone from being an excellent legal official. Such officials are not corrupt nor do they fail to be legal officials. But, they will fail to do what the law requires, or fail to play along with fellow officials, so that they can achieve the goal of realizing justice (in some small but meaningful way).

[12] *Law as a Leap of Faith*, p. 284.

correctly recognize at least some officials *as officials* and appreciate, to *some* degree, what rules govern those officials' behavior. But, Gardner allows that a legal system can exist in the absence of any of this. Subjects can be ignorantly alienated from the legal system, and the system could still exist as the governing system.

This is where Gardner's discussion of the rule of law becomes especially salient. Gardner is entirely clear that subjects *realizing* capacities for engagement with the legal system is irrelevant to whether a system manifests the rule of law. For, the first four criteria of the rule of law I drew out above are *modal* in the sense that they are met when it is *possible* for subjects to know certain things and act in certain ways. It is not necessary for a salubrious form of the rule of law for subjects *actually* to know certain things or act in certain ways. This makes sense since the rule of law depends entirely both upon *what officials do* and upon *how officials are related to each other and the legal norms both that create them and that they apply*. While officials could *force* subjects to learn about the law and *force* subjects to pursue legal action, this would both be an odd criterion for the rule of law and arguably not create the conditions in which subjects actually do anything (since they are being forced and so in at least some senses fail to act). This does not show that the beliefs and actions of subjects with respect to the law could make for an especially attractive political order. But the virtues of this attractive political order are, according to Gardner, entirely *political* virtues and stand at quite a remove from any of the *legal* virtues manifested in a system that displays a robust form of the rule of law.

All this raises the specter of the following sort of case counting as a full-throated instance of the law:

> Suppose that a society is governed by a brilliant advertising agency. Let the members of this agency be officials who recognize one another as officials by way of application of a rule that identifies them as such. These officials go to great lengths to generate carefully crafted rules both for social control and for applying these rules for social control. They have vast books filled with such rules. They even engage in long, formal arguments about how to interpret and apply these rules. But, the officials also use extremely effective and subtle advertising campaigns to get non-official subjects to follow these rules (where they apply to these subjects). Subjects almost always obey the law, and where there are disputes or failures to obey the law, the officials conscientiously work out the solution amongst themselves through long, formal arguments. They then use their advertising prowess to subliminally administer the legal decision amongst subjects.

The subjects invariably act in accordance with this decision thanks to the ridiculously effective advertising.

In this instance, the subjects utterly lack understanding of themselves as legal subjects. They have the *capacity* to form this understanding, of course. It is neither logically nor nomologically impossible for them to develop such an understanding. Furthermore, the officials do not *legally* prevent subjects from reading the law books or bringing a case before the judges. This is probably the most important absence of modal constraint—the subjects being legally able to develop an understanding of themselves, the law and their relationships to the law. Nonetheless, in fact, the officials are able to prevent this through the effective use of non-legal means.

According to Gardner, this arrangement would be a paradigmatic legal system. This system of rules would be as much an instance of the law as is the legal system in the United Kingdom. This, I think, should make people pause. Before discussing my concern, though, I should forestall an objection. One might think that the case I've developed is so unusual that it should not be used to regiment reflections on the nature of the law. But, the fictional aspect of this thought experiment is largely in the focus on an advertising agency. All forms of political ideology involve the obscuring of certain potential actions, the branding of certain forms of action as unnatural or disgusting (and so their impermissibility is taken to be *prior* to their illegality even though this may be an illusion—the actual depends relationship runs the other way), and the acceptance of certain (legally permissible) states of affairs as natural. A central activity of significant political struggle is often to challenge the hegemonic ideology and this is often the most difficult task in political struggle. For, ideology is not merely a few beliefs people have about politics. It, in large part, constitutes the political and moral presuppositions on the basis of which subjects both form more complicated beliefs about the political order and make decisions about how to act as political agents.

It is easy to imagine, then, instances in which ideology obscures for large portions of the population any sense of the legal system but at the same time conditioning that population to act in accordance with the law. Obviously, this cannot be too fine-grained a phe-

nomenon. But, most people's lives are not filled with fine-grained interactions with the law. Furthermore, there is certainly nothing about the law such that it must be so intrusive in subjects' lives that subjects regularly bump up against it. A minimal state does not lack a legal system; it simply lacks lots of laws, or at least lots of laws of a certain kind.

