***Law as a Leap of Faith* as Others See It (2014)**

by John Gardner
Professor of Jurisprudence
University of Oxford
http://users.ox.ac.uk/~lawf0081

Law and Philosophy 33 (2014), 813
doi: 10.1007/s10982-014-9218-5

Law as a Leap of Faith as Others See It

JOHN GARDNER*

The contributors to this symposium issue of *Law and Philosophy* see more in my book *Law as a Leap of Faith*[1] than I thought was there. For me, the book was a compilation of mainly pedagogical papers, written to display for intrigued but bewildered students the connections and disconnections between various well-known ideas about law and legal life (meaning law and legal life in general). My colleagues, at least as represented here, see the book in a different and perhaps more flattering light. They have searched for, and often claim to have found, implications and commitments of wider philosophical interest. In the light of those implications and commitments they have honoured me with testing objections that, it seems to me, would befit a far more substantial and original work than mine. For that, and for this opportunity to reply, I am grateful to all involved. I am only sorry that constraints of space will prevent me from adequately returning their compliments in the pages that follow.

Reading the contributions reminded me of these 1786 lines from Robert Burns that I learnt at school in Glasgow:

* University of Oxford.

[1] Oxford: Oxford University Press 2012. Hereafter: Gardner, *Faith*.

> O wad some Power the giftie gie us
> To see oursels as ithers see us!
> It wad frae mony a blunder free us,
> An' foolish notion.[2]

Sometimes I was surprised at how I came across to my readers, especially when my thinking was taken to be much more systematic, or philosophically ambitious, than, I intended or imagined. And yes, I would clearly have been saved from quite a few blunders, especially blunders of incomplete argument and poor formulation, if the criticisms assembled here had been available to me in advance of my book's publication. But would I also have been disabused of 'mony a ... foolish notion'? Of that I am not so sure. Maybe some of the notions that trouble my critics are not as foolish as all that. And maybe some of them, although foolish, are not my notions. Let's find out.

1. Toh on Hart's true legacy

In his important essay (which is much more than a response to my book) Kevin Toh paints me as 'a member in good standing'[3] of a prominent and perhaps dominant camp in the philosophy of law, whose members develop the work of H.L.A. Hart in a sadly un-Hartian direction by neglecting four key Hartian precepts. That I may have neglected some Hartian precepts, if true, does not worry me. Hart got a lot of things wrong and possibly the four precepts, if they are indeed Hartian, are among the things that he got wrong. Or possibly they are right but don't hold the

[2] 'To a Louse, On Seeing One on a Lady's Bonnet at Church' in Allan Cunningham (ed), *The Complete Works of Robert Burns* (Boston: Phillips, Sampson, and Co 1855).

[3] Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy', *Law and Philosophy* 33 (2014), 000 at [19]. Hereafter: Toh, 'Prescriptions'.

key to anything. Toh claims, however, that they are both right and key, and that we (meaning my fellow-campers and I) go badly wrong by neglecting them. We do not go wrong only in our reading of Hart but also in our thinking about law.

As I tried to convey in *Law as a Leap of Faith* I am not a great one for segregating philosophers into camps,[4] and I do not feel particularly at home in this one. While my supposed fellow-campers and I all share an overt indebtedness to Hart's work, we share that much with Toh as well. Our debts, however, are very varied, and in frittering away our Hartian legacies we differ no less among ourselves, it seems to me, than we each differ from Toh. Some of us may be less moved by the four precepts than Toh is, but that is simply because we all play up different ideas from the huge assortment that Hart bequeathed us while playing down others. A mere overlap between the sets of Hartian ideas that we play down would not, it seems to me, be a philosophically interesting commonality. Our commonality gets philosophically interesting, it seems to me, only if there is some positive thesis that we agree on (Hartian or otherwise), but that Toh rejects. What is that thesis supposed to be?

The main positive thesis that Toh foregrounds as a 'leitmotif' in our collective labours, and that he rejects, is the thesis that 'rules are practices'.[5] The quotations that Toh gives as evidence of our convergence suggest that some offer what Toh would call 'internal' statements of this thesis, while others offer 'external' statements of it. Some think that rules are practices whatever Hart thought, while others think that, rightly or wrongly, Hart thought that rules are practices. That may already be quite an important failure to converge. But that is not the full extent of the failure to converge. I cannot speak for the others named by Toh. But I for one reject both the 'internal' version of the thesis

[4] Gardner, *Faith*, v–vi.
[5] Toh, 'Prescriptions', [3].

and the 'external' version. I do not think that rules are practices and I also do not think that Hart thought that rules are practices.

I think, and I also think that Hart thought, that there is a special class of rules (customary or social rules) that are connected by their nature with practices. These are rules that are made by being practised – used as rules – in some social group. The rule's evolving content is supplied by whatever members of the relevant social group do in what they suppose to be conformity with the rule. That is what I occasionally call a constitutive relationship between social rules and practices.[6] By that, however, I do not mean to suggest an identity relationship. A constitution constitutes a legal system but is not identical with it. Likewise a practice constitutes a social rule but is not identical with it. I would be happy to say 'partly constitutes' if 'constitutes' is taken to mean (as it is taken to mean by Toh) 'wholly constitutes', and if 'wholly constitutes' is also taken to mean (as it is taken to mean by Toh) 'is identical to'. Maybe by just saying 'constitutes' I was inviting such misreadings. But if so I have not let the ambiguity remain unresolved in my work, as Toh himself records. In discussion of Scott Shapiro's work, I explicitly denied that according to Hart rules are practices.[7] And irrespective of whether it is Hart's thesis, I also explicitly denied that rules are practices. So if we must have camps, we may wonder why these twin denials leave me in Shapiro's camp as opposed to Toh's.

Toh replies that my interpretation of Hart can be represented as an 'insignificant notational variant' of Shapiro's.[8] I don't fully understand Toh's notations of my interpretation or of Shapiro's, and so I hesitate to deny that the notational variation may be insignificant. But if it is insignificant, then at least one of the interpretations is being misrepresented in Toh's notations. For

[6] For example, *Faith*, 69.

[7] John Gardner and Timothy Macklem, review of Shapiro's *Legality*, *Notre Dame Philosophical Reviews*, 5 December 2011.

[8] Toh, 'Prescriptions', [19].

the interpretations themselves (Shapiro's and mine) strike me as very different indeed. Let me explain how.

On Shapiro's interpretation, as I understand it, Hart attempts to explain the normativity of social rules – the fact that they are norms – by pointing to the practice (including the attitudes) of those who practice them. I do not think that can really have been Hart's explanation of what makes social rules norms. As Hart notes, the attitudes of the users of social rules, if they have any distinctive attitudes, are attitudes to them as norms, and some further explanation of what makes them norms is therefore called for. So what was Hart's explanation of the normativity of social rules, or of any rules at all? I am not sure. Although attitudes did come into the picture somewhere, it seems to me that Hart had pretty chaotic thoughts about normativity that do not add up to a worked-out position. Be that as it may, the thesis that I defend and attribute to Hart in the neighbourhood of 'practices partly constitute social rules' is not a thesis about the normativity of social rules, or about the normativity of anything. It is a thesis about the sociality of social rules, about the way in which they differ from other rules that are not social rules. They differ (for me and for Hart) in having their content supplied by the purportedly rule-following actions of the relevant norm-population, i.e. the actions by which the people who jointly make the rule take themselves to be severally following the rule. This does not touch on the question of why – in virtue of what – they qualify as norms. My remarks in which customs are presented as constitutive of customary rules therefore make neither an 'analytic claim about the meaning of "rule", nor an a posteriori, metaphysical claim about what rules are.'[9] Hence, so far as I can work it out, my remarks do not place me in the camp of errant philosophers to which Toh assigns me.

