

## Fifteen Themes from *Law as a Leap of Faith*

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The Editors of *Jurisprudence* have kindly granted me space to respond to the lively and exacting comments on my book *Law as a Leap of Faith*<sup>1</sup> that appear in this issue. With the Editors' permission, I am also taking the opportunity to respond (in the final section below) to some comments by Nicola Lacey that were published in *Jurisprudence* in 2013.<sup>2</sup> It is a particular pleasure to reply to Niki, who fatefully introduced me (when I was an undergraduate and she my tutor) to the various puzzles about law that I later came to write about in *Law as Leap of Faith*.

It is interesting to see that Niki and I still disagree now about much the same things that we disagreed about 30 years ago. At the time, philosophy of law was even more male-dominated than it is today. Many of Niki's philosophical views took shape as she involved herself ever more in the struggle against this and other instances of patriarchy, a struggle in which she was and remains an inspirational leader. Whether as cause or effect of her political outlook, Niki has long been mistrustful of the philosophical quest for universality, particularly of the ambition to explain the 'nature' of things. She regards talk of 'natures' (and of necessary truths, conceptual truths, universal truths, objective truths, etc.) as tending to lock us in to established hegemonic constructions of

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<sup>1</sup> Oxford: Oxford University Press 2012. Hereafter, *Faith*.

<sup>2</sup> Lacey, 'Institutionalising Responsibility: Implications for Jurisprudence', *Jurisprudence* 4 (2013) 1. Hereafter: Lacey, 'Implications'.

our world, and hence to inhibit intellectual as well as political progress. She is a progressive person for whom the plasticity of thought, not just of society, is of the essence. As she explains in various works, this is itself a philosophical position, not an anti-philosophical one.<sup>3</sup> However, it could not be more different from mine. I agree with virtually all of Niki's political commitments, insofar as they are known to me. However I do not agree that they should be harnessed to any kind of relativism or constructivism or 'non-essentialism' (Niki's favoured term).<sup>4</sup> The problem with our common political opponents, it seems to me, is not that they believe that human beings or women or legal systems or families or democracies or rights or other things have natures, i.e. features without which they would not be things of those kinds. The problem with our political opponents (when they are not just plain morally misguided or empirically mistaken) is that they get the natures of some things wrong and/or draw false conclusions from those aspects of the natures of things that they get right. In the struggle against false necessities we need, not just contingencies, but also true necessities.<sup>5</sup>

If you read my responses to Niki below you will get a flavour of how this difference between us plays out in connection with what I unapologetically call 'the nature of law'. I don't think that any of the other critics to whom I reply here harbour misgivings as deep-seated or as wide-ranging as Niki's about the kind of intellectual pursuits that occupy me in *Law as a Leap of Faith*, and

<sup>3</sup> She portrays it as a possible development of Wittgenstein's later thought in *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford 2004), ch 9. I am sceptical of that portrayal, but that is a topic for another day. For a different take, see Lacey, 'Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?' in Alan Norrie (ed), *Closure or Critique: New Directions in Legal Theory* (Edinburgh 1993).

<sup>4</sup> Lacey, 'Implications', 5 (note 7).

<sup>5</sup> I borrow my lingo, but clearly not my view, from Roberto Unger's trilogy *Politics: a Work in Constructive Social Theory* (Cambridge 1987).

indeed in my work more generally. The others come at my thinking from disparate angles, but all with rather more localized doubts and objections. In this respect they do not follow Niki's lead. But while we are on the subject of Niki's lead, and her leadership, it seems fitting to note that all but one of the critics assembled here are women. Philosophy of law, like most of academic philosophy, remains lamentably male-dominated, more so than the rest of the humanities, and more so than the rest of the legal academy.<sup>6</sup> Yet Niki and her contemporaries planted seeds of change and below you can see how magnificently they have taken root. Sari Kisilevsky, Kristen Rundle, and Kimberley Brownlee are among the most talented and accomplished philosophers of law of their generation. I am proud and honoured that they, and their no less brilliant peer Antony Hatzistavrou, each took the time and energy to reflect so closely and helpfully on the unapologetic classificatory essentialism, as Niki might call it, of *Law as Leap of Faith*. I divide my responses into five sections, one per critic. Picking up three themes from each critic, I get fifteen themes in all. Naturally, they are not as sharply differentiated as that enumeration suggests.

### 1. *Brownlee on law, morality, and society*

Kimberley Brownlee's comments – which range across several major themes of *Law as a Leap of Faith* – are characteristically friendly and generous.<sup>7</sup> But that makes them all the more testing. How much easier it would be to answer an antagonist!

Brownlee's first substantial worry concerns my interpretation of the oft-mentioned thesis that there is no necessary connection

<sup>6</sup> On likely causes and possible solutions, see Katrina Hutchison and Fiona Jenkins (eds), *Women in Philosophy: What Needs to Change?* (Oxford 2014).

<sup>7</sup> Brownlee, 'On Gardner on Law in General', in this issue. Hereafter Brownlee, 'On Gardner'.

between law and morality.<sup>8</sup> Mine is an interpretation which (as Brownlee agrees) makes the claim obviously false, even far-fetched. My interpretation also licenses me to say, contentiously, that no theorist of note has ever endorsed the thesis without qualification (or ‘as it stands’, to use the formulation from the book).<sup>9</sup> Brownlee thinks we should seek an interpretation which would make the thesis more specific and less incredible, and which would allow us to say that some writers have endorsed it. She suggests, to this end, that we give a specialized meaning to one or more of the words used to express the thesis.

I have no quarrel with that suggestion. Giving a specialized meaning to one or more of its words strikes me as no different from adding a qualification to the thesis before endorsing it – or in other words, not endorsing it ‘as it stands’. I am less sure, however, whether the particular emendation that Brownlee favours is going to be of much help. She endorses an attempt, which she attributes to David Lyons, to nuance the word ‘morality’ in the thesis.<sup>10</sup> So nuanced, the thesis allows ‘no necessary connection between law and moral rightness, goodness, or justifiability.’<sup>11</sup> But unless some further words are also to be given specialized meanings, this is still obviously false. As I argued in the book, law by its nature claims the authority to determine the moral rightness of actions, and law by its nature calls for moral justification.<sup>12</sup> The first is a necessary connection between law and moral rightness, the second a necessary connection between law and moral justifiability.

<sup>8</sup> Brownlee, ‘On Gardner’, [3-5]

<sup>9</sup> Gardner, *Faith*, 48.

<sup>10</sup> Brownlee traces this to Lyons, ‘Moral Aspects of Legal Theory’, *Midwest Studies in Philosophy* 7 (1982), 223 but I am unable to find it there. She may be thinking of Lyons’ ‘minimal separation thesis’ (found at 226) which modifies ‘connection’ rather than ‘morality’.

<sup>11</sup> Brownlee, ‘On Gardner’, [3].

<sup>12</sup> Gardner, *Faith*, 142-3 and 161-2 respectively.

Brownlee doesn't deny that such connections are necessary; but she wonders whether they are interesting enough to mention.<sup>13</sup> I said a few words, in chapter 11 of the book, about 'interestingness'.<sup>14</sup> I resisted attempts by Ronald Dworkin and William Twining to regulate what interests us as philosophers in a way that threatens to recast philosophy as a service industry for lawyers, policymakers, law-reformers, and other practitioners. I do not tar Brownlee with the same brush. She is interested in the same kinds of questions that I am interested in, hence her general friendliness towards my work. But she underestimates the extent to which certain questions that interest me are questions of the kind that also interest her. So, for example, she finds 'not much in the thought' that (as I articulated it) 'law and morality are necessarily alike in that they each comprise some valid norms'.<sup>15</sup> Whereas I find quite a lot in this thought. It is surely the key to understanding how it was possible for Kant to get morality so wrong by thinking of it on the model of a legal system, or more specifically as 'self-legislated', a kind of 'law within us'.<sup>16</sup> It is thus the key to understanding how it was possible for O.W. Holmes and many others to get law so wrong by granting the distorted but influential Kantian picture of morality, and trying to distance law from morality so conceived.<sup>17</sup> More generally it is hard to think of a proposition that has proved more problematic for philosophers of law than the proposition that law is made up of

<sup>13</sup> Brownlee, 'On Gardner', [4]. For a similar criticism of the same passage, see Matthew Kramer, 'On the Separability of Law and Morality', *Canadian Journal of Law and Jurisprudence* 17 (2004), 315 at 316.