Even in an intrusive state there can be totalitarian measures taken to obscure the legal order. One hallmark of a totalitarian regime is the zest of the ideological project undertaken by the state. There may be armies of legal officials at work in such regimes, but there are also armies of propagandists dedicated to making most of that legal system otiose. In particular, such a propaganda-rich environment in which from birth subjects are trained up in the cult of the state can lead subjects to assume that the way things are done is the natural order of things and all other ways of being are perverse. The law is never presented as *the law* but instead as an articulation of 'what nature intended.' Subjects' self-understandings are not as legal subjects obeying the law but instead as good people acting as nature intended. This is not, at least, an incoherent arrangement even if it is an extreme case. Suppose further that there is in this totalitarian state a robust system of legal powers available to these subjects that allow them to bring cases and so on. But, the subjects are not willing to take such action. For, it has other significant costs. For example, legal action, however permissible, can bring the actor to the attention of the terrifying state apparatus. This deters people from employing whatever legal powers the law may grant them. In fact, people are not even *aware* of these legal powers since no one ever uses them.

My point here is not to argue as follows: certain odious political orders are so odious that they cannot have a legal system; on Gardner's account they do have legal systems; so Gardner's account must be wrong. Such an argument makes a similar mistake that some think Fuller made in his critique of Hart. For, to make such an argument is to be so captured by the urgency of a moral conclusion, namely, that such and such political orders are morally terrible, that one infers that anything potentially good and powerful that exists within most other not-so-terrible political orders, namely, a legal system, cannot coexist with the morally terrible political order. That

would not be a truth-preserving inference. Sometimes the germs of the good exist within the bad.

So, to return to my claim about Gardner's account of a legal system, I am arguing that on Gardner's elaboration of legal positivism, officials can be so hermetically sealed off from subjects that the operation of the legal system is rationally unconnected both to subjects' self-understanding and to the decisions that these subjects make about how to lead their own lives. This is, I think, an incomplete picture of the law. It may seem natural to someone who thinks about the law primarily from the perspective of practitioners and officials. But, from the perspective of the people whose lives are shaped by the law, treating such cases as paradigmatic instances of a legal order (and consequently of the rule of law) is a mistake. For, the law, at least at first glance, is something that subjects mobilize in day-to-day conversation as well as in more private moments of reflection and deliberation. The *ideal* account of the law should reflect this. That Gardner's account of the law may not is, I think, a problem.

In short, my charge against Gardner's picture of the law, then, is that it fails to shed light on features of the law that have as much claim to conceptual centrality as do those features that are connected entirely to the official point of view. Some reason must be given for the occlusion of the subject's perspective on the law. It cannot be assumed away, without argument, right at the outset.[13]

Another way in which this may be a problem for Gardner's account of the law begins to appear as we reflect on the brief comment Gardner makes:

> …law is distinguished from many of its near neighbors (those that have a social function at all) by how it serves the many social functions that it, in common with those near neighbors, serves or is capable of serving. Law is not 'whatever resolves disputes' but a special *way* of resolving disputes, and for doing a huge range of other things besides, by the use of rules largely effective across a general popu-

[13] Perhaps Gardner's aim—and the aim of positivists more generally—is to rinse the law clean of any whiff of politics. Philosophical inquiry into the law is technical inquiry not political inquiry and so, to some degree, value-free. Fair enough: jurisprudence can proceed in the absence of settling thorny questions of political morality. But, what Gardner and other positivists seem to want to do is to generate a picture of law in which there isn't even a whiff of *political contestation*. They do this by occluding the subjects' point of view and focusing only on the official. The officials are technical agents, not political agents. And yet those governed by the law are political agents. To leave them out thereby rinses even the faintest whiff of politics out of legal theory. This, I've been arguing, is an error.

lation, and officials who apply them and who claim authority and supremacy in doing so.[14]

According to Gardner, the central task of the analytic legal theorist is to explain how law is distinctive in the way it governs a community. At least since Hart made it so in *The Concept of Law*, the natural contrast class to law for the positivist is custom.[15] Custom, like law, consists in norms. Custom, like law, can be deployed to resolve disputes. But, unlike law, custom lacks officials. According to Hart and Gardner, what makes law *law* as opposed to custom is the existence of these officials and their law-constituting behavior.