[9] Toh, 'Prescriptions', [5].

Toh quotes some words from chapter 3 of *Law as a Leap of Faith* that appear to point the other way. 'Gardner says,' he reports, 'that for Hart "the conforming behavior" that "constitutes" a rule of recognition is made "normative from the legal point of view".'[10] Those are my words, and the elisions do not corrupt their meaning. But the context and emphasis of the surrounding argument are lacking in Toh's rendition. What I was discussing at that stage in the book was not the problem of what makes the relevant customary norm a norm. What I was discussing was the problem of how that norm qualifies as the ultimate rule of recognition of a legal system, given the famous chicken-and-egg puzzle associated with it (viz. that the rule is what gives the legal officials who make up the relevant norm-population the legal status they need to belong to that population and hence to make the rule). I was interested, in other words, in how the socially normative becomes legally normative. So in the words Toh quotes, I was not emphasising the word 'normative' but rather the words 'from the legal point of view'. I assumed the ultimate rule of recognition of a legal system to be a norm, and a social norm at that, but I wondered how it could be legally ultimate in the way that Hart supposed it to be. Here is Hart's excellent answer, which I endorsed and still endorse: proto-officials or would-be officials of the legal system take each other already to be officials under the rule, and by conforming their conduct to the rule as they thus take it to be, they make that the rule, and anoint each other as officials of the legal system.[11] That is why the ultimate rule of recognition cannot be legislated, but can only be customary. Attempting to follow it, however misguidedly, is the only way of making it and changing it.

Toh may not object to this answer. But he seems to object to the question to which it is meant to be an answer – the question

[10] Toh 'Prescriptions', [16] quoting from Gardner, *Faith*, 69.
[11] Gardner, *Faith*, 69–71, 283.

of how the ultimate rule of recognition gets to be legal. He seems to regard that question as inconsistent with an important Hartian teaching about ultimate rules of recognition:

> There is supposed be nothing – viz. no fact or norm – in virtue of which a community's [ultimate] rule of recognition is legally valid. Questions of legal validity are supposed to be answered with finality by the rule of recognition. That is an important part of the functional role of any rule of recognition. And it is a mistake to ask about the legal validity of a rule of recognition.[12]

Perhaps so. But I am not asking about the legal validity of an ultimate rule of recognition. I am asking how it gets its legal *significance*, its ability to confer legal validity on other things. It does that by anointing some people as legal officials. How does it do *that*? This is a question about the content of this particular type of rule; about how it is possible for it to have the content that Hart says it does. It does not bear on whether it qualifies as a rule. That much is assumed when we ask about its content. True, it is not straightforwardly a legal rule; but it is a social rule without which there are no legal rules. And *qua* social rule there clearly are 'facts in virtue of which' it exists. It exists, for a start, only in virtue of its being practised by some norm-population. That is not an existence-condition for a rule, but it is, as Hart explains, an existence-condition for a social rule.

I should stress that *Law as a Leap of Faith* is not silent on the broader problem of normativity, i.e. of what makes a norm a norm. Chapters 1 and 6 attempt to sketch out, between them, a general approach to thinking about norms. It is a cognitivist approach that, although of classical origin, owes a lot of important detail to Hans Kelsen's thinking in the mid-period of his career, and to Joseph Raz's synthesizing interpretation of

[12] Toh, 'Prescriptions', [17].

Kelsen.[13] Chapter 1 sets up the approach by reflecting on the possibility and potential importance of adopting a 'point of view' in one's thinking. This possibility includes but is not limited to that of adopting a legal point of view. After extensive discussion in chapters 2 to 5 of the specifically legal point of view and its many peculiarities, chapter 6 returns to the wider normative landscape and the place of law in it. Naturally it is still only a sketch of the landscape; a book on law cannot equally be a book on games, on gastronomy, on religion, on friendship, on etiquette, or on morality. Yet in chapter 6 I do try to juxtapose law with all of these in a way that brings out, in a more literal way than I had been able to achieve in chapter 1, how normative 'points of view' are possible and how they can figure in our practical thought even when we are not personally committed to them (and indeed even when we personally find them irredeemably immoral, stupid, useless, valueless, etc.).

Toh does not find the themes of chapter 1 reprised in chapter 6, or indeed anywhere in the rest of *Law as a Leap of Faith*.[14] But that may be because he is hunting for a reprise of the wrong themes, the ones that carry faint echoes of Hart. Given the general influence that Hart has had over my work it is hardly surprising that faint echoes of him can be found all over the place, even when I am not developing a Hartian line of thought. And in Chapter 1 there may be faint echoes of Hart even though I am consciously not developing a Hartian line of thought. Actually, 'consciously not developing' is an understatement. Inasmuch as Hart's views about normativity in general are worked out enough to engage with at all, I am deliberately distancing myself from them in chapter 1. I get round to explaining why in chapter 6.

[13] Raz, *The Authority of Law* (Oxford: Clarendon Press 1979), 134–43.
[14] Toh, 'Prescriptions', [21].

I will not attempt to rehash the explanation here. Suffice it to say that the picture that I reject seems to have much in common with the picture that Toh embraces. It is hard to be sure because Toh is talking about normative statements, whereas in *Law as a Leap of Faith* I am mainly talking about the use of norms in reasoning, which is where I think we should look for their defining features. Maybe that makes a difference, or maybe not. Anyway, here is Toh's picture. For Toh, borrowing Hart's terminology if not his views, there are 'external' statements by which 'a speaker describes or states the fact that some person or group of people accept the relevant rule and are thereby guided in their conduct by that rule.'[15] And then there are 'internal' statements by which a speaker 'expresses his acceptance of a rule.'[16] If these (*mutatis mutandis*) are supposed to exhaust the possible ways of relating to norms as a norm-user as well as the possible ways of invoking norms as a speaker, then I reject the dichotomy. As I suggested in chapter 1 and argued in chapter 6, there are ways of using norms as norms that do not require acceptance of them (or any other pro-attitude towards them, however weak) on the part of the norm-user. One may use a norm in one's reasoning – for example, while occupying a professional role – while finding it entirely risible, damnable, or contemptible. Since there is no pro-attitude towards the norm in such a case, there is also no pro-attitude to express when one states the norm in the course of (say) advising a client or arguing a point with one's colleagues. But nor is one just stating ('externally') that the rule is accepted by others. One's statement, we could say following Neil MacCormick, is cognitively but not volitionally internal.[17] If that is possible then we need an account of what a norm is that allows for the possibility. And Toh's is not

[15] Toh, 'Prescriptions', [8].
[16] Toh, 'Prescriptions', [12].
[17] MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press 1978), 292.

it. Nor, if Toh is right to trace his account to Hart, is Hart's. The Kelsen-Raz account, on the other hand, fits the bill. It separates the question of whether one is using a norm in one's deliberation from the question of what attitude one takes towards it.

