Prefaces by John Gardner to the first five books in the series *Legal Theory Today* (Oxford: Hart Publishing)

1. *Law in its own Right* by Henrik Palmer-Olsen and Stuart Toddington (1999)

The second half of the twentieth century saw a remarkable explosion of original work in legal theory in the English language, partly a function of broadening intellectual horizons in British and American university law schools, and partly a personal testimony to the ground-breaking contributions of certain individual scholars. Unfortunately it seemed at times that the explosion not only rocked the subject but fragmented it, as different theoretical styles and approaches, with their own intellectual heroes and heroines, sought to establish themselves in the brave new interdisciplinary (and indeed multicultural) world of Anglo-American legal thought. As new sources of intellectual inspiration penetrated the often impatient but always creative legal mind, what should have been argument occasionally turned to enmity, and where there should have been dialogue there was sometimes a hint of disdain.

These were the marks of an academic revolution in its infancy. Now, at the end of the century, it seems that our intellectual insecurities are being replaced with a new and more ecumenical respect for learning. The pioneers of the supposedly rival approaches to legal theory have cascaded their contributions down to an ever widening circle of their students and their students' students, intellectual heirs who have intermingled and intermarried to the point at which, I like to think, ideas are becoming ideas again, as opposed to the totems and taboos of academic tribes. At the same time, and as a corollary, a larger critical mass in the law schools and closer connections with

theorists working in other academic milieux have made for a higher general standard of philosophical education and competence, even among those who blushingly like to think of themselves as 'black-letter' lawyers, and even, for that matter, among the most resistant of practice-orientated law students. Together these forces bring us to a point at which the subject is flourishing and, at least in the places I know best, flourishing cordially.

This book series aims to capitalise on this state of affairs. It aims to capture the spirit of open inquiry which comes after a period of exciting but sometimes divisive innovation. The books will therefore serve partly as an encomium for the vast achievements of the last fifty years, but will also push the subject forward, weaving together unexpected and sometimes superficially contrasting strands of thought to yield new and strong argumentative fabrics. Limited to a modest length and published at a modest price in a pocket-sized paperback format, the books are targeted at students and scholars alike, perfect for reading on the bus or in the bath, and, in their pace and tone, associating philosophy as much with ardour as with arduousness. The books take as their mantra the proposition that in legal theory, as in any theoretical field, the best secondary literature – the literature which best documents and assesses what others have already argued – will also turn out to be primary literature in its own right, always framing and defending its own novel positions.

With these aims for the series, it is a particular delight to be launching the series with this fascinating and wide-ranging study by Henrik Palmer Olsen and Stuart Toddington. Their project, fittingly, is to juxtapose and partly harmonise two contrasting thoughts which are very familiar in the history of law and legal science. The first thought is the thought that law exists autonomously, that it can be considered and studied, as the book's title suggests and many lawyers are wont to assume, in its own right. The second thought is the thought of law's surely

essential integration into the rest of the Art of Life, its social functions and its allied moral (or claimed-to-be-moral) messages and objectives. The thought, if I may play a little on the title, is that law must have some right to exist, that it cannot by itself make the case for its own existence, that it cannot legitimately lift itself by its own bootstraps. The book reveals, in ways which I found engaging and provocative, the possible dimensions of interplay between these two thoughts and the scope for explaining them not only as compatible, but also as in some ways interdependent. It is an old theme, heightened by modern debates in legal theory, and masterfully synthesised here. It is a fitting entree to *Legal Theory Today*. (15 July 1999)

2. *Law as a Social Institution* by Hamish Ross (2001)

Hamish Ross's important book is the second in the *Legal Theory Today* series, and like the first *(Law in its own Right* by Henrik Palmer Olsen and Stuart Toddington) it keeps faith with the idea that originally animated the series. It sets out to build a bridge between ways of thinking about law that are commonly thought to be worlds apart. In the case of *Law as a Social Institution,* the bridge is between 'analytical' and 'sociological' jurisprudence.