<sup>14</sup> Gardner, Faith, 270-4 and 296-7.

<sup>15</sup> Brownlee, 'On Gardner', [4].

<sup>16</sup> See the very interesting interpretation (and attempted partial rescue) of this Kantian picture by Patrick Kain in 'Self-Legislation in Kant's Moral Philosophy', *Archiv für Geschichte der Philosophie* 18 (2004), 257.

<sup>17</sup> Discussed in Joan Schwarz, 'Oliver Wendell Holmes's "The Path of the Law": Conflicting Views of the Legal World', *American Journal of Legal History* 29 (1985), 235, where relevant writings by Holmes are documented.

norms – in other words, that law is normative – and hence is apt to be compared and contrasted in some way with morality. Without that problem, we surely wouldn't be here.

Brownlee may say that this merely illustrates her point that some connections between law and morality may have important implications without being 'inherently' important.<sup>18</sup> I do not understand this distinction. I should think that the philosophical importance and philosophical interest of any thesis lies entirely in its implications; the more far-reaching the implications, the greater the philosophical importance and interest. This view seems to be borne out by the second part of Brownlee's commentary, in which she wonders about the implications of some of my remarks in the final chapter of *Law as a Leap of Faith*. She agrees with me against Dworkin, for example, that what Dworkin calls a 'sociological' way of thinking about law holds philosophical interest.<sup>19</sup> But this, as Brownlee's own ensuing questions demonstrate, is precisely because of implications of this way of thinking that Dworkin overlooked.

Brownlee's two main<sup>20</sup> questions on this topic – on the 'sociological' understanding of law – are linked in a way that allows me to answer them together. She asks for further particulars of my claim that anyone interested in jurisdictional boundaries should begin by thinking of social boundaries, not territorial ones.<sup>21</sup> And she wonders whether I am at ease with the implications of my dualist view of the relationship between

<sup>18</sup> Brownlee, 'On Gardner', [5, note 10].

<sup>19</sup> Brownlee, 'On Gardner', [6].

<sup>20</sup> I am leaving aside her question (Brownlee, 'On Gardner' [6]): 'What else is law if not a form of social control?' I objected to describing law as 'a form of social control' mainly because it encourages us (in its implicature) to focus on some types of law to the exclusion of others, and (in its vagueness) to compare law with things that are too unlike it, and too unlike each other, to make for illuminating (as opposed to obfuscating) comparisons.

<sup>21</sup> Brownlee, 'On Gardner', [7], commenting on Gardner, *Faith*, 280.

European Union Law on the one hand and the domestic law of EU member states on the other, a view which leaves me (she thinks) 'swimming in paradoxes of the variety that it both is true and not true of England that some norm is a legal norm.'<sup>22</sup>

My response to the second question paves the way for my response to the first. There is no paradox in holding that two legal systems with conflicting constitutions, and hence with potentially conflicting subordinate laws, are in force simultaneously in the same territory. Propositions of law are true or false only relative to legal systems, not relative to territories. Imagine Brownlee's content clause rendered as a question: 'Is [it] true of England that [norm *n*] is a legal norm?' If this means 'is norm *n* a norm of English law?', then we ought to expect a straight answer, which may be 'yes', or 'no', or (in the face of legal indeterminacy) 'neither yes nor no'.<sup>23</sup> But if the question means 'is norm *n* a norm of whatever legal system is in force in England?', then sometimes it ought to be met with the answer: 'yes *and* no – it depends which of the legal systems in force in England you have in mind. Do you mean English law or EU law or what?' There is nothing paradoxical about this answer. Territoriality, never mind exclusive territoriality, is no part of the nature of law. Some legal systems, such as canon law and shari'a, regulate a population that is not territorially defined. But even in those legal systems in which there is a territorial definition of the regulated population, that definition is fixed by law. What the law says on the subject may or may not match the social realities – which cannot themselves be settled by law – that determine whether and where and when and over whom and how exclusively the legal system in question is in force. That was what led me to say in the book that, so far as legal systems are concerned, social boundaries are more fundamental than

<sup>22</sup> Brownlee, 'On Gardner', [7], commenting on Gardner, *Faith*, 285.

<sup>23</sup> On the indeterminacy cases, see Gardner, *Faith*, 200.

territorial ones.<sup>24</sup> A legal system, as I explained, needs a certain kind of social existence – albeit only the rather limited kind of social existence explained by Hart in *The Concept of Law*<sup>25</sup> and nicely mocked by Hergé in *Tintin and the Picaros*<sup>26</sup> – before it can have any laws regulating its territorial reach (or its population reach, or for that matter anything else).<sup>27</sup>

A few lines back, and elsewhere in this response, and at various points in the book, I used an expression which troubles Brownlee. I just said that territoriality is ‘no part of the nature of law’. Unlike Lacey, Brownlee doesn’t doubt that law has a nature. But she wonders how I can square such remarks with my claim in the preface that ‘I don’t have a theory of law’.<sup>28</sup>

In a footnote she answers her own question. ‘[H]aving an idea about the nature of law,’ she writes, ‘is not the same thing as having a theory of law.’<sup>29</sup> My point exactly. In the preface I was thinking about the high expectations that people have of ‘theories’ – in particular, their expectations that theories will display a certain completeness and unity.<sup>30</sup> I was warning readers that my work would not meet these expectations, which I regard as misplaced. My remarks about the nature of law in the book, when they are true and interesting, are just a small sample of the countless true and interesting remarks that could be made about the nature of law. Moreover one could not use my remarks about the nature of law to fill in the answers to most of the other questions about the nature of law that I did not get round to

<sup>24</sup> Gardner, *Faith*, 280.

<sup>25</sup> Oxford 1961.

<sup>26</sup> trans L Lonsdale-Cooper and M Turner, London 1976.

<sup>27</sup> Gardner, *Faith*, 285–6.

<sup>28</sup> Brownlee, ‘On Gardner’, [6], quoting Gardner, *Faith*, v.

<sup>29</sup> Brownlee, ‘On Gardner’, [6, note 12]. This also answers the same question raised in passing by Lacey in ‘Implications’, 13.

<sup>30</sup> A recent valuable treatment of today’s highfalutin expectations of ‘a theory’ is Nick Fotion, *Theory vs Anti-theory in Ethics* (Oxford 2014).



answering. That is because there are usually multiple answers to those unanswered questions that would be consistent with my remarks. And consistency, I suggested, is the most we should hope for. That there be any greater unity among the necessary features of law (or of anything else) is a pipe dream.<sup>31</sup>

## 2. Hatzistavrou on explanation, continuity, and rationality

Antony Hatzistavrou focuses his prodigious energies on chapter 1 of *Law as a Leap of Faith*, in which I compared some debates from the philosophy of law with some debates in philosophical theology.<sup>32</sup> Many of Hatzistavrou's remarks serve as helpful developments of, or commentaries on, ideas that were only sketchily presented in the chapter. For example, he points out that there is a different 'because' relation in each horn of the *Euthyphro*-type dilemma into which I boil down certain traditional debates about the nature of law.<sup>33</sup> That is also true of the original *Euthyphro* dilemma addressed by Plato to those who believe in a deity. However, the difference between the two horns in respect of the meaning of 'because' does not dissolve the dilemma, and Hatzistavrou does not suggest that it does. On each horn the explanation still needs to be independent of the explanandum in a way that would be blocked by seizing the other horn. The horns still involve rival directions of explanation even though the types of explanation are different. So there is still space, and there is still need, for the Anselm-style dissolution of the dilemma that I personally favour, and a version of which I ascribe (in the case of law) to Hans Kelsen.<sup>34</sup>

<sup>31</sup> The theme is further developed in Gardner, *Faith*, 165-7.

<sup>32</sup> Hatzistavrou 'Theistic and Legalistic Belief', in this issue. Hereafter Hatzistavrou, 'Belief'.

<sup>33</sup> Hatzistavrou, 'Belief', [3].

<sup>34</sup> Gardner, *Faith*, 8.