Hart and Kelsen understood the puzzle of law's existence in similar ways. They understood it as a chicken-and-egg puzzle. And in trying to solve the puzzle, both became preoccupied, I think rightly, with explaining how the social character of law could be reconciled with its normative character. In the result, Hart did a lot more to explain its social character, while Kelsen did a lot more to explain its normative character. Hart's attempts to squeeze the normative character of law out of its social character led him to private if not public despair;[18] Kelsen's attempts to squeeze the social character of law out of its normative character led him, later in career, into a spiral of norm-sceptical decline.[19] Fortunately, however, Hart's brilliant explanation of law's social character is largely compatible with Kelsen's brilliant explanation of its normative character. At any rate that is my judgment. My way of persuading you is to juxtapose my Kelsenian discussions of law's normativity in chapters 1 and 6 of *Law as a Leap of Faith* with my Hartian discussions of law's sociality in chapters 2, 3, and 4, so that we can see whether the two hang together. As he has done more than once before, Toh gives me cause to reflect further on quite a few problems in what I say. But he does not lead me to think that there is any incongruity between my broadly Hartian treatment of social norms and their importance for law, and my much more Kelsenian treatment of normativity in general.

[18] Nicola Lacey, *A Life of H.L.A. Hart* (Oxford: Oxford University Press 2004), 228. Herafter: Lacey, *Life*.

[19] Culminating in the irrationalist position taken in Kelsen, *General Theory of Norms* (trans Hartney; Oxford: Clarendon Press 1991).

2. Duarte d'Almeida and Edwards on law's claims

As well as sharing their understanding of the puzzle of law's existence, Hart and Kelsen shared a view about the hazards of writing about the nature of law. On one side lay the perennial risk of overmoralizing law, of assimilating law to morality, as the 'natural law' tradition was thought by both authors to have done. On the other side lay the opposite risk of contrasting law too dramatically with morality, possibly thereby losing sight of law's normativity. Kelsen accused 'legal sociologists' of falling into the second trap,[20] but Hart demurred. His view of legal sociology was less jaundiced, or less jaded.[21] He saw that normativity was a key concern of, for example, Durkheim and Weber. Hart illustrated the second trap instead by looking closer to home, among the so-called Legal Realists and in the Bentham-Austin tradition of philosophical thinking about law. His criticisms of Austin, in particular, are recalled by every law student. The Austinian 'command theory', according to the student's recollection, boils law down to habits instead of rules, and thereby loses sight of the essential normativity of law. Hart is then said to have put the normativity back in with his famous 'internal aspect of rules', the 'critical reflective attitude' that supposedly distinguishes rule-using behaviour from its merely habitual counterpart.

This recollection of Hart's critique of Austin distorts Hart and distorts Austin. Austin thought that laws are commands of the sovereign backed up by threats of sanctions. Hart objected that Austin lacked a suitable mechanism for identification of the sovereign. Austin thought that the sovereign was simply the commander whom a population habitually obeyed above all others. Hart argued that for there to be a legal system there must

[20] Kelsen, *General Theory of Law and State* (trans Wedberg; Cambridge, Mass.: Harvard University Press 1945), especially at 175ff.
[21] Gardner, *Faith*, 274ff.

also be a rule identifying the sovereign as the apt commander to obey.[22] A legal system is not just a set of ('primary') rules, he argued, but a set of primary rules combined with some further ('secondary') rules regulating (*inter alia*) membership of the set. Here – at the level of the secondary – is where Austin made do with habits and Hart insisted on rules. But Hart did not claim that Austin had no room for primary rules. That would have been a claim easily refuted. Rules are norms with a certain kind of generality. Commands are norm-creating acts. All that it takes for there to be a rule, as Austin said, is a for there to be a command with the right kind of generality.[23] Hart knew this. So when Hart resisted the picture of law as 'the gunman situation writ large'[24] he was thinking of the sovereign as the gunman in question, barking commands and hence creating norms, but doing so without any further norm authorizing him to do so.

Yet Hart had a second worry about the gunman model that, while he treated it separately, he did not adequately differentiate from the first. He thought that the commands of gunmen merely oblige, whereas laws obligate. He struggled to make sense of this distinction. The constant pressure towards overmoralization was there, and Hart laboured hard to resist it, but much of his labour was fruitless and disorientated. He was too fixated by the back-up threats in the gunman situation and said too little about the commands. If he had focused on the commands he might have emphasized the following more than he did.[25] Not all norms that require things of us – mandatory norms – are norms of obligation. Norms of obligation (or duty) are all and only those that require things of us *categorically*, meaning irrespective of our

[22] Hart, *The Concept of Law* (2nd ed, Oxford: Oxford University Press 1994), ch 4. Hereafter: Hart, *Concept*.
[23] Austin, *The Province of Jurisprudence Determined* (ed Rumble; Cambridge: Cambridge University Press 1995), 27.
[24] Hart, *Concept*, 7.
[25] He did mention it: Hart, *Concept*, 87

personal goals at the time. Other norms also require things of us, but only *hypothetically*, meaning in a way that trades on some personal goal that we happen to have at the time. The gunman (in Hart's simple gunman situation) requires but he does not obligate; and that is because (even according to the gunman) conforming to his requirements is simply the price one pays for getting away with one's life. The law, by contrast, contains obligations, requirements that (according to law) one is to conform to whether one can get away with nonconformity or not. Maybe one can get away with murder or theft or speeding. Maybe not. The requirement of the law is the same either way.

In *Law as a Leap of Faith* I doubted whether establishing that the law's requirements are obligatory ones is sufficient to do all the work that Hart was trying to do, or at any rate all the work that he needed to do, in contrasting law with 'the gunman situation writ large.' Following Raz, Alexy, and many others I argued, in chapters 5 and 6, for a more moralistic distinction between law and the proverbial gunman than Hart is prepared to allow. When the law requires things, I argued, it makes a moral claim – sometimes called a claim to legitimacy – that the gunman does not. That the law's requirements are (according to law) categorical is a mere consequence of this. It comes of the fact that moral requirements are categorical ones. But not all categorical requirements are moral ones; and besides there is a lot more to the law than requirements. So there is more to the law's moral claim – I argued – than a claim to require categorically.[26]

I say all this by way of laborious preamble to a discussion of Luìs Duarte d'Almeida's and James Edwards' virtuoso paper.[27] I say it because the positive position they take towards the end of

[26] Gardner, *Faith*, 156–7. It is, I argued, a claim to apply to us 'inescapably'. I devoted some energy, in chapter 6, to distinguishing the inescapable from the categorical; neither is necessary for the other.

[27] 'Some Claims about Law's Claims', *Law and Philosophy* 33 (2014), 000. Hereafter: Duarte d'Almeida and Edwards, 'Claims'.

their paper – in which no distinction is drawn between obligating and merely requiring[28] – suggests that they do not hear the difference that Hart and I hear between the voice of the law and that of the gunman. Or if they do, they do not read chapters 5 and 6 of *Law as a Leap of Faith* as my attempt to explain that difference. If that is so, then I was remiss in failing to spell out, as I just have, what motivated the position I took in those chapters. I was mainly concerned to show that it is possible to moralize the law without overmoralizing it. It is possible to understand the law as made up of moral norms in one sense, but not in another. The law is not made up of moral norms in the sense that it is not necessarily moral binding. One does not automatically have a moral obligation with the same content and force as one's legal obligation. Indeed legal norms are often morally unacceptable and thus worthy only of being shunned, subverted, eliminated, resisted, and/or ridiculed. Yet that very fact shows a way in which legal norms are indeed moral norms. They are would-be moral norms. They are norms that call for integration into moral thought, for a morally acceptable use, and if such use cannot be found then they are failures in their own terms. Whether any given legal requirement succeeds in binding us morally – in forging *mala* out of mere *prohibita* – depends on many variables. But all of them, by their nature as legal, claim to do so.