Ross takes seriously H L A Hart's remark in the preface to *The Concept of Law* (1961) that the work can be read either as a work of 'analytical jurisprudence' or as a work of 'descriptive sociology'. What exactly, wonders Ross, would be the difference between these two readings? The answer is fascinating. It turns out that the common contrast between 'analytical' and 'sociological' jurisprudence is a false contrast, for a successful sociological jurisprudence needs to be no less analytical – no less concerned with the dissection and classification of concepts – than any other. What marks it out and commends it as a specifically sociological jurisprudence (says Ross) is firstly its distinctive focus on legal norms as social norms, and secondly its

studying of its subject matter from a distinctive perspective, namely the 'hermeneutic' perspective of the detached insider.

Not all legal theory shares or needs to share these particular foci. After all, many legal norms are not social norms and so cannot be studied as social norms. And at least some theoretical problems faced by lawyers demand investigation from a committed-true-believer's perspective. Nor does Ross deny these points. What he argues, however, is that there remains logical space for a distinctively sociological jurisprudence, and that Hart's *The Concept of Law* should be regarded as a serious, but flawed, attempt to produce one.

What struck me most about this book on first encounter was the total absence from its pages of the kind of verificationist scepticism about the domain of the *rational* that so damages many attempts to think sociologically about law, or to locate law among the social sciences. Like Weber but unlike many self-styled Weberians, Ross is no reductionist about human agency and harbours no subliminal longing to convert rules or standards (or the institutions ordered by them) into mere causal or probabilistic generalisations. That is why there are moments when his criticisms of Hart resonate with those of another bridge-builder in jurisprudence, namely John Finnis. One might think that no body of work in the philosophy of law could be further removed from the 'sociological' and more immersed in the 'metaphysical' than Finnis's. But there we have another false contrast. It is no accident that Finnis, like Ross, is so immersed in Weber's work. Sociology too must have its metaphysics, its irreducible presuppositions. In this book Hamish Ross formally reopens the metaphysics of legal sociology to scrutiny. In the process he carries forward, while at the same time reorienting in a direction markedly different from Finnis's, the double-sided enterprise announced by Hart in the preface of *The Concept ofLaw*. I hope you enjoy the result as much as I did. (19 March 2001)

3. *Evaluation and Legal Theory* by Julie Dickson (2001)

Legal philosophers have lately become ever more preoccupied with questions, not so much about law, as about legal philosophy itself. To what extent is legal philosophy objective? To what extent is it value free? To what extent is it descriptive? And so on. If one always suspected that the philosophy of law is a self-indulgent pursuit – and I have heard many lawyers and law students express that view with great vigour – then this recent growth industry (the philosophy of the philosophy of law, or meta-jurisprudence, as one might call it) may strike one as positively narcissistic. But in a way the anti-philosophical stance of many lawyers and law students is the very thing that explains the growth of this industry. When studying law one learns to demand an authority for every proposition. This demand tends to instill in the law student, and later in the lawyer, a sceptical attitude to all questions that cannot in principle be settled by authority. So the most far-fetched and incoherent forms of scepticism – forms that even the most sceptical literary theorists would find embarrassing – often take particularly deep root in the legal community. In some law schools there is almost an arms race to see who can out-sceptic their colleagues. It is perfectly understandable, against this backdrop, that those with a genuinely philosophical interest in law should gradually be drawn into ever more navel-gazing debate about the status of their own work as philosophers.

In this third book in *the Legal Theory Today* series, Julie Dickson avoids the navel-gazing and cuts through the existing meta-jurisprudential debate. To do so, she focuses specifically on the place of *evaluation* in legal philosophy. Many sceptics have talked as if the presence of evaluative elements in philosophical writings about law were somehow a dirty little secret. Legal philosophers who purported only to explain the nature of law in fact imported their own ideological predilections and inevitably

ended up displaying the law in a favourable (or unfavourable) light. Nothing in legal philosophy was ever value-neutral, the allegation goes. Everything was either a secret defence or a secret critique of law. This allegation was designed to face legal philosophers with a dilemma. On the one hand, they could agree that their work on the nature of law actually constituted a defence (or critique) of law. On the other hand they could insist that all they were doing was 'describing' law, with their evaluative faculties switched off. The first option was thought to be unpalatable to most philosophers of law, while the second was thought to be incredible.