His careful elaboration of these points leads Hatzistavrou to wonder whether my dissolution might place me on the horns of a new dilemma, or at least have me walking a tricky tightrope. He wonders about what we might call the conceptual continuity of normative domains, the extent to which concepts of goodness and rightness (and presumably of justification, duty, reason, etc.) carry over from, say, the moral to the legal or the human to the divine.<sup>35</sup> He observes that my Anselm-style dissolution of the *Euthyphro*-type dilemma might face problems whichever way I lean on the question of conceptual continuity. Too little conceptual continuity and my talk of ‘goodness personified’ and ‘rightness institutionalized’ is not really germane to the problem of how law and God are supposed to have their hold over us. In these expressions ‘rightness’ and ‘goodness’ turn out to mean something technical, or at any rate domain-specific, and do not answer to our ordinary concerns about rightness and goodness. Too much conceptual continuity, on the other hand, and it seems to Hatzistavrou that there is no longer any real problem of how law and God are supposed to have their hold over us. Their hold over us is just built into the very idea of them.

I am not inclined to see the second of these lines of thought as a threat to my position, for its conclusion strikes me as correct. The following reflections may help to bring out how and why. It is possible for us to disagree about what it *takes* for something to be good or right without disagreeing about what it *means* for something to be good or right. It is likewise possible for two things to be good or right in different *ways*, or relative to different objectives, interests, concerns, or points of view, without any suggestion that they are good or right in different *senses*. The high bonuses of investment bankers that are good for them are not good for civilization, but that is not because ‘good’ means something different in the two contexts. It is simply

<sup>35</sup> Hatzistavrou, ‘Belief’, [4–5].

because the bankers in question have cut themselves loose from civilization, and their fate is no longer as bound up as it should be with the fate of civilization. Likewise, the bankers in question have no moral right to the income levels that they have a contractual right to, but that is not because 'right' means something different in the two contexts. It is simply because the bankers' employment contracts are not morally binding. The material conditions of goodness or rightness, to put it another way, are not the same as the conceptual conditions.<sup>36</sup> My view is that the material conditions of legal rightness differ (I would say: differ necessarily) from those of moral rightness, but that the conceptual conditions of legal and moral rightness are the same.<sup>37</sup> It is the same concept of 'right' in both domains, even though nothing is legally right just in virtue of being morally right, or *vice versa*. Likewise, the material conditions of God's goodness differ (I would add: necessarily) from those of human goodness. Yet each is goodness in the same sense. Conceptually, goodness is goodness. Rightness is rightness. As Kelsen famously exclaimed in his Berkeley debate with Hart, 'norm is norm!'<sup>38</sup> That is how it makes sense to assert, as I asserted in my book, that every legal norm is a would-be moral norm.<sup>39</sup> If there were no conceptual continuity across the two instances of 'norm', then saying this would be indulging in mischievous wordplay. If there were both conceptual continuity and material identity, on the other hand, the 'would-be' qualification would make no sense. Every legal norm would be a moral norm pure and simple, and there would

<sup>36</sup> I argued in Gardner, *Faith*, ch 10, that the same is true of principles of justice. See 246-249, where I differentiate what makes something a principle of justice *tout court* from what makes it a *sound* principle of justice.

<sup>37</sup> This is similar but probably not identical to the view defended by Joseph Raz in *The Authority of Law* (Oxford 1979), ch 8. Compare the 'two semantic theses' that Raz distinguishes at 158-9.

<sup>38</sup> See Lacey, *A Life of H.L.A. Hart*, above note 3, 251.

<sup>39</sup> Gardner, *Faith*, 162.

be no question of, for example, whether and when and how and why we might have a moral obligation to obey the law.

Hatzistavrou's second concern is about another kind of continuity across domains, this time what we might call the continuity of rationality. How do practical reasons (reasons for action) relate to and interplay with epistemic reasons (reasons for belief)? The question arises in my chapter 1 because, says Hatzistavrou, I slide between two questions under the heading of 'faith in God', viz. the practical question of whether to follow God's supposed directives and the epistemic question of whether to believe that God exists.<sup>40</sup> I have written a great deal elsewhere about the ways in which, in my view, epistemic and practical reasons relate and interplay. The problem is central to my work on the contrast between justified and excused actions.<sup>41</sup> But for the purpose of my discussion in chapter 1 of *Law as a Leap of Faith*, much of the detailed apparatus of that work is beside the point. All I relied on, and all I needed to rely on, was a very simple, and I imagined uncontroversial, thought. The thought is that, if God does not exist, people who follow what they take to be a command of God (i.e. people who  $\phi$  for the reason that God commanded  $\phi$ ing) act for a non-existent reason. The reason does not exist because the command does not exist.

Saying this is not to deny Hatzistavrou's point that 'even though one may not be epistemically justified to believe in God, one may nevertheless have ... strong practical ... reasons to have faith in God.'<sup>42</sup> I agree with that much. But whether God exists is one question; whether one is justified in believing that God exists is another. If God exists then one has reason to do as He commands (and to trust in Him, to bow down before His might,

<sup>40</sup> Hatzistavrou, 'Belief', [6-7].

<sup>41</sup> See Gardner, *Offences and Defences* (Oxford 2007), esp. chs 5, 6, and 12. On some presuppositions of this work, see Gardner 'The Logic of Excuses and the Rationality of Emotions', *Journal of Value Inquiry* 43 (2009), 31.

<sup>42</sup> Hatzistavrou, 'Belief', [7].

etc.), and that is true whether or not one has reason to believe that one has such reason. Reasons for action, in short, do not evaporate merely because their existence cannot reasonably be detected. Nor, however, do reasons for action come into existence merely because it is reasonable to think that they exist. If God does not exist, then one has no reason to follow His supposed commands (or to trust in Him, to bow down before His might, etc.), whether or not one is justified in believing that He exists. Since one has no reason to follow His supposed commands if He does not exist, one cannot be justified, under these circumstances, in following what one mistakenly supposes to be His commands. It follows that one may be justified in believing that He exists and issues commands, while unjustified in acting on those commands. Here the most one can hope for, as I argued in my other work, is an excuse. My own view is that some but not all believers in God are justified in their believing in God, and some but not all of those justified believers are also excused in abiding by what they take to be the word of the Lord. None, however, are justified in abiding by it, since there is no Lord, and hence no word of the Lord to abide by.<sup>43</sup>

### 3. Rundle on ends, instruments, and values

It was only after *Law as a Leap of Faith* went to press that Kristen Rundle's book *Forms Liberate* appeared.<sup>44</sup> Had I read *Forms Liberate* in advance I might have said in my book that, in spite of some differences, Rundle and I sing from the same song sheet in

<sup>43</sup> As in the book I write here as if the God in question were the traditional Christian one, complete with the male pronouns and other trappings. My remarks could of course be adapted to relate to other deities.

<sup>44</sup> *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford 2012).

our attempts to rehabilitate Lon Fuller's ideas.<sup>45</sup> Rundle's work on the subject is far more extensive and thorough than mine, but both of us think that Fuller was ill-served by being cast as a foil to Hart. In my view he was also ill-served by being cast as foe to a mysterious shape-shifting ideology known as 'positivism'. Rundle may not agree that he was ill-served by that. She keeps the *Fuller v Positivism* meme very much alive in her book<sup>46</sup> and in her contribution to this symposium.<sup>47</sup> Be that as it may, however, Rundle and I agree that a cartoon version of Fuller's thought has taken hold, and many important insights in his work have thereby come to be forgotten or ignored.

In chapter 8 of my book I tried to return some of the finesse to Fuller's thinking on the subjects of *form* and *function*. I tried to dissociate him from the idea that the rule of law is a 'formal' ideal, regulating the form or forms of law or laws, and also from the idea that law is a 'functional' kind, distinguishable by its special purpose or point or function, namely 'subjecting human conduct to the governance of rules.'<sup>48</sup> In *Forms Liberate*, as its title reveals, Rundle is more comfortable than I am with the first of these ideas. But in her comments for this symposium, her interest is piqued more by what I said about the second.

The aspect of what I said that most piques her interest is this. I said that law is not, for Fuller, *the* enterprise of subjecting human conduct to the governance of rules. It is *an* enterprise *for* subjecting human conduct to the governance of rules. It is but one way of doing that. Law shares the end of subjecting human

<sup>45</sup> I have continued the campaign in 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', in Lisa Austin and Dennis Klimchuk (eds), *The Rule of Law and Private Law* (Oxford, forthcoming).

<sup>46</sup> Rundle, *Forms Liberate*, above note 44, e.g. at 28ff and 144ff.

