JOHN GARDNER

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I. Life and career

John Gardner was born on 23 March 1965 in Glasgow, Scotland.[2] His father, William Russell Williamson Gardner, was a Senior Lecturer in the German Department of Glasgow University and Chairman of the Goethe Institute in Glasgow. His home was a social and intellectual gathering place for German writers and thinkers. His mother, Sylvia, a secondary school teacher and also a Germanist, and his maternal grandfather, a graduate of Oxford, engaged John at an early age in philosophical conversations. John graduated from Glasgow Academy in 1982, and in 1983 was admitted to New College, Oxford, to study Jurisprudence (law).

At New College, one of the law fellows, Nicola Lacey FBA, became John Gardner's most influential tutor. She steered him towards legal philosophy and encouraged him to study moral philosophy with Jonathan Glover. After graduating with a First Class BA in Jurisprudence, in 1986–7 John studied for the Bachelor of Civil Law, the

[1] J. Gardner, *From Personal Life to Private Law* (Oxford, 2018).

[2] This section draws extensively on Annalise Acorn, 'John Gardner 1965–2019', https://www.law.ox.ac.uk/content/john-gardner-1965-2019, which also includes more detail about his life and family.

challenging postgraduate degree in law at Oxford. He thrived in the environment of several weekly seminars on different aspects of legal philosophy, where he could dazzle fellow students and impress his teachers by his capacity to criticise and revise standard conceptual assumptions and frameworks of analysis. During that year, there were two remarkable achievements: he was elected to a Prize Fellowship (now an Examination Fellowship) at All Souls College, Oxford, and he was awarded the prestigious Vinerian Scholarship for the best results in the BCL examinations.

Like most Prize Fellows at All Souls College, John Gardner found it both stimulating and daunting to work as an equal with many brilliant senior colleagues including Gerry Cohen, Tony Honoré, Derek Parfit and Amartya Sen. In conversations with these Fellows and other scholars in the university, he honed his analytical talents on diverse intellectual puzzles. Perhaps his most influential interlocutor in All Souls College was Parfit, who liked to challenge any philosophical distinction with microscopic analysis. In the broader faculty of law, on the basis of the major contributions of H. L. A. Hart, Ronald Dworkin, John Finnis, Joseph Raz and other colleagues in the faculty and their many students, Oxford had become world-leading in the field of legal philosophy. This intellectual milieu provided a fertile environment for Gardner to develop and try out his own ideas through teaching. Under these influences, while he was a Fellow of All Souls College, he developed as a philosopher whilst at the same time, though rather more slowly than he had hoped, completing a DPhil in 1994 under the supervision of Joseph Raz. He also began to teach in a variety of fields. At that time he began a fruitful thirty-year partnership of teaching seminars with Tony Honoré on causation, theories of tort law and legal theory more generally.

On the completion of his Prize Fellowship in 1991, Gardner was appointed to a university lectureship and a tutorial fellowship at Brasenose College, Oxford. In 1996, he was appointed a Reader in Legal Philosophy at King's College, London, where he had particularly fruitful collaborations with his colleague Timothy Macklem.

At the remarkably youthful age of 35, in 2000 he was elected to the chair in Jurisprudence at University College, Oxford, in succession to Ronald Dworkin. In the sixteen years he held the chair, he was a vital leader in the field and an inspiration to colleagues and students alike. When he organised a faculty seminar series, even if it was on a topic that was not on the current syllabus, he would attract not only a substantial number of students, but often an almost equal number of colleagues to hear his sharp analytical responses and his ability to frame issues in unexpected ways. He was gifted at seeing the potential in his students' and others' thoughts, excavating what was of most value and pointing the way to more careful and coherent development of their ideas. He willingly took on substantial administrative burdens, whilst at the same time being extraordinarily conscientious in his care of postgraduate students. In his rooms in Logic

Lane, Gardner carried on the tradition established by Hart and Dworkin of holding weekly philosophical discussions with members of the university and others. He also created, organised and secured funding for the H. L. A. Hart Fellowship at University College for visiting scholars in law and philosophy. During this period he also enjoyed and benefited from visiting appointments abroad, especially at Yale.