Many students have been taught to read the later phases of the debate between Dworkin and Hart as representing the struggle between the two horns of this dilemma. And many have concluded – as well one might – that the palating of the unpalatable has more going for it than the creding of the incredible. Hence they awarded victory to Dworkin, who (it is said) at least had the courage to admit that he was being ideological, as surely the sceptics were right to say that all writers on law must be.

Julie Dickson beautifully destablilises this familiar student conclusion not by seizing the opposite horn of the dilemma but by showing that the dilemma was always an illusion. That legal philosophers must approach law evaluatively in order to explain its nature does not entail that every act of explaining the nature of law is an act of defending (or criticising) law. As Dickson puts it, there are 'indirect' as well as 'direct' roles for evaluation in legal philosophy. Even 'describing' law in the way that Hart wanted to do is an indirectly evaluative activity. But it does not follow that it conceals a defence (or critique) of law and so has a dirty little secret of the kind that the sceptics allege. Hart's method picks out what *is significant* about law – and *that itself is an evaluation* – *but* it leaves open whether what is significant about law is significantly good (as Dworkin claims it must be) or significantly bad (as an anarchist might claim in response), Here

we have a kind of evaluation that does not decide between defence and critique and is, *in that limited dimension,* value-neutral. It leaves open whether one should be an anarchist or a law-lover, or indeed (like most of us) someone in between. But it does not involve switching off one's evaluative faculties and looking at one's subject through totally undiscriminating eyes, for that would indeed be incredible as a philosophical method – or indeed as any kind of intellectual approach.

The book sets itself modest ambitions. It aims to make logical space for 'indirectly evaluative' legal theory without defending it as the right way to go. I tend to think that the book exceeds this ambition and brings out much that is attractive about the kind of legal theory that Dickson has in mind. More importantly, however, I like to think that the book may help to bring to an end the excessive polarisation on the subject of methodology that has marked the period since the publication of Dworkin's *Law's Empire*. Since *Law's Empire* appeared, the question is often raised, in Dworkinian terms, of whether one is an 'interpretivist' concerning the nature of law. But everyone is an interpretivist concerning the nature of law and always has been. The works of Bentham, Kelsen and Hart were all of them equally interpretations of law and legally related phenomena. They all aimed to explain law and legally related phenomena in a way that played up the important and played down the unimportant. So the real issue is not whether we philosophers of law are necessarily interpreters; it is whether we are forced, as Dworkin thinks we are, to be *constructive* interpreters, i.e. to explain law in a way that shows it *favourably,* aligning the important with the importantly *good*. If Dickson is right – and I think she is – we need not be constructive interpreters. We can approach the problem of the nature of law as an evaluative problem, but still with a more open mind about law's value. (2 April 2001)

4. *Law and Aesthetics* by Adam Gearey (2001)

By its nature, law makes moral claims. But can it be judged only by moral standards? Clearly not. It can also be regarded and evaluated as, among other things, an object of aesthetic appreciation: as a literary genre, an intellectual architecture, a social spectacle, and so on. Lawyers not infrequently come to think of their work as one might think of a work of art, prizing elegance, coherence, balance, and other aesthetic virtues, over moral virtues such as honesty, generosity, and humanity. Even justice – the one moral virtue which lawyers find it hard to avoid mentioning – is transformed by some legal thinkers into an aesthetic form. Never mind sensitivity to people's needs and predicaments, just look at that symmetry, that order!

This prizing of the aesthetic over the moral – or of form over substance, as the point is often (misleadingly) put – may strike one as the most extreme case of lawyers' narcissism. Not surprisingly this very accusation was one of the original inspirations behind the critical legal studies movement, whose members saw in the elegant conceits of what they called 'legal formalism' a kind of unhealthy escapism from 'the field of pain and death' (as Robert Cover put it) in which law operates. And yet some critical legal studies writers merely compounded the felony with a new version of the same narcissism. They became the *enfants terribles* of the law school, replacing the formalists' passion for finding coherence and order in the law with a like passion for finding incoherence and disorder. Many were subversives only in the way that the dadaists and the absurdists were subversives. They subverted the values of the traditional legal aesthetes but in the process they reinforced the view that law is mainly an object of aesthetic criticism, mainly suited to being deconstructed and transfigured and problematized. Their work stood to the 'formalism' of some lawyers as a Hirst sheep in formaldehyde stands to a Constable landscape. Our preconceptions were challenged but still we seemed to be stuck

in a virtual moral vacuum. Only the blandest and most naive moral truisms (look, people are still being oppressed!) lurked behind the sophisticated countercultural manoeuvres.