In chapter 5 I was mainly concerned to resist a preliminary objection to this view, namely the objection that the law is not the kind of thing that can make claims (or make promises or decisions, or have aims, intentions, etc.). I resisted not only the outright rejection of such agential talk in respect of the law, but also its demotion to merely figurative status. Duarte d'Almeida and Edwards do not side with those who raise the preliminary objection. But they raise a number of challenges, some more troubling than others, to my line of argument against it. Their

[28] Duarte d'Almeida and Edwards, 'Claims', [25].

more consequential challenges, and the ones to which I will restrict the rest of my comments, concern (i) which claims law makes and (ii) which officials speak for law in making them.

Under heading (i) Duarte d'Almeida and Edwards object that, in arriving at the conclusion that law makes moral claims, I dispose too quickly, and too glibly, of the possibility that law is only making *legal* claims when it makes normative claims. Why – they ask as I did – should a claim by law that φing is obligatory not be interpreted as a claim that φing is merely *legally*, not morally, obligatory? My answer committed me (inter alia) to the following thesis: that legal obligations are but moral obligations claimed by the law to exist. For Duarte d'Almeida and Edwards this is an eliminative or reductive thesis. It entails, to their way of thinking, that legal obligations are obliterated. A claimed penguin is not really a penguin, they suggest, and in the same way a claimed obligation is not really an obligation.[29]

I am not so sure that a claimed penguin is not really a penguin. Children may converse with imaginary penguins. That imaginary penguins are not real penguins does not entail that they are not really penguins. To put the same point in a less cryptic way, the fact that an imaginary penguin is all in the mind of the child does not entail that what is in the mind of the child is something other than a penguin. But I owe the Duarte d'Almeida and Edwards objection a fuller answer than this playful echo of *Sense and Sensibilia*.[30] Their objection, if sound, would be catastrophic to my project. For its implication is that I am yet another legal theorist in a long line who failed to find a navigable route between the rock of excessive moral credence for law and the hard place of law without normativity. In ensuring enough logical space for immoral law – they are suggesting – I ended up falling in with the Legal Realists, making

[29] Duarte d'Almeida and Edwards, 'Claims', [19]

[30] J.L. Austin, *Sense and Sensibilia* (ed Warnock; Oxford: Clarendon Press 1962), ch 7.

the normative self-presentation of the law into a mere smokescreen for a fundamentally non-normative practice. In Duarte d'Almeida's and Edwards' words, I transformed a legal system from a system of norms into a 'set of claims'.[31]

But it is Duarte d'Almeida and Edwards who overpolarise the possibilities here. Consider the following remark:

> We are saying, not that law *claims* that *X* has an obligation to φ, but that law *requires X* to φ. And there is a big difference between *requiring* someone to φ, and *claiming that* someone has an obligation to φ. While to claim something is to perform a descriptive speech act, requirements are prescriptive rather than descriptive speech acts.[32]

The dilemma set up for me here by Duarte d'Almeida and Edwards is a false one. My thesis that the law claims to obligate is consistent with the thesis, which indeed I endorse, that the law actually requires things and does not merely claim to do so. My point is only that the law's requirements are claimed by the law to be moral ones (and hence to be obligations). This is where the voice of the law, be it sincere or insincere, differs from the voice of the gunman. Both agents require things, but only the law is constrained by its nature to be morally pretentious in doing so. This is not a reductive or eliminative thesis. It does not run aground with the ill-fated Legal Realists. Not only is normativity preserved (an act of requiring, even by a gunman, is the exercise of a normative power); also the law cannot be understood except as issuing its requirements in a moral voice. There is no way to reduce this feature of law out. It is a defining aspect of the legal point of view, which Hart calls the 'internal point of view' of a legal system. The legal point of view is a point of view rife with moral concepts, and rules and rulings structured by them, even when the law is totally immoral (and also, as I tried to illustrate at

[31] Duarte d'Almeida and Edwards, 'Claims', [19]
[32] Duarte d'Almeida and Edwards, 'Claims', [20], emphasis omitted.

length using some remarks of Justice Holmes, irrespective of the efforts of particular officials to avoid using them).[33]

This takes us to topic (ii). When the law makes whatever claims it makes, through which officials does it do so? It is tempting to think, with Duarte d'Almeida and Edwards,[34] that whoever makes the law also makes its characteristic claims (if it makes any). It is also tempting to think that the relevant claim-making will be manifest in the language of law-making, perhaps in the drafting of written constitutions or statutes. In my view, however, these are not the right places, or at any rate not the first places, to look. Legislative provisions, just like commands, could imaginably be stripped of their moral flavour, e.g. by using imperatival formulations. Not so the legal arguments in which the legislative provisions will be invoked. In legal arguments, and more generally in legal reasoning, the norms of the law are widely treated and used as if they were moral norms. A great deal of legal reasoning, as I explained elsewhere in *Law as a Leap of Faith*,[35] is moral reasoning from legal premises. Without the assumption that legal requirements are (being advanced or held out as) moral obligations the characteristic inferences of law-appliers are pervasively invalid. Naturally this affects the language used in the law, and talk of obligations or duties (and the rights that ground them) is therefore pervasive in most legal systems, including in legislation. But as my brief excursus on the work of Justice Holmes was meant to illustrate, legal language is moralized because legal argument is moralized, not vice versa. In bearing out the thesis that law makes moral claims, what is most decisive, then, is the official treatment and use of the law in legal reasoning (central to the business of law-applying officials) rather than the vocabulary of typical law-making utterances.

[33] Gardner, *Faith*, 145-8.
[34] Duarte d'Almeida and Edwards, 'Claims', [26].
[35] Gardner, *Faith*, 37-42, 185-90.

3. Shecaira on the morality in legal reasoning

My moralized account of legal reasoning is the main topic of Fábio Perin Shecaira's generous and illuminating paper.[36] Like Duarte d'Almeida and Edwards, Shecaira draws attention to some rough formulations in my book, many of them in passages where I thought (it seems mistakenly) that the finer points would be settled by surrounding remarks. I will comment on only one of these, where Shecaira specifically invites me to do so. He wonders whether I think that legal reasoning is moral reasoning even when it is reasoning towards a conclusion about what the law already says.[37] The short answer, as he first suspects, is no. Legal norms are such that they can be identified by their sources alone, and hence without resort to argument about their moral (or other) merits. It is true that moral argument is often used in the interpretation of the law. But this only goes to show that interpreting the law is often a matter of imbuing it with content that it does not yet have. So when I say baldly in the book that 'legal reasoning is moral reasoning'[38] my attention has indeed shifted or drifted away from attempts to work out what the law already says. As Shecaira moots,[39] I am by now focusing exclusively on cases in which what the law already says is used as a major premise in reasoning to arrive at conclusions that, until they are reached by an official with the power to bind legally by reaching them, are not yet legally binding. This I followed Raz in calling 'reasoning according to law'.[40]

[36] 'Gardner on Legal Reasoning', *Law and Philosophy* 33 (2014), 000. Hereafter: Shecaira, 'Reasoning'.
[37] Shecaira, 'Reasoning', [17-18].
[38] Gardner, *Faith*, ix.
[39] Shecaira, 'Reasoning', [17].
[40] Gardner, *Faith*, 40, following Raz, 'On the Autonomy of Legal Reasoning' in his *Ethics in the Public Domain* (Oxford: Oxford University Press 1994).