In 2016, Gardner was elected to a Senior Research Fellowship at All Souls College. He hoped that a position with few administrative responsibilities and a lighter teaching load would enable him to complete several intellectual projects. Although he was able to bring some of his projects to fruition, mostly in tort law, ambitious plans in the wider theory of private law and discrimination law were cut short by his development of oesophageal cancer. Although initial medical interventions seemed to have been successful, the disease returned and he died in 2019 within a few months of receiving a terminal diagnosis aged 54.

John Gardner was lovingly committed to his second wife, Jenny Kotilaine, a barrister, and devoted to their daughter Audra and his two stepchildren, Henrik and Annika. He drew extensively on his memories of a happy family life in his philosophical discussions. He also believed in enjoying many experiences in life, which included for him playing bass guitar in a rock group and developing his culinary skills and posting innovative recipes on his always interesting and popular personal website.[3] The website contains hundreds of memorials from John's friends, colleagues, former students and lots of others who barely knew him but admired him greatly as a scholar and a person.

II. Criminal law

Most of Gardner's published work on criminal law appeared between 1990 and 2007, when he published a collection of sixteen of his papers on criminal law, along with a substantial 'Reply to Critics'[4]; his interest in criminal law was sparked and sustained by his intellectual friendships with his fellow graduate students Jeremy Horder and Stephen Shute (with whom he co-authored a much-discussed paper on what makes rape so serious a wrong).[5] Although his 'philosophical positions', he insisted, were

[3] https://johngardnerathome.info/.

[4] J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, 2007). He later published a further reply to critics: 'In defence of *Offences and Defences*' (2012) 4 *Jerusalem Review of Legal Studies* 110.

[5] J. Gardner and S. Shute, 'The wrongness of rape', in Gardner, *Offences and Defences*, p. 1 (originally in J. Horder (ed.), *Oxford Essays in Jurisprudence* (4th Series; Oxford, 2000), p. 193); for later clarification and defence, see J. Gardner, 'The opposite of rape' (2018) 38 *Oxford Journal of Legal Studies* 48.

'not driven by any comprehensive vision',[6] a vision of criminal law's essential character emerges from his work; and although no one could accuse him of simplifying (let alone over-simplifying) the issues or the institutions with which he dealt, at the core of that conception of criminal law lies a deceptively simple thought—that criminal law

> is primarily a vehicle for the public identification of wrongdoing … and for responsible agents, whose wrongs have been thus identified, to answer for their wrongs by offering justifications and excuses for having committed them.[7]

By unpacking this thought, we can identify the central elements of Gardner's quite distinctive conception of criminal law.

The first point to note is that this is not a justificatory account, according to which criminal law's purpose, what makes it worth maintaining such an institution, is the public identification of wrongdoings and the calling to account of wrongdoers. To say that this is criminal law's peculiar activity is certainly to espouse some version of 'legal moralism', but Gardner is not the kind of legal moralist who thinks that the justifying purpose of criminal law is to call wrongdoers to account (or to punish them).[8] That is what criminal law does; that is what gives it its distinctive character as a legal institution: but whether it is worth maintaining such an institution, what valuable ends it can serve, and what its scope and limits should be, are further questions that this account does not purport to answer. When we turn to those further questions we must, Gardner insists, recognise what a harmful institution criminal law is. It

> wreaks such havoc in people's lives, and its punitive side is such an extraordinary abomination, that it patently needs all the justificatory help it can get. If we believe it should remain a fixture in our legal and political system, we cannot afford to dispense with or disdain any of the various things … which can be said in its favour.[9]

The things that 'can be said in its favour' are, Gardner also argues, primarily instrumental:[10] what can justify maintaining such a havoc-wreaking practice is that it can help to secure various goods or to avert various evils, including such things as the prevention of wrongdoing (both the kinds of wrongdoing that are themselves

[6] J. Gardner, 'As inconclusive as ever' (2019) 19 *Jerusalem Review of Legal Studies* 204, 223. The key word here is 'driven': Gardner would not resist a 'comprehensive vision' if that was where the arguments led him.

[7] J. Gardner, 'In defence of defences', in *Offences and Defences*, p. 80 (originally in P. Asp *et al.* (eds.), *Flores Juris et Legum: Festskrift till Nils Jareborg* (Uppsala, 2002), p. 251).

[8] Contrast e.g. M. S. Moore, *Placing Blame: a Theory of Criminal Law* (Oxford, 1997).