So the question arises: Is there any authentic moral insight lurking within an aesthetics of law? Does approaching the law as an object of aesthetic appreciation count as any more than a vain distraction from the real job of revealing its moral strengths and weaknesses? Adam Gearey's book tackles these problems by gradually drawing us into the web of Nietzsche's revisionist aesthetic morality, in which the highest admiration is reserved for the testing of one's creative limits, and in which true virtue lies in overcoming all that constrains and dampens the human spirit. You may think it curious to talk – it is my expression, not Gearey's – of Nietzsche's 'aesthetic morality'. Wasn't Nietzsche's aim to put morality behind us altogether? Well, yes and no. Nietzsche always read the word 'morality' to mean 'what people conventionally take to be morally required of them', and this cod-morality understandably appalled him. But what he wanted to see in its place was first and foremost a better set of moral judgments, with various traits conventionally classified as moral weaknesses reclassified as moral strengths, and vice versa. One of Nietzsche's fancies was that in this rival vision of human flourishing, the true values of ethics and aesthetics would converge. By the subversion of the conventional, the human spirit would have its beauty, as well as its honour, restored. It is from this aspect of the Nietzschean dream that Adam Gearey takes his cue. A Nietzchean legal aesthetics – a full appreciation of law's creative potential – is also a new morality of law.

The voice of the book that follows – as you can tell from this trailer – is relentlessly optimistic, and the dream Nietzsche prevails over his nightmare counterpart. The nightmare counterpart is of course the Nietzsche for whom 'creative potential' includes the potential to murder and destroy, for whom just thinking the conventionally unthinkable – however monstrous – is an act of liberation for the human spirit. With that

nightmare in mind, one may be tempted to conclude that we still need to distinguish *within* our creativity between good and evil uses of it, and that an aesthetics of law ordered around creativity must in that respect still be answerable to a relatively independent ethics of law. But there speaks the pessimist, for whom the human power to create includes the power to create misery as readily as joy. This work is by and large an imaginative celebration of the opposite view. I must say that in that respect I found it exhilarating and indeed liberating, and hence a nice exemplification of its own thesis. By the same token it is the most stylistically *outré* of the books published so far in the *Legal Theory Today* series, for in true Nietzschean spirit it is as literary as it is philosophical. In abandoning old hostilities and building intriguing new bridges, however, it clearly belongs with the other books. It is the work of a generous spirit as well as a sparkling wit, and to that extent moral and aesthetic virtues do indeed converge within its pages. (14 May 2001)

5. *Risks and Legal Theory* by Jenny Steele (2004)

One takes a risk if and only if there is a probability, however small, that one's action will have bad consequences. Since every action carries such a probability, everything we do is risky. This has always been so. It is an aspect of living in the world that has figured prominently in literature and philosophy since the birth of civilisation. This makes the fashionable idea that we are living in 'a risk society' puzzling. In what sense is our society more of a 'risk society' than any other? Are there more risks or greater risks? A cursory survey of the history of life suggests otherwise. Is it that we are more aware of risks? Perhaps.

More obvious to the amateur eye, however, has been the growth of the idea that materialised risk is always someone's fault, in the sense that someone (often an amorphous 'they', the powers-that-be) must have acted unjustifiably (possibly even

inexcusably) in taking (or failing to eliminate) risk. Thus when a risk materialises – when the bad consequences come to pass – the question is always instantly asked 'What lessons can be learned?' even where there is nothing to suggest any faulty action by anyone. It never crosses anyone's mind that sometimes there is no lesson to be learned. Nobody should change their behaviour. These things – fires in care homes, train crashes, children drowning on school expeditions, homicidal maniacs working in the Health Service – sometimes just happen. And even when they do not just happen, even when someone did make them more likely, it is not always the case that this someone is at fault and has 'lessons to learn'. Sometimes risks are worth taking and we should go on taking them. Children need to be subjected to risk, for example, so that they learn how to live with risk when they grow up. That a few of them drown on school expeditions is the price we must pay. And the only way not to have any more train crashes is not to have any more trains, which one does not need to be a train-lover to regard as preposterous overkill.