Shecaira thinks that my account of reasoning according to law is attractive but too permissive. It dignifies as legal reasoning instances of reasoning that should not be so dignified. I should say that my talk of 'dignification' here is a bit tongue-in-cheek. It plays up the impression given by Shecaira that for me, classifying some reasoning as legal reasoning legitimizes its use by judges.[41] But I hope I didn't claim this. If I did, I repent. My claim was intended to be only this: that making law by legal reasoning is not the same as legislating. This claim is relevant only to those objections to the legitimacy of judicial law-making that rely on the thought that one cannot make law other than by legislating. While resisting objections of this kind, I leave the way open for objections of other kinds to the legitimacy of judicial law-making, including those (emphasized by Shecaira[42]) that invoke restrictions on the extent to which or the contexts in which judges, or some judges, are authorized by the law of their legal system to engage in reasoning according to law (or are permitted by their oaths of office to do so, etc).

Be that as it may, Shecaira still thinks that my account allows reasoning to qualify too easily as reasoning according to law. He offers two examples. The first is one of my own examples turned against me.[43] It is an imagined case in which a judge uses moral considerations to resolve a conflict between the law of contract and the law of torts (both represented in highly simplified form). Shecaira points out that what I called the first 'premise' of the argument (the tort rule) is ultimately the loser in the conflict. He notices that if it were enough for reasoning to be 'according to law' that the reasoning invokes a legal rule only to override it on moral grounds, that would accredit a great deal of legislative reasoning as reasoning according to law, thereby breaking down

[41] He gives the impression by naming my view about how judicial law-making and legislating differ 'the legitimacy thesis': Shecaira, 'Reasoning', [4].
[42] Shecaira, 'Reasoning', [28-30].
[43] Shecaira, 'Reasoning', [23-5].

the very distinction I am trying to draw. So if my example did not include another legal premise (the contract rule) that is used to make the case for overriding the tort rule, it would cut against my thesis, not in favour of it. I agree. The helpfulness of the example in making my case turns entirely on the fact that a legal rule is being overridden *on legal grounds*, i.e. by relying on another legal rule. If my presentation of the case failed to bring that point out, it was defective. I included two conflicting legal rules in the example merely to draw attention to one very familiar situation in which legal reasoning is moral reasoning from legal premises, namely a situation of conflict between two legal rules. (My other main example, as Shecaira notes,[44] was of reasoning by moral analogy from one legal rule to another.)

Shecaira's own second example is not one of mine. It is his stylized rendition of the reasoning of the United States Supreme Court in the notorious 1905 case *Lochner* v *New York*:[45]

[1] The liberty of the individual is to be protected against state interference (an already-valid legal norm);

[2] the liberty of the individual encompasses the [liberty of the individual] to purchase or sell labor;

[3] therefore, the liberty of the individual to purchase or sell labor is to be protected against state interference;

[4] therefore, the liberty of bakery employees to agree to work for more than 60 hours a week or 10 hours a day is protected against state interference.

[44] Shecaira, 'Reasoning', [15].

[45] 198 US 45 (1905); Shecaira, 'Reasoning', [26]. I have replaced Shecaira's word 'right' with the words 'liberty of the individual' in premise 2 to make the argument valid.

Shecaira suggests that the legal premise [1] does not constrain the judges very much.[46] It leaves them free to incorporate via premise [2] a dubious moral judgment, one which in his view does almost all of the work in supporting interim conclusion [3], and from there the unhappy final conclusion [4]. So the judges, thinks Shecaira, are legislating in effect. Premise [1] lets them do more or less what they like. Yet on my account this seems to be a clear example of legal reasoning, not a borderline or questionable example. He wonders whether I – or at any rate anyone with any sense – would really want to so classify it.[47]

I cannot speak for anyone with any sense, but my own answer is that this is a clear case of legal reasoning – assuming, of course, that premise [1] faithfully states a legal norm. I am not sure that I would even be inclined to place this case in the more complicated category of reasoning according to law. To me this looks like law-applying without legal change, so that any moral objection to the conclusions in [3] and [4] is a moral objection to the legal position that is already revealed in premise [1].

How so? Well, there are those (Shecaira may be one of them) who think that liberty is analytically valuable – that 'liberty' is the name of a value – and hence that premise [2] cannot but make the reasoning to [3] depend upon a moral evaluation.[48] Liberty to buy and sell labour must be good in just the way that liberty is good if the latter is to include the former. If that is true then [3] is not part of the law until a relevant official makes the evaluation in [2] and is thereby led to conclusion [3]. I will call this the 'moral opening' view. Some people (usually known as 'inclusive legal positivists') dissent from the moral opening view, saying that the moral value of liberty can be incorporated into the law by [1] such that [3] can follow without reaching outside the law

[46] Shecaira, 'Reasoning', [26].
[47] Shecaira, 'Reasoning', [28].
[48] For discussion see Bernard Williams, 'From Freedom to Liberty: The Construction of a Political Value', *Philosophy and Public Affairs* 30 (2001), 3.

in [2]. I dissent from both the moral opening view of the case, and the inclusive legal positivist alternative. I say that liberty is not analytically valuable. Of course, many people value liberty (I am one of them) but those who do not value it, while they may be morally mistaken, are not conceptually confused. It is not oxymoronic to say 'that's liberty, but there's nothing at all to be said in its favour'.[49] That being so, it is possible to identify instances of liberty without doing any moral (or other) evaluation in the process. There may be moral norms regulating liberty to φ but they do not bear on whether liberty to φ counts as liberty. If that is true, then premise [2] need not introduce any moral evaluation into the law. It may simply be stating what the law already says. Indeed, if you join me in thinking that liberty is not analytically valuable, you will find it hard to escape the conclusion that this is all that premise [2] is doing. Unless there are some special unstated legal rules for interpreting the legal statement in [1], such that it is not a statement about liberty but a statement about 'liberty' (in some technical legal sense), [1] should clearly be read as a statement about the legal protection of liberty, and [2] adds nothing to that statement except to emphasize that any *instance* of liberty is an instance of *liberty*, so that [3] follows without further ado from [1]. In which case [3] already represents the law, and probably therefore [4] as well. That being so, Shecaira is right to doubt whether his rendition of the *Lochner* argument fits my description of reasoning that 'develop[s] the law gradually using existing legal resources.'[50] But that is not because it develops the law non-gradually. It is because it does not develop the law at all.

Even if we grant, however, that the argument from [1] to [3] changes the law, we should not follow Shecaira in thinking that premise [1] – the existing law – represents little or no constraint

[49] Contrast the oxymoron in saying the same about justice: Gardner, *Faith*, 250. Being just is analytically a way of being good.
[50] Shecaira, 'Reasoning', [27], quoting Gardner, *Faith*, 41.

on how it is changed. To see why not, imagine a judge who acknowledges that [1] represents the law but is minded to dissent from [3]. On any view she has her work cut out. To avoid arriving at conclusion [3] she will have to engage in some fancy footwork. She will have to point to some law that conflicts with the law in [1], or argue that the law as stated in [1] should be given some special interpretation such that [2] is not the mere tautology that it seems, or make some moral argument, on the basis that liberty is analytically valuable, to the effect that the liberty to buy and sell labour, or to do so to the radical extent in [4], does not instantiate that value. If [1] were a mere license to legislate, why would the dissident judge have to go to such elaborate lengths? Shecaira may reply that this shows only that reasoning from [1] to not-[3] or not-[4] would be legal reasoning; it does not show that the same holds true for the reasoning from [1] to [3] and [4] that he lays out. Maybe. But reflection on the position of the dissident judge does undermine Shecaira's reason for doubting whether the reasoning from [1] to [3] and [4] is legal reasoning. To the extent that any dissident judge is constrained by the law in [1] *not to depart* from conclusions [3] and [4], the judges on the other side of the decision are also constrained by the law in [1] to *embrace* conclusions [3] and [4]. And it seems to me that [1] – still assuming that it is a faithful statement of the law – is indeed a very severe constraint on the work of the judges in Shecaira's version of *Lochner*. The fact that the judges in *Lochner* would maybe have welcomed the constraint, because it helped them to reach the conclusion they anyway wanted to reach, is neither here nor there for this purpose. I never said, and nor would it be plausible for anyone to say, that reasoning counts as reasoning according to law only if the law that furnishes its operative premise(s) places *unwelcome* constraints on reasoners.