<sup>47</sup> Rundle, 'Gardner on Fuller: A Response to "The Supposed Formality of the Rule of Law"', in this issue. Hereafter: Rundle, 'Response'. For many examples of the *Fuller v Positivism* meme, see Rundle, 'Response', [5-6].

<sup>48</sup> Fuller's famous phrase in *The Morality of Law* (New Haven 1969), 130.

conduct to the governance of rules with many other things. But even the end of subjecting human conduct to the governance of rules, I argued, is not an end in itself. It is only what I called 'a subsidiary end'.<sup>49</sup> Morally defensible law subjects human conduct to the governance of rules only in order to achieve some further end, such as fewer deaths, better education, more productivity, or less poverty. These, in Fuller's terms, are possible 'substantive aims' for law, which are regulated by the same 'external morality'<sup>50</sup> that also regulates politics, personal relations, business dealings, and the rest of life. But apart from the question of whether law has a defensible end, by the lights of external morality, the question also arises of how law can be used, in a morally defensible way, to serve its ends. Here is where law's 'internal morality' adds its voice to that of external morality.<sup>51</sup> Among the various moral constraints that apply to us all in our choice of means, there are certain moral constraints specific to law and its use. There is a properly *legal* way for law to be and for law to be used. This internal morality limits the use of law even for the most morally unimpeachable of further ends.

Rundle is not convinced that this is really Fuller's position. She worries, on Fuller's behalf, that 'there is no value in a subsidiary end in its own right, but only in so far as it is instrumental to something external to itself.'<sup>52</sup> But that suggests too dramatic a contrast. Not everything, the value of which is conditional on something else, is valuable only as an instrument of that something. So, for example, the value (or much of the value) of the long C6 chord that ends the final movement of Mahler's *The Song of the Earth* is value that comes of its being the final chord of that final movement. It is mostly value conditional on the chord's, and the movement's, place in the overall work.

<sup>49</sup> Gardner, *Faith*, 205.

<sup>50</sup> Fuller, *The Morality of Law*, above note 48, 153.

<sup>51</sup> *Ibid.*

<sup>52</sup> Rundle, 'Response', [5].

But that does not suggest for a moment that the chord, let alone the movement, has mostly instrumental value. Rather, it is consistent with the chord's, and the movement's, having mostly intrinsic value that is conditional on its role as part of a larger intrinsically valuable whole. The C6 chord has this intrinsic value, and contributes it to the intrinsic value of the whole, only when it forms part of the whole to which it contributes.

Value like this could be called 'constituent intrinsic value'.<sup>53</sup> In the Mahler example the value in question is aesthetic. But moral value may also be constituent intrinsic value. For example, many – I am among them – think that the value of personal freedom or liberty is often constituent intrinsic value. Under many circumstances, that I chose freely to pursue some goal adds intrinsic value to my pursuit of it. But not under all circumstances. In particular, if the goal is an immoral one, the fact that I chose it freely does not redeem it. Indeed it makes my pursuit of it, and its reflection on me, even worse. Freedom is an intermediate end in the pursuit of other value, for there is nothing – or nothing much – to be said for having freedom without having anything worth freely doing once one has it. Yet the value of freedom is not thereby turned into that of a mere instrument for doing worthwhile things. Often it also contributes constituent intrinsic value to the doing of them.<sup>54</sup>

By the same token, one need not think of the value of law as purely instrumental in order to think of it as conditional on the uses to which law is put. One might think that law, or some law, has constituent intrinsic value as well as instrumental value. That position is a lot more attractive than thinking that there is value

<sup>53</sup> Much reflection on this kind of value can be traced to G.E. Moore, who writes seminaly in *Principia Ethica* (Cambridge 1903), 191, of things that 'give to the wholes of which they form part a value far greater than that which they themselves possess' (where 'themselves' means 'by themselves').

<sup>54</sup> The view in this paragraph is most influentially developed by Joseph Raz, *The Morality of Freedom* (Oxford 1986), ch 14.



to law, or to some law, ‘in its own right’, i.e. irrespective of its contribution to any larger achievement or endeavour.

Nevertheless, as Rundle suspects,<sup>55</sup> I tend to think that the value of law is mostly instrumental. The main exception is the role that law plays in the life of those who are interested in it as a vocation or a pastime (honing their legal skills, battling the system, serving as a legal official, etc.). For those who are not personally invested in it like this, it seems to me, law generally brings value into the world by being an instrument of value.

Unlike Rundle, I tend to think that Fuller thinks this too. Fuller’s remark, quoted by Rundle, that law involves ‘a general direction of human effort ... that we can approve in principle even at the moment when it seems to us to miss its mark,’<sup>56</sup> does not indicate otherwise. We often ‘approve in principle’ of instruments for their potential to serve valuable ends in ways that that befit them as instruments, even when we know that they can be misused in ways that invert (turn from positive to negative) their value ‘at [that] moment,’ meaning in respect of that particular occasion of misuse. The fact that a good-quality chisel was misused for a particularly grisly murder does not prevent me, as a keen handyman, from recognizing its good quality, its specialized excellence *qua* chisel. Its good quality lies in its ability to serve worthwhile ends well in a way that befits a chisel. I may say ‘that’s a rather splendid chisel – a pity it was the instrument of such bloodshed’ without suggesting for a moment that its use as an instrument of such bloodshed was in any way redeemed, rendered less heinous or more justifiable, or otherwise improved by the splendidness, and without suggesting that its value in the

<sup>55</sup> Rundle, ‘Response’, [4-5].

<sup>56</sup> Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’, *Harvard Law Review* 71 (1958), 630 at 632, quoted in Rundle, ‘Response’, [5].

cases in which it is well-used as a chisel is anything other than its instrumental value, its value as an instrument.<sup>57</sup>

My reading of Fuller has him say something similar about the value of law. He thinks that law can have an excellence *qua* law that we can recognize as an excellence even when the law is put to bad use. Law can be of good quality, like a chisel, in its potential to serve worthwhile ends in a way that befits it as law. When it does serve worthwhile ends in a way that befits it as law, it realizes its distinctive instrumental value as law. But even when it does not serve such ends well in such a way, it has potential instrumental value as the kind of thing that could serve such ends well in that way. We may admire it accordingly. We do not save all our admiration for intrinsic value; potential instrumental value, like that of the well-made chisel, impresses us too.

Does this do justice to ‘the idea that law has dual centres of gravity: morality *and* efficacy’?<sup>58</sup> Rundle worries that it does not. But the contrast she draws here between morality and efficacy is another overdramatic one. Consider Rundle’s own enviably clever book title, taken from a note in Fuller’s papers.<sup>59</sup> To the

<sup>57</sup> On the other hand a real aficionado of well-made tools might entertain the thought that the murder was made just that extra little bit heinous, constituent-intrinsically, by the very fact that such a splendid chisel was abused in its commission. Likewise a conscientious lawyer may entertain the thought that apartheid laws are made just that extra little bit more awful, constituent-intrinsically, by being rule-of-law compliant. The perversion of the rule of law to make evil is an added evil. This is consistent, of course, with regarding the rule-of-law compliance of such evil laws as a blessing in other ways, e.g. as a possible instrument of freedom for those who have to live under apartheid. I for one believe that upholding the rule of law protects us against some possible abuses of law: see text at note 61 below. But I also believe that the rule of law itself can be perverted. I have learnt much on this topic from Martin Krygier’s excellent piece ‘The Rule of Law: An Abuser’s Guide’ in András Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Amsterdam 2006).

<sup>58</sup> Rundle, ‘Response’, [7].

<sup>59</sup> Rundle, *Forms Liberate*, above note 44, 1.

extent that the value of 'forms' lies in the fact that they 'liberate', forms are valuable as instruments of liberty. To the extent that liberty is morally valuable, then, the moral value of forms lies in their efficacy in bringing liberty into the world. And for those, like me, who aren't sure what 'forms' are,<sup>60</sup> much the same can be said about law. To the extent that the value of law lies in the fact that it liberates, law is valuable as an instrument of liberty. To the extent that liberty is morally valuable, the moral value of law lies in its efficacy in bringing liberty into the world. Law is to that extent, we might say, a kind of moral instrument.