The literature about tort law discussed by Jenny Steele in Part II of this book, has as one of its foci the question of when risk-taking is faultless (or reasonable), so that there are no lessons to be learned from the materialisation of the risk and hence no pedagogical purpose in tort damages. Some, mainly in the economic tradition, tend to think that risk-taking needs to be justified (shown to be reasonable) only by pointing to countervailing good consequences. Others think, as I tend to think, that this perspective is impoverished. Not only should we not be content to count economic consequences; we should not be content to count consequences full stop. Many valuable activities, from love affairs to business ventures, have their intrinsic value enhanced by their riskiness. Their riskiness counts against them consequentially, but in favour of them non-consequentially. A way of looking at reasonableness that only counts consequences has a deadening effect on our culture by teaching us the misguided lesson that we should only think of

risk as a negative, and as needing other good consequences to justify it. Of course, some people make an exception for extreme sports. But the problem is nicely demonstrated by the fact that this has come to be thought of as an exception

This is one possible reaction to the economists. A different (but compatible) reaction is represented by Tony Honoré's work. For Honoré, a focus by tort law on the materialisation of risks need not be justified pedagogically, i.e. by the need for lessons to be learnt. So it need not involve a search for fault, for some unjustified and unexcused risk-taking on the part of the defendant. Two people may take identical risks – one no more justified and no more excused than the other – and yet only the one whose risk materialises commits a tort. The primary importance of the risk is not that it gives one something to justify in court, but that by taking the risk one is gambling on its non-materialisation. If one loses the gamble, one pays. This gives us an interesting new idea about all these people who are constantly asking for lessons to be learned whenever a risk materialises. Their error may not be in thinking that someone has to take the rap when risks materialise. Their error may only be in thinking that this requires fault, and hence that future behaviour should also change as a result. If this is right, we should detach our worries about 'the risk society' from our simultaneous worries about 'compensation culture'. The two represent different morbid social developments: one a morbid preoccupation with 'closure' on the past (compensation, apology, counselling ...) the other a morbid yearning for an antiseptic risk-free future. The two are unified only by the tendency, which is not a distinctively contemporary tendency, for people to point the finger always at other people and never at themselves.

This contrast and interplay between our forward-looking interest in as yet unmaterialised risks (control and regulation) and our backward-looking interest in materialised risks (attribution and remedy) is the central theme of Jenny Steele's book. Possibly she does not find it all as morbid as I do. Possibly she is more

sympathetic to those who want less risk, materialised and unmaterialised, in their lives. But be that as it may she repeatedly brings out the connections and the tensions between the two main ways of concerning oneself with risk. She finds that recent legal theorists in the Anglophone tradition have by and large emphasised the second aspect of the subject. They have been interested especially in which realised risks are 'mine', in the sense that I should bear the *ex post* cost of their materialisation, either by paying compensation to others or by not being compensated myself. The writers in this vein, who are discussed very thoughtfully and perceptively in Part II of the book, include Honore, Ripstein and Dworkin. Steele relates their ideas in fascinating ways to some current problems in legal and social policy. At the same time she compares and contrasts this whole body of work with a similarly extensive body of recent sociological and social-theoretical work on risk that is the subject of Part I.

Here concerns about attribution and remedy play second fiddle, by and large, to concerns about *ex ante* control and regulation. Attribution and remedy are themselves conceived, by and large, as elements of possible schemes. Here risk is regarded, predominantly, as a collective challenge. At any rate that is a recurrent theme that Steele brings out, contrasting it with the relatively 'individualistic' concerns of the legal theorists in Part II, and the way in which similar 'individualistic' concerns have lately been insinuating themselves into social policy, especially social insurance.

Steele hesitates, and I think rightly, to correlate the forward-looking concerns too closely with the collectivist, and the backward-looking too closely with the individualist. In fact a major objective of the book, and a major triumph, is to reveal how problematic this correlation is, and how much interplay there must be between the superficially incompatible preoccupations of the various writers under scrutiny. For this, as well as its fascinating tour of theoretical issues that currently arise

in various important areas of legal and social policy, I am delighted to see Jenny Steele's book in the *Legal Theory Today* series. (7 January 2004)