I agree with Shecaira, of course, that there is something dodgy about *Lochner* as he reconstructs it. Indeed I agree with him that the judges who helped themselves to this reasoning, if

any did, were possibly legislating, or at the very least making a radical departure from the existing law. But they were not doing so in their reasoning from [1] to [4]. Rather, it was the conjuring up of [1] itself that was the radical departure. This is the moment, in other words, to drop our assumption that [1] faithfully states the law. I am no expert on the law of any US jurisdiction in 1905 or at any other time, but it does not take an expert to know that legal rules invalidating and otherwise regulating contracts of slavery (and presumably also contracts to rape, murder, rob, etc.) were by then prevalent and accepted as constitutionally valid by the courts, following the North's victory in the Civil War. Either these legal rules violated the rule in [1] and should not have been accepted as constitutionally valid, or else [1] must be interpreted so as to allow for them. Either way, [1] emerges as an extremely misleading statement of the law. Either (a) it faithfully states a single legal rule but one that conflicts with another legal rule or set of legal rules allowing for certain nearby liberty-infringements, or (b) it deals with liberty only in some specialized sense of the word such that some infringements of liberty do not qualify, in law, as infringements of liberty.

If (a) then conclusions [3] and [4] are defeasible. We need to know what any conflicting legal rules say and why they should not prevail over the rule stated in [1], as they patently do with contracts to enslave, rape, murder, etc. It is highly misleading not to mention the conflicting rule in the course of making the argument. If (b) then we need to know more about what specialized sense is given to 'liberty' such that selling oneself into slavery is not an exercise of liberty, whereas renting oneself into slavery, in the manner mentioned in [4], is an exercise of liberty. In either case much more argument is needed to show how the law commits us to [3] and [4], because without much more argument it is impossible to accept what [1] says as a faithful statement of the law. Thus we might say: premise [1] is only claimed to be the existing law, and so the reasoning that proceeds from it is only claimed to be reasoning according to law. Or as

we might also say: *Lochner* as rendered by Shecaira is clearly *per incuriam*, thus bad law, and fit only to be overruled (by judges with a legal power to overrule) or gradually distinguished into irrelevance (by other judges). Shecaira is right to brand the decision 'disingenuous'[51] if it says what he suggests it says. The disingenuousness, however, does not reside in the reasoning involved in getting the judges from [1] to [4]; it resides in the hidden moves that got them to [1] in the first place. The reasoning from [1] to [4] raises no problems of any kind, so far as I can see, for my account of legal reasoning.

4. Redondo on the varieties of legal positivism

If I am right about reasoning according to law there is a conceptual connection between law and morality. Legal norms are such that they can be used in arguments as if they were moral norms. From the legal point of view that is indeed how they should be used. For legal norms are claimed moral norms. In her spirited and incisive discussion of rival 'legal positivist' views,[52] Cristina Redondo seems to accept the existence of this or some similar conceptual connection between law and morality:

> [I]n order to grasp the concept of law, we need to know what a morally binding reason is, i.e. we need to have the concept of moral reason. In this sense, there is a necessary relation between the concept of law and the concept of moral reason. However, this fact does not imply that among the [criteria] defining the concept of law there exists the property of being a moral reason. In other words, even if the concept of law is necessarily related to the concept of moral reason, it

[51] Shecaira, 'Reasoning', [26].

[52] 'Law as a Leap of Faith: Some Remarks on the Connection Between Law and Morality', *Law and Philosophy* 33 (2014), 000. Hereafter: Redondo, 'Connection'.

would be an error to think that to be an instance of the concept of law necessarily implies being an instance of the concept of moral reason.[53]

I entirely agree. 'Being a moral reason' is not one of the criteria for the correct use of the concept of a legal reason (nor therefore one of the criteria for the correct use of the concept of a law or a legal norm etc.). Nevertheless 'being a claimed moral reason' is such a criterion. Someone who thinks that law is mere gameplay or banditry, because she does not realise that law makes a moral claim, is not fully in command of the concept of law.

One might have thought that accepting this much entails rejecting, as I do, the thesis (which I labelled NNC) that there is 'no necessary connection between law and morality'. But Redondo wants to hold onto NNC, or at any rate to allow it to be held onto in the name of legal positivism. In an attempt to save it she interprets NNC as the thesis that 'the concept of law is necessarily not connected to morality understood as a set of reasons or norms.'[54] 'Necessarily not connected' is certainly a change from 'not necessarily connected'. But it is a change in the wrong direction. It only makes NNC harder to swallow. How do the other insertions in Redondo's formulation ('the concept of' and 'understood as a set of reasons and norms') help to make NNC more palatable? I am at a loss to understand. Legal reasons and norms are connected to moral reasons and norms (and the set of legal reasons and norms is connected to the set of moral reasons and norms) if the former reasons and norms are claimed, however outrageously, to count among the latter. To add that this connection is 'conceptual' is merely to say that nobody fully understands what legal reasons and norms are until they grasp that this claim to be moral is made in respect of them. So it makes no sense for Redondo to say that in rejecting NNC,

[53] Redondo, 'Connection', [20].
[54] Redondo, 'Connection', [22].

> [Gardner] is not thinking of a relation between the concepts of law and morality. He is thinking about the relation between those things that belong to the genre law and those that belong to the genre morality.[55]

This is a distinction without a difference. It is not as if a relation between As and Bs is one thing, and a relation between the concept of an A and the concept of a B is another. A relation between the concept of an A and the concept of a B is merely a relation between As and Bs (in other words, between things belonging to the respective genres) that holds in virtue of what it is to be an A and what it is to be a B.

Trouble with concepts and how they relate to the things of which they are the concepts may also be behind what Redondo has to say about the one thesis that I do endorse in the name of legal positivism. In chapter 2 of *Law as a Leap of Faith* I endorse

> (LP★) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).[56]

Redondo says that in advancing this thesis I flout or disrespect a distinction that I rely on fruitfully in chapter 7, and that in the process I fail correctly to represent the legal positivist creed.

In chapter 7, as Redondo rightly points out, I argue that we should distinguish the criteria for the correct use of the concept of law from the conditions of legal validity that are fixed by the law in any given legal system. We should take care not to think of the validity conditions of, say, Israeli or Mexican law as subsidiary criteria for the correct use of the concept of law. What is conceptually determined is that, in every legal system, there are some such validity conditions; what exactly they are is a question

[55] Redondo, 'Connection', [19].
[56] Gardner, *Faith*, 21, quoted by Redondo in 'Connection' at [5].

of law to which different legal systems give different answers. I charge Ronald Dworkin with running roughshod over this distinction and thus 'upping the ante'[57] by presenting ordinary legal disagreements as conceptual disagreements about law.