[9] J. Gardner, 'Crime: in proportion and in perspective', in *Offences and Defences*, pp. 214–15 (originally in A. J. Ashworth and M. Wasik (eds.), *Fundamentals of Sentencing Theory* (Oxford, 1998), p. 31).

[10] See J. Gardner and J. Edwards, 'Criminal law', in H. LaFolette (ed.), *International Encyclopedia of Ethics* (Oxford, 2013; https://doi.org/10.1002/9781444367072.wbiee640) on 'the instrumental principle'.

criminalised, and further wrongdoings, such as private acts of revenge, that may flow from them) and the prevention of harm. Harm prevention is also one of the 'constraints' that limit the scope of the criminal law—that limit the range of wrongdoings that it should seek publicly to identify or to call agents to answer for committing. Gardner does not espouse what is perhaps the more familiar version of the Harm Principle, according to which conduct is a candidate for criminalisation only if it is itself harmful: as he and Shute applied the principle in their explanation of why even 'pure' cases of rape that might cause no harm should be criminalised, criminalisation itself can be justified only if it serves to prevent harm.[11] The rationale for this constraint is that criminalisation is itself such a harmful and havoc-wreaking enterprise that it can be justifiably invoked only if it can be expected to prevent more harm than it causes.

The second point to note is that this account of criminal law puts responsible agents and their agency at the very centre of the picture: indeed, although Gardner officially espouses, as we have just seen, the instrumental principle that criminal law must be justified by its beneficial effects, he also shows the intrinsic, non-instrumental value of a practice that engages us as responsible agents. A responsible agent, for Gardner, is one who has 'an ability to offer justifications and excuses … the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being'.[12] The 'intelligible account' that we can, as responsible agents, give of ourselves is an account of the reasons that guided us—reasons that guided our actions, but also our beliefs and emotions; it is in terms of such reasons that we can justify or excuse our actions. Furthermore, rational agents will want to be able thus to answer for themselves—'as rational beings we cannot but want our lives to have made rational sense, to add up to a story not only of whats but of whys. We cannot but want there to have been adequate reasons for why we did (or thought or felt) what we did (or thought or felt)'.[13]

Gardner presents this as part of an 'Aristotelian story' of human beings and their flourishing, and his account is indeed in many ways Aristotelian, notably in the role it gives the emotions as important elements of a rational life. But here as elsewhere his account also has a Kantian flavour, since it emphasises the importance of our character as rational beings, and of treating each other as such; a Kantian tone is also evident

[11] Gardner and Shute, 'The wrongness of rape', pp. 29–30. See also Gardner and Edwards, 'Criminal law', pp. 4–5: they also (pp. 5–7) identify other limits on the scope of the criminal law, including rights to privacy and liberty, and 'rule of law' demands for certainty, clarity and prospectivity.

[12] J. Gardner, 'The mark of responsibility', in Gardner, *Offences and Defences*, p. 182 (originally in (2003) 23 *Oxford Journal of Legal Studies* 157): this is what he calls 'basic responsibility'.

[13] Gardner, 'The mark of responsibility', p. 178.

in Gardner and Shute's account of the core wrongness of rape as consisting in the rapist's 'sheer use' of another person,[14] which has clear and explicit echoes of the Kantian prohibition on treating others merely as means.

This is not to present Gardner as a Kantian, since in many ways his account of criminal law, and of human action and responsibility more generally, is profoundly and explicitly anti-Kantian: he was happy to count himself a 'rationalist', who 'stood up for the primacy of reasonableness in life and law',[15] but his rationalism was not Kantian. In particular, as noted, he gave the emotions a central and un-Kantian role in our rational life, since they fall within the realm of reason: they are sources of reasons for action, they are responsive to reason (for we can have reasons to feel as well as to think and to act), and they can be appraised as reasonable or as unreasonable.[16] He also developed a broader critique of Kantian views on 'moral luck' and the place of morality in our lives. A central element of that critique is captured in Gardner's denial of the Kantian claim that 'morally perfect people cannot be morally unlucky in their lives', and his counter-assertion of the Aristotelian claim that 'no amount of moral virtue … ensures that one leads a morally perfect life', because '[o]wing to bad luck, even a morally perfect person may lead a morally imperfect life'.[17] One reason for this is that we can, through no fault of our own, find ourselves in situations in which we cannot but violate a duty, either because it is impossible to fulfil the duty (as when I cannot save a person whom I have a duty to save), or because we face a conflict of moral demands and find that we must (morally) violate one of our duties (as when a parent must break his promise to take his children to the beach, in order to help one of his students who is in urgent and desperate need). In such cases we do wrong, and although we should not be blamed or condemned for it, it nonetheless leaves a moral 'blemish' on our lives; our lives are thus 'damaged'.[18]