Of course, as Rundle notes, I do not believe that law always brings liberty into the world. I believe that law that lives up to the rule of law (what Fuller calls the inner morality of law) mitigates certain threats to liberty that law otherwise poses, and continues to pose even when law has morally defensible ends.<sup>61</sup> That still leaves law as a kind of moral instrument, but only when it meets distinctively legal standards of excellence, the ones which Fuller calls the standards of law's 'inner morality'.<sup>62</sup> Here Rundle and I are caught up in an independent disagreement. Following some of Fuller's less guarded remarks, she does not think that there is such a thing as law that fails to meet distinctively legal standards of excellence: '*law itself* runs out when the conditions of the rule of law are not adequately

<sup>60</sup> Gardner, *Faith*, 198-204.

<sup>61</sup> Gardner, *Faith*, 215.

<sup>62</sup> Hart comes down too hard on Fuller's phrase 'the inner morality of law'. He says that we might as well speak of an 'inner morality of poisoning': H.L.A. Hart, 'Review: *The Morality of Law*', *Harvard Law Review*, 78 (1965), 1281 at 1286. A better analogy would be 'the inner morality of business'. As well as assessing the ends that businesses serve we can assess how their business is conducted. Even in worthwhile lines of business there are cowboy and fly-by-night operators. And even in odious lines of business there are those whose dealings are properly business-like. There are two questions: how to do business and what business to be in. It is not daft to think of the former as implicating a 'morality of business' that bears on all lines of business.

fulfilled.’<sup>63</sup> Maybe she feels the same about chisels. Maybe she thinks that there is no such thing as a poor-quality chisel. There are of course chisels that are put to better and worse use (morticing, musical-instrument-making, maiming, murder, etc.) and there are also chisels that are better and worse for those uses. But something that does not meet decent quality standards simply *qua* chisel, Rundle may think, is decidedly not a chisel.

I argued against this view in *Law as a Leap of Faith*. One argument I made, relevant to law and chisels alike, is that if something cannot but live up to a certain standard, then that standard is not a standard applicable to that thing. A standard applies only where it could conceivably go unmet.<sup>64</sup> If that is true, then Rundle is inviting us to draw the disarming conclusion that, although the Fullerian ideal of the rule of law (the ‘inner morality of law’) clearly sets standards, it does not set any standards for law. But then what would it mean to say that, in a certain situation, ‘the conditions of the rule of law are not adequately fulfilled’? Who or what is being judged and found wanting by Fuller’s rule-of-law standards if not the law itself?

#### 4. Kisilevsky on justice, allocation, and games

Sari Kisilevsky joins Kimberley Brownlee in tackling themes that straddle various chapters of *Law as Leap of Faith*.<sup>65</sup> She asks a large number of shrewd and fair questions. I will not even try to answer them all. I hope, however, that my reply to Rundle will already have helped to answer some of her initial questions

<sup>63</sup> Rundle, ‘Response’, [8] (emphasis in original).

<sup>64</sup> Gardner, *Faith*, 196 and 221. See also Gardner, *Offences and Defences*, above note 41, ch 8 (co-written with Timothy Macklem); Gardner, ‘Reasons and Abilities: Some Preliminaries’, *American Journal of Jurisprudence* 58 (2013), 63.

<sup>65</sup> Kisilevsky, ‘Legal Positivism and Legal Normativity: Gardner’s *Law as a Leap of Faith*’, in this issue. Hereafter: Kisilevsky, ‘Positivism/Normativity’.

‘about how ... law’s external ends relate to its “inner morality”.’<sup>66</sup> Obviously the book leaves many stones unturned on this subject. But I continue to work on various aspects of the ideal of the rule of law.<sup>67</sup> Kisilevsky helps me to identify some possible new lines of inquiry, and I am very grateful for that.

There is another strand of my response to Rundle that may also be thought relevant to Kisilevsky’s commentary. Towards the end, in what she calls her ‘proposal’,<sup>68</sup> Kisilevsky suggests that law is ‘constitutive of some aspects of justice’.<sup>69</sup> What she means is that the law provides much-needed determinacy where what to do under the heading of justice would otherwise be indeterminate. We can only do justice adequately when there are some extra rules to fill in how we should do it, and law is needed, she thinks, to provide some of those rules. Does this not take us back to the question of whether law has (what I called) constituent intrinsic value? If law is justice-constitutive, then surely it is a value-contributing part of an intrinsically valuable whole, viz. the doing of justice. If so, then surely I overstated (above and in the book) the extent to which law’s value is instrumental. I should make a lot more room for law’s intrinsic value. After all I cannot deny, for it is the thesis of my own chapter 10, that quite a lot of law’s work is justice-work.

As Kisilevsky notes, I follow Hart in doubting whether the doing of justice (meaning: conformity to sound norms of justice and valid reasons of justice) is always intrinsically valuable.<sup>70</sup> Of

<sup>66</sup> Kisilevsky, ‘Positivism/Normativity’, [5]. In particular I hope I have made it clearer that when I deny that we should want law for its own sake, I don’t thereby commit myself to regarding all of law’s value as instrumental.

<sup>67</sup> See Gardner ‘Criminals in Uniform’ in RA Duff, L Farmer, S Marshall, M Renzo and V Tadros (eds), *The Constitution of Criminal Law* (Oxford 2012); Gardner, ‘Some Rule-of-Law Anxieties’, above note 45.

<sup>68</sup> Kisilevsky, ‘Positivism/Normativity’, [9].

<sup>69</sup> Kisilevsky, ‘Positivism/Normativity’, [10].

<sup>70</sup> Gardner, *Faith*, 231, cited in Kisilevsky, ‘Positivism and Normativity’, [8].

course, I entirely accept that the doing of justice is *analytically* valuable. Talk of ‘a just but valueless deed’ is self-contradictory. But that is consistent with the value of the deed, in virtue of which it is a just deed, being purely instrumental. The point is merely that, when that instrumental value is absent, the deed is not just. Many people equate or associate the analyticity of a valuation with the intrinsicity of the value to which it refers.<sup>71</sup> But this conflates two almost completely unrelated issues.

Allow me to set aside for now, however, my doubts about the intrinsic value of doing justice. I agree that there is sometimes intrinsic value in doing justice.<sup>72</sup> When that is so, and when the law is uniquely placed to specify how to do the justice in question, should we not conclude that the value of law is constituent-intrinsic value? No we should not. From the fact that a well-crafted law would help people to do intrinsically valuable things by specifying what would count as the relevant intrinsically valuable things to do, we should not conclude that the well-crafted law that does the specifying would itself be intrinsically valuable. On the contrary: such a law gets to do the specifying of what would count as the intrinsically valuable things to do only in virtue of being a well-crafted law that helps people to do those same intrinsically valuable things. Its role in specifying what is to be done depends on its value as instrument for the doing of it.<sup>73</sup> This shows that we should tread carefully

<sup>71</sup> For a list of offenders see Fred Feldman, ‘Hyperventilating About Intrinsic Value’, *Journal of Ethics* 2 (1998), 339 (under the heading of ‘incorruptibility’).

<sup>72</sup> Most obviously, but not only, when justice is done justly, i.e. exhibiting the moral virtue of the agent who does it. This makes her a *pro tanto* better person, and the world is constitutively better for containing such a person. Contrast Tom Hurka, who thinks that the intrinsic goodness of virtue derives from the intrinsic goodness of what it is that the virtuous pursue: Hurka, *Virtue, Vice, and Value* (Oxford 2001), ch 1.

<sup>73</sup> I have argued to this effect at length and with concrete examples in Gardner ‘What is Tort Law For? Part 1. The Place of Corrective Justice’, *Law and Philosophy* 30 (2011), 1 at 18-22.

with Kisilevsky's idea that the law is 'constitutive of some aspects of justice'. It is one thing for the law to 'constitute justice', in the sense of *specifying what counts* as the just thing to do; it is another thing for the law to 'constitute justice' in the sense of *being a value-contributing part* of the doing of the just thing. I do not doubt that (following or relying on) the law is sometimes a value-contributing part of doing the just thing, where doing the just thing is intrinsically valuable. But I do doubt whether it is any part of the explanation for this fact that the law is sometimes needed to specify what counts as the just thing to do. That is a role in which the relevant value of the law is instrumental.