I've argued above, though, that amongst subjects, the law can be transformed into custom. That is, *from the perspective of the subject* the law is the custom around here. The curious feature of Gardner's picture of the law, then, is that it allows for two fora of rule-shaped activity: official norms in the cathedral, i.e., the law; and customary norms in the marketplace, i.e., custom. There is no conceptual requirement that these two be *rationally* related to one another even if they are causally related. Most notably, the behavior required by the norms may be the same, but the *content* of the norms could be radically different.

So, while there is a factual connection between law and custom—i.e., there is a *de re* connection in that both the custom and the law require the same physical activity—there is not a rational connection between law and custom—there is no *de dicto* connection between custom and the law because the content of the norms, and so their meanings, are different from one another. The law governs officials' behavior in the cathedral, and custom governs everyone else's behavior outside the cathedral (and who knows what the officials think when they live as subjects and not as officials). The law begins to seem almost fetishistic. It is something that concerns only the officials. The real work of social control is being done by custom. Custom, not law, rationally shapes society. So, who, outside of officials, should even care about the law?[16]

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[14] *Law as a Leap of Faith*, p. 293.

[15] The previous footnote should make clear, then, that I disagree with this. *For the positivist*, the natural contrast class to the law is (governance through) *politics*, or at least (governance through) political contestation.

[16] An actual example of this phenomenon is described in Edward A. Tomlinson, "Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law," 58 *La. L. R.* 101 (1997–1998).

The worries have doubled. For, not only do we have a very odd picture of the law—one that leaves out the subjects' understanding of the law—but it is also threatens to be a philosophically sterile picture of the law. Absent any conceptually necessary rational connection between officials' activity and subjects' self-understanding as being governed by that activity, what philosophical significance does the law have? At the very least, what is the difference between the law and any old set of rules governing a club? What ends up being morally gripping are the norms outside the cathedral—the ones that shape society. If the law happens to connect up with these norms then so much the better for the law. But, our interest in it is quite derivative.

At this point, Gardner may point to a crucial passage in which he denies that the advertising agency thought experiment would count as an instance of a legal system, which in turn threatens the line of inquiry I've been developing:

> …even for Hart, it can't be sheer coincidence that the general population in question stays, by and large, on the right side of the law. Some explanatory link between their conformity and the legal rules is required. Those who hold themselves out to be the officials of the legal system must be able to affect non-official behavior by changing or applying the rules, or else they are not officials of the legal system.[17]

This passage suggests that merely by changing and applying the law, officials should be able to shape the society they govern. The official simply tweaks a word of a regulation here, files an opinion there and the world shifts. Surely this sort of governing order cannot brook the sorts of baroque machinations of ideology and the totalitarian state on which my concerns about Gardner's theory of law rest.

Alas, all modern governing orders have baroque systems of control, and ideology operates in all spheres, not just in backward or religion-soaked environments. There is nothing *special* about a legal order such that complex apparatuses of control aren't necessary. The official relies upon a vast network of institutional actors and widespread forms of deference, i.e., ideologically driven acceptance of the legal order, for her actions *as an official* to have any effect at all on

[17] *Law as a Leap of Faith*, p. 293.

subjects' behavior. Legal officials do not have the god-like power to straightaway transform word into deed.

Gardner recognizes as much when he writes in the sentence that immediately follows the passage just quoted:

> But the capacity of officials to [affect non-official behavior by changing or applying the rules] can be very indirect, via a long chain of intermediaries. The constitutional court, for example, may be able to affect the behavior of the appellate courts, who affect the behavior of magistrates, who affect the behavior of police officers and other petty officials, who in turn affect wider public behavior thanks to proxy rules such as 'never argue with a police officer (since they are likely to have, or be able to get, law on their side).'[18]

Gardner tells a friendly story here, and the friendliness masks the equally plausible alternative stories about the relationship between official's action and subjects' behavior. Just as there can be a laudatory relationship between constitutional courts and jovial beat cops, there can be a malevolent (but no less impressive) relationship between constitutional courts and the nefarious secret police. The proxy rule that people follow is not 'Never argue with a police officer' but instead 'Never argue with anyone, lest you get noticed by the secret police and judged a threat to the regime.' People simply avoid confrontations with each other, and insofar as confrontation is unavoidable, they try hard to deal with it themselves so as to minimize interaction with the terrifying operations of the regime. This may be a politically repugnant political situation, but it remains a legal system in fine working order, at least by Gardner's lights.