Redondo thinks, however, that I am hoist on my own petard because in (LP★) I run roughshod over the same distinction. She wonders: Does (LP★) state a (proposed) criterion for the correct use of the concept of law? Or does it state validity conditions for laws? I know what I think, and what I intended to say. I think that (LP★) states a criterion for the correct use of the concept of law which narrows what kinds of validity-conditions it is (conceptually) possible for legal systems to have in their system-specific list of validity-conditions. Or to put it another (Hartian) way: (LP★) tells us what type of content a legal system's ultimate rules of recognition can have; they cannot have just any content; a rule of recognition must be such that it identifies one or more sources of law; but of course different legal systems have different ultimate rules of recognition identifying different sources. I thought that I made this much tolerably clear in my characterisation of Hartian rules of recognition in chapter 7, a characterisation which foregrounded the (LP★)-compliant features of Hart's thinking on the subject. But maybe I did too little to bring the two chapters together.

Be that as it may I can see none of the uncertainty that Redondo sees concerning whether (LP★) is 'about the concept of law or [about] the conditions of legal validity'.[58] Clearly it is about both. It is about one limit that the very concept of law places on the possible conditions of legal validity that can exist in any legal system (still allowing that the actual conditions of legal validity vary enormously between systems). One key implication of this, by the way, is that it is not true, as some have thought,

[57] This is Nicola Lacey's nice characterization of Dworkin's manouevre in *Law's Empire* (and writings of that time): Lacey, *Life*, 349.
[58] Redondo, 'Connection', [5].

that laws can have any content whatsoever. (LP★) already restricts the possible content of an ultimate rule of recognition.

Redondo thinks that, in chapter 2, I exploit the uncertainty that she detects in what (LP★) is about. I exploit the uncertainty, she thinks, to make (LP★) seem more ecumenical than it really is, bringing a mere illusion of common ground to the warring factions of legal positivists. More specifically, she says, for those known as 'hard' or 'exclusive' legal positivists,

> LP★ says nothing explicitly about the general concept of law; it says something about the content of each rule of recognition. LP★ states a parochial [validity condition] determining whether a norm belongs to a legal system or not.[59]

By contrast, thinks Redondo, 'soft' or 'inclusive' legal positivists would embrace (LP★) only as a conceptual thesis that

> does not imply any restriction on the parochial [validity conditions] provided by the rules of recognition accepted in any specific legal system. ... In this reading, LP★ only rejects merit as a conceptual feature of law in general, not as a possible condition to be part of a specific legal system.[60]

I have to confess that I do not fully understand these characterizations, and to the extent that I do understand them I do not recognize them as capturing any aspect of the debate between 'exclusive' and 'inclusive' legal positivists that I know. When I introduced (LP★) I already explained how the debate between 'exclusive' and 'inclusive' legal positivists, as I understand it, fits into the margin of philosophical discretion that (LP★) deliberately preserves.[61] Inclusive legal positivists agree with their exclusivist siblings that validity of any legal norm

[59] Redondo, 'Connection', [6].
[60] Redondo, 'Connection', [6]
[61] Gardner, *Faith*, 20-21.

depends on its source, not its merits. They disagree only about the legal effect of a reference in source-based norms to further norms, reasons, ideals, etc. that are not source-based, such as moral or aesthetic ones. We may think of uses in the law of words like 'cruel' or 'indecent' or 'malicious'. The 'inclusive' legal positivist says that such references to raw moral standards serve to incorporate them into the law, such that what is immoral in the relevant way thereby becomes illegal. The 'exclusive' legal positivist says, by contrast, that such references to raw moral standards are elliptical authorisations or instructions to someone to apply the relevant moral standard. It is not cruelty or indecency or malice itself that bears on the legal position, on this view, but rather some official's *ruling* on the subject of cruelty, indecency, or malice. Notice that this disagreement does not in any way bear on whether (LP★) states or does not state a conceptual truth. In fact, both sides agree that it does, and both agree that the truth in question is one that sets limits on the possible conditions of legal validity. They merely disagree on which precise limits it sets.

5. Smith on public alienation from law

As this response to Redondo (and most everything else I have said above) makes clear, I follow Hart in putting legal officials and their work at the heart of our thinking about law. As Matthew Smith points out in his deep and troubling critique, there are at least two different ways in which *Law as a Leap of Faith* emphasises official attitudes and actions over non-official ones.[62] First, in chapter 8, it is officials whose respect for law, or fidelity to law, is said to be the principal hallmark of our living under the rule of law. Second, in chapter 11 (and implicitly

[62] Smith, 'Officials and Subjects in Gardner's Law as a Leap of Faith', *Law and Philosophy* 33 (2014), 000. Hereafter: Smith, 'Officials'.

elsewhere), the very existence of a legal system (with or without the rule of law) is held to turn on there being officials who see and use its rules and rulings as rules and rulings, even though the wider population may interpret them as Austinian threats, or as Holmesian predictions, or as signs or portents, or in some other reductive way. Smith wonders whether our thinking about law can afford to marginalize, as much as he thinks I do, the attitudes and actions of a wider (non-official) population.

In reacting to what Smith says, let me begin with the chapter 11 issue, the issue about the existence-conditions for a legal system. Smith thinks that the existence-conditions that I set are too accommodating. Like Shecaira, he proceeds by counterexample. He says that I am committed to allowing that there exists a legal system in an imaginary situation in which (a) officials maintain a body of rules applicable to a wider population and make rulings on their application to particular cases, and (b) the wider population in question tends to act in line with the various rules and rulings as they develop and emerge, but (c) the only connection between (a) and (b) is a 'ridiculously effective'[63] mode of subliminal advertising by which the officials influence the actions of the wider population to bring them into line with the rules and rulings, without its being understood by that wider population that what they are being influenced to come into line with are rules and rulings (and perhaps – Smith is not so clear – without their realizing that they are being influenced at all). Feature (c), thinks Smith, satisfies my chapter 11 proviso that, for a legal system to exist, 'it can't be sheer coincidence that the general population ... stays, by and large, on the right side of the law.'[64] His hunch is that this proviso of mine is not strict enough – that for a legal system to exist there needs to be some popular

[63] Smith, 'Officials', [13].
[64] Gardner, *Faith*, 293, quoted by Smith in 'Officials' at [17].

awareness of and responsiveness to the law *qua* system of rules and rulings, if not exactly to the law *qua* law.[65]

I am not sure whether my chapter 11 proviso really is satisfied by feature (c) in Smith's example. I elaborated the proviso to some extent after I stated it, as Smith notes, and the way in which I did so was consistent with and perhaps conducive to an interpretation of it according to which there must be some basic level of public awareness of the modality of law (rules, rulings, officials, etc.) for there to be a legal system in existence, even though how it comes together as system, let alone a legal system, may be opaque to non-officials. But I also knowingly left my interpretation of the proviso vague on this score, for a reason that I stopped to spell out. We are talking here about a possible limit case of a legal system, what Hart calls 'an extreme case'.[66] There is an inevitable zone of indeterminacy at the limits or extremes of any classification, as I pointed out, and 'second-order indeterminacy probably makes it silly to debate the question of which range of examples lie in this indeterminate zone'.[67] Yet this, I said, should not distract us from the 'important question of whether there is any classificatory frontier (be it rife with indeterminacy or not) in this vicinity,'[68] meaning in the vicinity of a system in which (as Hart puts it) 'the internal point of view is ... confined to the official world.'[69] I am happy to see that Smith agrees with me that there is an important and interesting classificatory frontier – a limit case – somewhere in this vicinity. That is exactly what chapter 11 proposes.