As this discussion already suggests, Kisilevsky is particularly intrigued by how I fit my thinking about justice into my thinking about law and legality. If I understand her right, she sees a tension between my thesis that law has no distinctive ends, only distinctive means, and my thesis that law cannot but be involved in settling questions of justice. She asks: Isn't justice, or the doing of justice, a distinctively legal end? In chapter 10 of *Law as a Leap of Faith* I argued that it is not.<sup>74</sup> The law cannot but confront questions of justice, I argued, but those questions of justice are not specific to the law. Commercial arbitrators, university admissions officers, and FIFA referees, like judges in the law courts, are faced with questions of justice simply because they are adjudicating in contexts in which there must be losers as well as winners, and they are charged with deciding who will fall into which category. So courts of law are not unique in having the role of doing justice. What distinguishes them is a special *way* of doing justice, namely doing it according to law.

Some have claimed that doing justice according to law is not merely a special way of doing justice. It is more like justice in a special *sense*. I devote some space in *Law as a Leap of Faith*<sup>75</sup> (and

<sup>74</sup> More particularly *Faith*, 256-9.

<sup>75</sup> Especially *Faith*, 246-9.

more space in other work)<sup>76</sup> to arguing against this view. The main point of doing so is to show that the justice-work of courts of law is only modally distinct from the justice-work of other adjudicative institutions, and indeed from the justice-work that we all have to do (albeit less intensively) in bringing up children, negotiating with colleagues, captaining teams, compromising with spouses, complaining to banks, juggling commitments, choosing whom to vote for, etc. Recognizing this is entirely consistent with holding that the material conditions of a just decision in a court of law may differ from those of a just decision in another setting. For there is no denying that the ideal of legality (Fuller's 'inner morality of law') can affect what would count as the just thing to do, even though doing justice is itself an imperative of what Fuller calls 'external morality'. Indeed some but not all of the requirements of legality are themselves justice-specifying. They specify a certain way of doing justice – for example, by public trial, hearing both sides, before an impartial official, and with the public giving of legally recognized reasons – as the properly legal way of doing it. (As our culture gets increasingly legalistic, more and more people expect their employers, their teachers, their utility companies, and even their parents to implement similar ways of doing justice.)

Kisilevsky is unhappy with my view, implicit in this sketch, that questions of justice are simply moral questions about how to allocate things. She doubts whether the relevant feature of courts of law, in virtue of which they are also courts of justice, is that they 'declare winners and losers.'<sup>77</sup> Their answerability to justice has more to do, she thinks, with the fact that courts 'protect[ ]

<sup>76</sup> e.g. in 'What is Tort Law For? Part 1', above note 73.

<sup>77</sup> Kisilevsky, 'Positivism/Normativity', [6].



rights and enforce[ ] obligations.<sup>78</sup> This strikes me as an unhelpful contrast. Let me mention two difficulties with it.<sup>79</sup>

First, legal obligations and legal rights must themselves be allocated by somebody. In most legal systems the courts are the primary allocators of at least some of them, and also the fallback allocators of all of them when previous allocators have left allocative indeterminacies. For example, a legal right to recover a specific sum in damages, and a legal obligation to pay it, is almost always allocated by a court of law in common law and civilian systems; and if the legal right to recover or the legal obligation to pay even an unspecific sum in damages is indeterminately allocated in existing law, the courts are left to allocate that too.

Second, one need not have ‘a cynical view of legal conclusions’ (Kisilevsky’s words)<sup>80</sup> to think that, even when the court is not the allocator of rights and obligations, its protecting rights and enforcing obligations is properly and commonly understood and evaluated by judges as a way of making winners and losers of those who appear before them. In chapter 5, I analyzed a case in which a senior judge openly found that he could not do justice according to law, because applying the settled law, which he lacked the power to overrule, forced him to perpetrate an injustice.<sup>81</sup> The injustice was that a young woman lost an appeal against her acquittal when, in the judge’s view, she should have won it in view of her severe learning disability. Clearly the judge was concerned about the negative impact on the young woman, and on similarly-placed learning-disabled people. Judges are people too, as Joseph Raz says,<sup>82</sup> and

<sup>78</sup> Kisilevsky, ‘Positivism/Normativity’, [6 note 23].

<sup>79</sup> I have developed the twin points in this paragraph at length in Gardner, ‘What is Tort Law For? Part 2. The Place of Distributive Justice’ in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford 2014)

<sup>80</sup> Kisilevsky, ‘Positivism/Normativity’, [6 note 23].

<sup>81</sup> Gardner, *Faith*, 141-4.

<sup>82</sup> Raz, ‘Incorporation by Law’, *Legal Theory* 10 (2004), 1 at 7.

they rightly worry, not only about the allocation of legal rights and obligations among the people before the court (and others like them), but also about the way in which these allocations impact on those people and their lives (and of course on other people and their lives too). Indeed the impact on people and their lives (mainly instrumental, but occasionally constituent-intrinsic) is the only reason I can think of for ever worrying about the allocation of legal rights and obligations.<sup>83</sup> That justice between the people before the court must be done in terms of their legal rights and obligations is but an aspect of the modal restriction under which judges place themselves, whether by oath or otherwise, when they take office.<sup>84</sup> Obviously they often wish they were at liberty to do justice without any such restriction, especially but not only when the law is unjust and they see no honourable way round its injustice.<sup>85</sup>

Yet Kisilevsky's doubts persist. If questions of justice are simply moral questions about how to allocate things, she asks, why are questions of justice not as much in the foreground in games as they are in legal systems? I gave a partial answer in the book, and Kisilevsky gestures towards it.<sup>86</sup> Questions about how to allocate the things that are at stake within games – points, moves, cards, turns, throws, tokens, etc – are not normally moral questions, so long as nobody is failing to follow the rules (in which case the morality of game-playing in general is implicated, and questions of justice are back on the table). Obviously,

<sup>83</sup> This is an endorsement of the so-called 'person-affecting restriction' on principles of justice. It rules out certain kinds of egalitarianism and certain kinds of retributivism: see Larry Temkin, 'Equality, Priority, and the Levelling Down Objection', in M Clayton and A Williams (eds), *The Ideal of Equality* (London 2000). I intend 'people' in my formulation to be flexible enough to accommodate whatever beings may turn out to be of ultimate moral concern.

<sup>84</sup> For more details of the restriction, see Gardner, *Faith*, 74-5, 189-90, 210.

<sup>85</sup> See Gardner, *Faith*, 258 note 28.

<sup>86</sup> Kisilevsky, 'Positivism and Normativity', [7], citing Gardner, *Faith*, 136.

morally significant consequences can be grafted on to any game, and they are built into a few of them (e.g. Russian Roulette, ‘chicken’). But when there are such consequences, the question promptly arises, as you would expect, of whether the game is a just mechanism for their allocation.<sup>87</sup> If you and I play hoopla for the last place on the lifeboat, the question promptly arises of whether *this* is a just way to allocate *that*. Indeed if we play tennis for sizeable prize-money, or poker for non-trivial stakes, or Minecraft for serious peer-kudos, the question also arises of whether the relevant gains and losses are being justly allocated by that mechanism. Is it just that the men’s competition pays bigger prize-money than the women’s? Is it just that the rookie player is cleaned out by the more seasoned gamblers? Is it just that affluent gamers can boost their scores by using in-app purchases?<sup>88</sup>

It is true that such questions are not typically about particular rules of the game itself but rather about the use and abuse of the game as a whole, or about how play is facilitated, supervised, or governed by the game’s officials. The main reason is mentioned, although not developed, in *Law as a Leap of Faith*.<sup>89</sup> There is no point in following one of the rules of a game in isolation from the other rules. Exchanging a tiny piece of green plastic shaped like a house for pink play-money and placing it on a yellow box marked ‘Piccadilly’ that is printed at one edge of a folding cardboard square is not something that one would have reason to do unless one were playing a game of *Monopoly*.<sup>90</sup> And one is

<sup>87</sup> Gardner, *Faith*, 161–2.

<sup>88</sup> People may be inclined to say ‘fair’ these days more often than ‘just’. I do not regard justice and fairness as different. So ‘justice as fairness’, Rawls’ famous brand-name, is to my ears pleonastic. See Bernard Williams, ‘Justice as a Virtue’ in A.O. Rorty, *Essays on Aristotle’s Ethics* (Berkeley 1981).

<sup>89</sup> Gardner, *Faith*, 212.