Another anti-Kantian dimension of Gardner's view of responsibility is his insistence (partly developing Tony Honoré's work on 'outcome responsibility') that we are responsible not just (as Kant would have it) for our choices or the exercise of our wills (which is supposedly within our control), but for the actual effects of our actions on the world, even when those effects are not, or are not wholly, within our control.[19] This is true not only when we act culpably, intending to bring about some

[14] See Gardner and Shute, 'The wrongness of rape', pp. 14–16.
[15] Gardner, 'In defence of *Offences and Defences*', 128.
[16] See also J. Gardner, 'The logic of excuses and the rationality of emotions' (2009) 43 *Journal of Value Inquiry* 315.
[17] J. Gardner, 'Wrongs and faults', in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford, 2005), p. 52.
[18] See e.g. Gardner 'Wrongs and faults', pp. 54, 57; 'In defence of defences', pp. 80–1.
[19] See T. Honoré, *Responsibility and Fault* (Oxford, 1999).

harm or taking a reckless or negligent risk of doing so, and are then held responsible for the harm if it actually ensues, but even when we act in wholly innocent inadvertence: for, Gardner argues, 'the ordinary or basic kind of wrongdoing is "strict" wrongdoing, e.g. hurting people, upsetting people';[20] if I cause injury to another person, I do wrong (a wrong that leaves a blemish on my life), even if I had no reason to believe that I might cause injury.

To say that we are responsible for the actual effects of our actions, and for the wrongs that we commit even if we commit them justifiably or through non-culpable inadvertence, is to talk of our 'basic' responsibility: these are things that we can be called upon to answer for—and that, as rational beings, we must be ready to answer for. If our answer, the account we give of why we acted as we did, is justificatory or excusatory, we can avoid certain kinds of 'consequential responsibility': in particular, we can avoid being blamed, and should be able to avoid a criminal conviction—although we incur other kinds of consequential responsibility, for instance duties of apology and reparation.[21]

The discussion in the previous few paragraphs did not distinguish sharply between moral and legal responsibility—between our responsibility as moral agents in our extra-legal lives and the responsibility that the law, in particular criminal law, ascribes or should ascribe to us. This reflects Gardner's own approach: not just because he wrote about our moral lives as well as our lives under the law, but because he grounded criminal law in morality, both substantively and conceptually. Criminal law should criminalise, that is, identify as criminal wrongs only conduct that is indeed morally wrongful;[22] and it draws its concepts from our extra-legal moral discourse. That is not to deny that, given the institutional character of criminal law, and the constraints that bear on it, it will inevitably diverge to significant degrees from extra-legal moral discourse: but

> specialised legal concepts always depend for their existence on unspecialised everyday concepts to which the law resorts, and in relation to which … the specialised legal concepts are given their shape. … [T]he criminal law helps itself to the ordinary

[20] J. Gardner, 'Fletcher on offences and defences', in *Offences and Defences*, pp. 141, 150; see Gardner 'Obligations and outcomes in the law of torts', in P. Cane and J. Gardner (eds.), *Relating to Responsibility* (Oxford, 2001), p. 111; 'The wrongdoing that gets results' (2004) 18 *Philosophical Perspectives* 53.

[21] See also J. Gardner, 'The negligence standard: political not metaphysical' (2017) 80 *Modern Law Review* 1, on 'assignable' responsibilities.

[22] Wrongful either in virtue of its pre-legal character, as with so-called '*mala in se*', or in virtue of its prohibition by the law, as with '*mala prohibita*': see Gardner, 'Reply to critics', p. 239. This, as noted above, makes Gardner a kind of 'legal moralist'—but not the kind who thinks that the justifying purpose of criminal law is to denounce or punish moral wrongdoers (see at nn 8–9 above).