[65] I take it that Smith and I can agree that it does not quite need to be awareness of and responsiveness to the law *qua* law. A population need not have the concept of law to be regulated by law. Gardner, *Faith*, 298.
[66] Hart, *Concept*, 117
[67] Gardner, *Faith*, 291.
[68] Gardner, *Faith*, 291.
[69] Hart, *Concept*, 117

In the light of this, one may wonder what in *Law as a Leap of Faith* might have led Smith to suppose that '[a]ccording to Gardner, this [subliminal advertising] arrangement would be a *paradigmatic* legal system'[70] or 'a *full-throated* instance of the law'[71] or '*as much* an instance of the law as is the legal system in the United Kingdom.'[72] My view is the opposite. If the subliminal advertising arrangement constitutes a legal system, it is a decidedly non-paradigm one. In chapter 6 I explicitly contrasted paradigm cases with limit cases, arguing that there can only be paradigm cases if there are limit cases beyond the paradigm.[73] In its paradigm case, I said, a legal system not only has 'a division between officials and subjects, a system of courts, etc.' but is also 'morally successful'.[74] I made an argument in support of this 'moral success' thesis, building on my chapter 5 thesis that all law makes a moral claim, pointing out that there is a possible limit case, far from the paradigm of morally successful law, in which the moral claim of law is not only false but duplicitous.[75] It would be hard to make this consistent with the view that Smith's subliminal advertising arrangement is a paradigmatic legal system.

One way, I suppose, would be to argue that the subliminal advertising arrangement is indeed a morally successful case of law. Maybe this is what Smith thinks that I would argue? His tone of moral disapproval towards my chapter 11 position certainly suggests that this is what he thinks I would argue.

So maybe this is where my chapter 8 point about the ideal of the rule of law is supposed to fit in. According to my 'asymmetrical' interpretation of that ideal, official departures

[70] Smith, 'Officials', [13], emphasis added.
[71] Smith, 'Officials', [12], emphasis added.
[72] Smith, 'Officials', [13], emphasis added.
[73] Gardner, *Faith*, 64–5.
[74] Gardner, *Faith*, 166.
[75] Gardner, *Faith*, 167–8.

from the law are the ones that primarily threaten its attainment.[76] Non-official departures, not so much – and in themselves not at all. Perhaps Smith reads me as holding the following conjunction of views, built up gradually across chapters 6, 7 and 8:

(i) A system that amply meets the other conditions for being a legal system qualifies as a paradigmatic legal system if and only if it also amply meets the moral success condition (chapter 6);

(ii) A legal system that amply lives up to the ideal of the rule of law is amply morally successful *qua* law, and hence amply meets the moral success condition (chapter 7);

(iii) A legal system amply lives up to the ideal of the rule of law only if its officials typically follow the law, never mind how much the wider non-official population does so (chapter 8).

That conjunction of views would indeed be compatible with (although it would not compel) the view that the subliminal advertising arrangement is paradigmatically legal. But these are not my views, and they are not the views that I defend in *Law as a Leap of Faith*. I think that (i) needs tweaking, (ii) is a mistake, and (iii) misleads by omission. Let me explain how.

The problem with (i) is not really brought out in chapter 6, but it lurks just beneath the surface. There is no unique paradigm of law; there are multiple paradigms. The various criteria for something's counting as a legal system cannot be satisfied in an exemplary way all at once. For a start, there cannot conceivably be total moral success in law, moral success in all respects at once. One can conceivably attain optimal legal certainty, for instance, only at the price of injustice. That is a boringly familiar thought among lawyers. If it is true, then there can be no single paradigmatic case of a legal system; there must be at least two, the one that is exemplary in respect of certainty and the one that is exemplary in respect of justice (even though justice is relevant to certainty and certainty is relevant to justice). Anarchists will push

[76] Gardner, *Faith*, 213.

the point further. They will say that any system that is exemplary in meeting the non-moral criteria for being a legal system – the division between officials and non-officials, the existence of authoritative norm-applying institutions, etc. – cannot possibly live up, in any significant measure, to the moral success condition. With authority, the anarchists will say, there comes only rank illegitimacy. If they are right then by the lights of (i) paradigmatic legal systems are inconceivable. That conclusion strikes me as a *reductio* of (i). We should tweak (i) to allow even anarchists to distinguish paradigmatic from non-paradigmatic legal systems, and more generally we should reformulate (i) to bring out as clearly as we can that we should not be expecting to find one and only one paradigm of a legal system.

This already helps us to diagnose the big mistake in (ii). In *Law as a Leap of Faith* I did not assert, and more than once denied, that a legal system is morally successful, even morally successful *qua* law, merely in virtue of living up *par excellence* to the ideal of the rule of law. The thought that living up *par excellence* to the ideal of the rule of law is sufficient for morally successful law is what I decry as Hayek's error in chapters 2 and 8, and as Dworkin's error in chapter 7. So it would be open to me to argue that Smith's subliminal advertising arrangement is not paradigmatically a legal system even if it amply conforms to the ideal of the rule of law. If there are multiple paradigms of legal systems, they are not cases in each of which one feature of a legal system is present in an exemplary way, while the other features of a legal system are only minimally present. Rather they are cases in which – as even the anarchist position illustrates – the other features of a legal system are absent only to the extent necessary to enable the one to be present in an exemplary way. That being so, I would want to deny Smith's subliminal advertising arrangement the status of paradigmatic legal system even if it were fully rule-of-law compliant, because it is so radically morally obnoxious in so many other ways.

But in fact I agree with Smith, of course, that the subliminal advertising arrangement is nowhere near rule-of-law compliant. That is because my asymmetrical interpretation of the ideal of the rule of law pays much more attention to the position of non-official law-users than Smith acknowledges. Indeed the position of non-officials is in one way at the very centre of my analysis. Failing to point this out is how (iii) misleads by omission. The most important reason why, under the rule of law, officials *should* use the law for guidance is so that non-officials *can* use the law for guidance.[77] Official fidelity to law is a necessary condition for the rest of us to be able to rely on the law to fashion our own lives, exposing ourselves to legal consequences or avoiding them at our own election or by our own failure to elect. I see nothing in Smith's subliminal advertising arrangement to suggest that this element of election is preserved for the non-official population that falls under its spell. Likewise with the non-official populations in Huxley's and Orwell's imaginary dystopian societies, where somatic drugs and intimidation by surveillance respectively do the work of Smith's 'ridiculously effective' advertising. Do Huxley's and Orwell's societies have legal systems? That is far from clear. But it is entirely clear that they do not have paradigmatic legal systems. One reason – no doubt one reason among others – is that in both societies the rule of law is almost entirely absent. *Law as a Leap of Faith* says no different. *Pace* Smith, the book gives no succour to the foolish notion that one should regard the case of a legal system with what Hart memorably calls a 'deplorably sheeplike'[78] non-official population as somehow a paradigm case of a legal system.

[77] Gardner, *Faith*, 214-6. See also Gardner 'Criminals in Uniform' in RA Duff, L Farmer, S Marshall, M Renzo and V Tadros (eds), *The Constitution of Criminal Law* (Oxford: Oxford University Press 2012)
[78] Hart, *Concept*, 117.