<sup>90</sup> Or derivatively, unless one is showing someone how to play *Monopoly*, making a *Monopoly*-themed installation, humouring a *Monopoly*-obsessed kidnapper, playing one’s own game adapted from *Monopoly*, etc.

playing a game of *Monopoly* only if one is following, for the most part, the game's other rules. This means that the individual rules of a game rarely fall to be evaluated – whether for their justice or for anything else – except in respect of their contribution to the playing of the game. That is the main reason why nobody says, at any rate with a straight face, that the *Monopoly* rule allowing one to have no houses on Piccadilly unless one owns all three of the yellow properties is an unjust rule.

As I incanted periodically throughout the book, law is not a game.<sup>91</sup> My critique of 'formal justice' in chapter 10 had an excessively game-like picture of legal life as its principal target. It challenged the depressingly popular idea that selective fidelity to law (say sticking to legal rule *r1* at time *t1* and then bending it at time *t2*, or sticking to rule *r1* at the same time as ignoring and flouting rule *r2*) represents a kind of injustice or unfairness, somewhat akin to cheating at croquet or cribbage. One is not 'playing by the rules.' I find this idea embarrassingly stupid. So obviously I agree with Kisilevsky that law and games are very different in respect of the norms of justice that regulate them and the respects in which they are regulated. I do not, however, agree with her larger proposal that 'law, and not ... games, is specially subject to the norms of justice.'<sup>92</sup> So I do not agree with her view that my demarcation of the domain of justice needs to be fortified in some extra way to keep game-allocations out.

#### 5. Lacey on modalities, generalities, and jurisprudence

Finally we come to Nicola Lacey's deep and difficult comments, which themselves respond to comments that I made in the final chapter of *Law as Leap of Faith* on some of her earlier work. Like Kisilevsky and Rundle, Lacey takes an interest in my view that

<sup>91</sup> Gardner, *Faith*, 52, 136, 212, 297.

<sup>92</sup> Kisilevsky, 'Positivism and Normativity', [6].

law differs from various otherwise similar social arrangements not by its distinctive ends but by its distinctive means – ‘modally’ rather than ‘functionally’.<sup>93</sup> Lacey does not present a functionalist alternative, for she does not want to be in the business of exploring the nature of law (‘law in general, law as such, law wherever it may be found’).<sup>94</sup> She doubts whether this is a respectable line of business to be in. She limits herself, therefore, to casting doubt on what I have to say about law’s distinctive modality, without offering any rival view of her own.

I doubt whether much is to be gained by trying once again to persuade Lacey that my line of business is a respectable one. So for now I will limit myself to exposing a few misconceptions that I find in her explanation of my views. These misconceptions help to oil the wheels of her critique. I wonder whether perhaps I did not explain myself lucidly enough in the book, for at some points I do not recognize as mine the views that Lacey ascribes to me.

(1) I did not argue and do not believe that ‘legality is ... the distinctive modality of law’<sup>95</sup> where legality means something like what Fuller called ‘law’s inner or internal morality’.<sup>96</sup> On the contrary, I insisted at several points in the book that there may be law without legality.<sup>97</sup> Even without legality, law is still to be distinguished modally: for example, by its use of rules (however obscure), its use of moral claims (however preposterous), its use of authority (however illegitimate), its use of custom (however concocted), its use of officials (however jumped-up), and its use of interpretation (however far-fetched). One need only look at

<sup>93</sup> The terms are Les Green’s, from ‘The Concept of Law Revisited’, *Michigan Law Review* 94 (1996), 1687 at 1709.

<sup>94</sup> My words, from Gardner, *Faith*, 270, quoted in Lacey, ‘Implications’, 33.

<sup>95</sup> Lacey, ‘Implications’, 15.

<sup>96</sup> Lacey, ‘Implications’, 14.

<sup>97</sup> Gardner, *Faith*, 29-34, 190-4, 224-6, to cite only the longer discussions.

Kafka's parable *Vor dem Gesetz*<sup>98</sup> (and the novel *Der Prozess* into which it was later woven)<sup>99</sup> to see how law, complete with all of these modal features, might be coupled with a radical failure of legality. That was surely Kafka's main point. He may even have thought, not implausibly, that law tends over time to become a parody of itself in which the ideal of legality is turned on its head, and nobody can make use of law for any further purpose. Then it no longer matters much what the law says on any particular subject. A legal system becomes a game-like apparatus mainly orientated towards the perpetuation of its own play.

It is true that, in *Law as a Leap of Faith*, I made a connection between law's modality and the ideal of legality. I said that the ideal of legality 'is a modal ideal for a modal kind.'<sup>100</sup> But as I said in reply to Rundle, this view does not and could not yield the conclusion that every instance of the kind lives up to the ideal. So it does not make legality the modality of law in general.

(2) I did not claim, and do not believe, that 'law's supremacy or importance is an unchanging given.'<sup>101</sup> That is not because I do not believe that there are timeless truths about law. Rather, it is because I do not believe that law's supremacy, or its (social) importance, are among those timeless truths. I believe, and I said in the book, that law *claims* supremacy, which means that according to the law of any legal system, other normative arrangements (including other legal systems) are all subject to the law of that system even if they do not derive from it.<sup>102</sup> This is consistent with the law's taking a back seat on most matters, allowing other arrangements to stay in the driving seat, even *sub silencio*. It is also consistent with the law applying self-denying

<sup>98</sup> In Franz Kafka, *Ein Landarzt* (Leipzig 1919), included in English in Kafka, *The Complete Stories* (ed Glatzer, New York 1995).

<sup>99</sup> Berlin 1925. In English as *The Trial* (trans Mitchell, New York 1998).

<sup>100</sup> Gardner, *Faith*, 217.

<sup>101</sup> Lacey, 'Implications', 14.

<sup>102</sup> Gardner, *Faith*, 278, 287.

ordinances by which it deals with certain topics only and leaves other topics to be dealt with elsewhere, including by other legal systems. It is also consistent with a general population going about in its old ways largely oblivious to the law's existence. If the 'state law' of Yap in Micronesia<sup>103</sup> doesn't bother much with regulating the wider population of Yap, but mainly regulates corporate and governmental goings-on, then there is no relevant inefficacy when the ordinary folk of Yap ignore it or do not even become aware of its existence, for there is little in it that regulates their actions. The thesis that law must be efficacious to exist does not mean that law must be efficacious in doing things that it does not bother to do, or in doing things that it only claims to be able to do without actually getting round to doing them.

One of the recurrent themes of *Law as a Leap of Faith* is that law may be ridiculous, absurd, pretentious, and rife with an inflated sense of its own importance. Throughout the book I challenge theorists who flatter law by treating it as actually having the social importance, or the supremacy, or for that matter the moral force, that it claims to have.<sup>104</sup> In the most law-fetishistic hands of all, the social importance of normative arrangements morphs from a necessary to a sufficient condition of their adding up to a legal system. Every socially important normative set-up is then classified as law. In the book, I reserved special opprobrium for this view.<sup>105</sup> I worry that Lacey is giving succour to it when she says that 'particular conceptions of law can and must claim empirical support'.<sup>106</sup> She is inviting the thought that whatever normative arrangements are prevailing or effective or influential or commonly used in the population at a particular time in a particular society – well, those must be the law.

<sup>103</sup> Lacey, 'Implications', 14, citing Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford 2001).

<sup>104</sup> Gardner, *Faith*, 17-18, 144, 165-6, 224-5, 287-9.

<sup>105</sup> Gardner, *Faith*, 292-3.

<sup>106</sup> Lacey, 'Implications', 15 note 47.

Lacey is inviting that thought, but probably it is not her own thought. Her own thought is revealed instead by her suggestion that ‘classification [e.g. of something as a legal system] must bear a reflexive and constantly evolving relationship with its own subject matter, as with the attitudes of the agents whose activities constitute the relevant institutional practice.’<sup>107</sup> That thought provokes two counter-thoughts from me.

First, thinking of the ‘attitudes of the agents’, Lacey’s anthropological and historical examples suggest that, in deciding what people are doing (in particular whether it is law) we should give weight to what they think they are doing (and in particular whether they think it is law). That is the view I associated in my book with Brian Tamanaha, and I resisted it with the point that it is possible to have and use law without knowing that it is law and without even knowing what law is.<sup>108</sup> It is also possible to imagine that one has and uses law, and that one knows what law is, when one does not.<sup>109</sup> I assume that what we are interested in is the question of who has and uses law, not the question of who thinks they do. So I do not see how Lacey’s examples bite.