What we must explore, then, is not *each* link in the long chain of intermediaries between constitutional court and legal subject, but instead the *final* link in that chain binding subjects to officials. This link—the one between the cop and the subject, in Gardner's telling—is the one that takes across the threshold from cathedral to market, from the ought of the law to the is of behavior.

This discussion does not amount to an objection to Gardner's account of the law, much less to Hartian legal positivism writ large. Rather, it is an invitation not to treat the legal optic as unidirectional. In *Law as a Leap of Faith*, Gardner develops an account of the law from the perspective of officials. This rich account beautifully captures much of the complexity of the legal order in which officials operate. But, it

[18] *Law as a Leap of Faith*, p. 293.

leaves us wondering what sort of connection that order must have to the social order it aims to generate via the legal technique.

The natural move here is to stress that the law shapes society through subjects grasping the meaning of the laws. In this way, the law provides *practical guidance* via subjects' intellectual engagement with the law. A necessary condition for a system constituted by officials producing and applying rules claiming authority to govern the entire community counting as a legal system is that the rules govern the community by way of the members of that community *understanding* them.

This picture of the law requires viewing the law from both the perspective of the official and the subject. The official must, in a sense, see the law from the subject's perspective to avoid the rule failing to count as *law* because it does not successfully guide subjects. The subject must view the rule from the official's perspective in order to try to grasp what is being asked of her. Law necessarily has a discursive character.[19]

A discursive account of the law does not make all ''real'' law products of democratic institutions. A totalitarian state can have a fully functioning legal order, with all the discursive bells and whistles. All that is required is that the officials of that legal order must be sensitive to the perspective of the subject, in the same way they would be sensitive to the perspective of the subject if involved in idle conversation in a restaurant. Additional norms governing legal orders would be somewhat like the norms of communication.

Joseph Raz's Normal Justification Thesis (NJT), insofar as we apply it to legal systems, suggests a more discursive take on legal systems:

> …the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[20]

[19] On this view, rules that none of the subjects addressed by that law know about—secret law—and rules that none of the addressed subjects could understand—call this nonsense law—may at best be borderline cases of law. I say ''addressed subjects'' here because I am not referring to laws that empower or require officials to act secretly, but instead laws that secretly require subjects ignorant of those laws to act in a certain way. This would especially be the case if it is analytic that law always purports to give its addressed subjects reasons to obey. So, perhaps this is where the terminological rubber meets the political road.

[20] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), p. 53, italics removed.

(This is not the place to engage in Raz exegesis, so I shall assume a somewhat straightforward reading of the NJT.) The law, as Gardner notes, necessarily claims authority. If by claiming authority the law necessarily thereby makes a claim along the lines of the NJT, then the law necessarily aims to be understood and taken to be authoritative by its subjects. If this is so, then a necessary feature of any account of the law is an account of the subjects' perspective of the law. That is, any account of the nature of the law requires an account of how subjects are to understand the law, and what mechanisms, if any, facilitate that understanding.

As should be clear, then, positivism is not inconsistent with a requirement that we theorize the law at least partially from the perspective of the subjects. Consequently, nothing Gardner says in the text is inconsistent with my recommendation here, with the exception of any claim to the effect that *all* there is to a theory of the law is how the officials understand themselves in relation to the law and how they comport themselves in relation to each other and the rules they make, they apply and that make them officials.

Gardner's discussion of the officials, the legal system constituting norms, and the relationship between them is indispensible for any positivist account of the law. But, it is not the entire story. Any analytic account of the law should also include a substantive explication of the way that legal norms shape the behavior of the subjects governed by those norms. In particular, it should capture the law from both the perspective of the official and the perspective of the subject.[21]

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