Second, and more important, the master-questions that occupy philosophers of law-in-general typically include the following. Which (and in particular whose) activities ‘constitute the relevant institutional practice’, namely the practice of law? And which ‘subject matter’ is the subject matter of law? We can follow Lacey’s advice to make our classifications relate reflexively to the relevant institutional practice and the relevant subject

<sup>107</sup> Lacey, ‘Implications’, 19.

<sup>108</sup> Gardner, *Faith*, 298-9.

<sup>109</sup> Imagine a group of children to who think that they have law because law, they suppose, is the midmorning snack of fruit and milk that is served daily at their nursery. Back story: they were told yesterday ‘you all have to sit down and eat now, it’s the law’ by their room supervisor. This is authentic classificatory confusion, not just a verbal error of the kind that might lead a child to think that, say, serial killers are people who poison your cereals.



matters only if we have already done enough basic classifying to identify these correctly. That is the basic classifying that I try to do. I want to know *in virtue of what* the people and institutions that Lacey picks out as ‘relevant’ qualify as relevant, i.e. as law-people and law-institutions. It cannot be that this is how they think of themselves (see above). And it cannot be that they are socially important or supreme (see above). So what is it?

(3) By insisting that certain normative arrangements are not legal systems, I supposedly ‘deprive the terrain of jurisprudence of some very significant objects of analysis.’<sup>110</sup> This line is also taken by Bill Twining and I also resisted it in the book. I pointed out that ‘it does not follow from the fact that [certain] arrangements deserve the attention of legal theorists that they are legal systems’.<sup>111</sup> They could also deserve the attention of legal theorists because they differ revealingly from legal systems. Morality, for example, is no legal system. But where would we be if analysis of it were a no-go zone for philosophers of law?

That rhetorical question suggests an even more robust response to Lacey and Twining, one which I did not offer in the book. It does not matter, except for the purpose of designing courses and writing textbooks, which subject-matters are part of ‘jurisprudence’ or ‘legal theory’ or ‘philosophy of law’ and which are not. It is a matter only of pedagogical and bibliographical convenience. Unlike law, philosophy does not have official demarcations of its subject-matters. It is not even very sharply demarcated from other disciplines.<sup>112</sup> In *Law as a Leap of Faith* I wrote about religion, custom, morality, cuisine, etiquette, games, the metric system of measurement, and various other families or groups of norms. Over the years, in developing my interests as a philosopher of law, I have been drawn into topics conventionally

<sup>110</sup> Lacey, ‘Implications’, 14.

<sup>111</sup> Gardner, *Faith*, 296.

<sup>112</sup> I made an attempt to demarcate it in ‘Law and Philosophy’ in S Halliday (ed), *An Introduction to the Study of Law* (Edinburgh 2012).

studied under the headings of epistemology, ethics, theory of politics, metaphysics, aesthetics, philosophy of mind, philosophy of psychology, philosophy of action, philosophy of language, philosophy of religion, and even on occasions philosophy of science. It never occurred to me to draw a line under an incomplete argument and say: 'I can't complete that argument; it wouldn't be jurisprudence any more.' Why should I care whether it would be jurisprudence? By the same token, why should we feel 'deprived' of an 'object of analysis' merely because of a boundary of convenience between branches of philosophy?

I say: the more objects of analysis the merrier. Analysing an object of analysis means differentiating it from other objects of analysis with which it nevertheless has enough in common to make it worth looking for the differences. If we are not prepared to differentiate objects of analysis, as I explained in chapter 11, we have no objects of analysis. If we are not prepared to say what counts as law and what does not, then it is not the case that we have a more capacious subject of study, an excitingly larger jurisprudence. We have no subject of study at all.

(4) Finally, Lacey attributes to me the view 'that law's modality ... is independent of law's changing social functions [and] institutional structure.'<sup>113</sup> This is not exactly a false report of my view, but it is an extremely misleading one. Naturally I think that law's widely varying social functions and institutional structures affect its modes of operation. This is true of variations from legal system to legal system as well as from era to era. In the era of the so-called 'regulatory state', to stick with Lacey's example,<sup>114</sup> there are new styles and sites of law-making and law-applying aplenty. In particular the roles of law-maker and law-applier are combined in new ways, different from those that

<sup>113</sup> Lacey, 'Implications', 14.

<sup>114</sup> Lacey, 'Implications', 14.

prevailed in earlier modes of power-separation.<sup>115</sup> The question is not whether law's modality has changed here, for clearly it has. The question is whether the 'before' modality and the 'after' modality have anything that unites them as legal, i.e. as special cases of the (more general) modality of law. Even if one says that the paradigm of law has shifted (which I think people are much too quick to say) one has to be able to explain what makes it a shift in the paradigm of *law*, rather than in the paradigm of (say) regulation or policing or government, which are very different 'objects of analysis'. And before one says that the supposed shift in the paradigm of law is also a shift to a 'new concept of law' one had better be able to say why the 'old' concept of law (as it were) was not already capable of recognising, as an instance of law, these new arrangements. If indeed it was not, we need to know why we should think that what we need to put things right is a 'new concept of law' (whatever that may be) as opposed to a dawning realisation that, now that we have the regulatory state, we are just not that into law any more.

If that sounds like the wrong conclusion, that's because it is. In the regulatory state we are unfortunately *very* into law, in a near-Kafkaesque way. Kafka himself nicely showed that we don't need a 'new concept of law' to be able to see it that way. What we have is a legal system (in the familiar sense of the word) in which law is proliferating to the point at which it is becoming the enemy of legality.<sup>116</sup> The legal modality of the regulatory state is a pathologically hyperactive instance of the same old legal modality that philosophers have been studying since Plato.

These issues about legal innovation are at the heart of my concerns in chapter 11. How many times must we read that the

<sup>115</sup> My former student Brendan McGurk wrote an excellent doctoral thesis on this subject called *The Rule of Law in the Regulatory State* (unpublished 2005). It can be consulted in the Bodleian Library in Oxford.

<sup>116</sup> I wrote about this in a blog entry, 'When Law is Part of the Problem', <http://blog.oup.com/2012/09/law-enforcement-rule-of-law-asymmetry/>

rise of European Union law, the law of the WTO, international criminal law, indigenous law, 'soft law', human rights law, or some other cutting-edge law school topic requires us to revisit our thinking about the very nature of law? How often is it said that Kelsen, or Hart, or others who wrote in earlier times about the very nature of law were distracted by the prevalence, in their day, of particular kinds of law that are no longer the most prevalent kinds? In chapter 11 I tried to test such voguish claims against a variety of examples of supposedly unnoticed or unforeseen legal systems. I found the claims to be severely overstated. The examples in question, when they were indeed examples of legal systems, all fitted the broadly Hartian specifications for a legal system. I saw nothing in the recent modal shifts in the world's legal systems to suggest that we should abandon what Hart wrote about the modality of law in general, or to suggest that what falsified earlier attempts to do the same was a lack of foresight or imagination. It was not necessary for Hart to foresee the rise of European Union Law or any other latter-day legal orders to accommodate them in his account of the nature of law. The Holy Roman Empire, the Faroe Islands after 1298, the early United States, the *Lex Mercatoria*, and England before the Judicature Acts, not to mention huge swathes of colonial Africa, provide ample historical examples of what is now known as 'legal pluralism' as well as 'transnational law'. Knowing this full well, Hart was careful not to assume that law exists only in legally monistic environments. The result is that what Hart said about the nature of law already *accommodated*, although as Neil MacCormick noted it did not much *emphasise*,<sup>117</sup> the modal shifts that we are witnessing in legal life today. But why should Hart have emphasized them? Why are they (and why are we) so special? Probably, in the great arc of

<sup>117</sup> MacCormick, 'Beyond the Sovereign State', *Modern Law Review* 56 (1993), 1 at 9.

history, these shifts will turn out to be no less ephemeral than the shift from Republican to Imperial law in Rome, from feudal law to post-feudal law, from the law of the night-watchman state to the law of the welfare state, from the law of the welfare state to the law of the regulatory state, from colonial law to post-colonial law, and so forth. Legal historians and legal sociologists study each of these modal shifts in all their colourful institutional detail. Philosophers of law have the additional task (not their only task) of explaining how it can be that each is a modal shift occurring within the modality of law, i.e. one that is consistent with the nature of law in general, and therefore one that does not mark either the beginning or the end of the legal world.