> concepts of justification and excuse, among many others, in constructing its more specialised concepts.[23]

Thus, although we cannot assume that the law's concepts and doctrines should precisely match those found in extra-legal moral thought, the latter is the essential starting point for analytic or normative discussion of the former.

This brings us finally to a further set of issues in criminal law theory to which Gardner made a distinctive and influential contribution: those concerning justifications and excuses. Theorists used to tell a fairly simple story about justifications and excuses. One way to ward off a charge of culpable, responsible wrongdoing is, on the simple view, to admit responsibility, but to deny that the action for which I admit responsibility was wrong—in other words, to justify my action. The other way to ward off the charge is to admit that the action was wrong or untoward, but to deny responsibility for it—in other words, to excuse it.[24] Gardner comprehensively rejected this view. Both justifications and excuses, he argued, serve to ward off the kind of *consequential* responsibility that consists in conviction and punishment (in criminal law) or in blame (in moral life); but both admit *basic* responsibility for that which we seek to justify or excuse. And neither justifications nor excuses need deny wrongdoing: for what I justify (what requires a justification) might be a wrong.[25]

At least two qualifications are needed. First, to argue that justifications might not negate wrongdoing is to reject the 'closure view', according to which to justify an action is precisely to show that it was not, in its particular context, wrong. As Gardner later made clear, he robustly rejected such a view in relation to justifications outside the criminal law—both in our extra-legal life and in private law; but he thought that the position in criminal law was less clear cut, since some criminal law justifications can be portrayed as wrong-negating.[26] Second, he certainly did not deny that some non-justificatory defences in criminal law negated basic responsibility: the insanity defence is the obvious example. Nor did he argue, outright, that it was *wrong* to class such defences as 'excuses':[27] his concern was, rather, to distinguish those kinds of defence from defences that admit basic responsibility but constitute excuses, rather than justifications.

[23] Gardner, 'In defence of *Offences and Defences*', 112.

[24] See, famously, J. L. Austin, 'A plea for excuses', in his *Philosophical Papers* (Oxford, 1961), p. 124; cited by Gardner in 'In defence of defences', pp. 82–3.

[25] See especially Gardner 'The mark of responsibility'; 'Justifications and reasons', in *Offences and Defences*, 91 (originally in A. P. Simester and A. T. H. Smith (eds.), *Harm and Culpability* (Oxford, 1996), p. 103); 'The gist of excuses', in *Offences and Defences*, p. 121 (originally in (1998) 1 *Buffalo Criminal Law Review* 575).

[26] See Gardner, 'In defence of *Offences and Defences*', 118–19.

[27] See Gardner, 'In defence of *Offences and Defences*', 116.

Gardner's account of justifications and excuses flows from his conception of human beings as rational agents who 'cannot but want there to have been adequate reasons for why we did (or thought or felt) what we did (or thought or felt)':[28] for both justifications and excuses appeal to the reasons for which I acted (or thought or felt) as I did. To put his position very crudely, when I justify my action, I show that I had good enough reasons to act as I did: in the case of criminal law justifications, this involves showing that the law permitted me to attend, and to be guided by, reasons that would otherwise be excluded from practical consideration as operative reasons for action; but the key point in distinguishing justifications from excuses is that I appeal to the good reasons for which I acted.[29] When I excuse my action, by contrast, I do not claim that I acted for good enough reasons. I claim instead that although my action did fall short of what it ought to have been, it was motivated by emotions and beliefs that were themselves justified; and that though in being motivated by those emotions and beliefs I displayed 'human frailty', I nonetheless '*lived up* to the relevant normative expectations, by coping as well as we should expect anyone to cope with a difficult predicament'.[30] Someone who uses defensive force to protect another from attack is justified in what she does, because she acts for a reason (an 'undefeated' reason) for which the law permits her to act. Someone who, by contrast, commits perjury under duress might not be justified in doing so: but he may be excused if he acted out of a reasonable, justified fear of the threatened harm, and 'cop[ed] as well as we should expect anyone to cope' in such a situation.

This brings us back to Gardner's central conception of criminal law, as a rational enterprise that addresses us as responsible agents—'a vehicle for the public identification of wrongdoing … and for responsible agents, whose wrongs have been thus identified, to answer for their wrongs by offering justifications and excuses for having committed them'.[31] The criminal law's 'public identification of wrongdoing' is a public identification of reasons by which we should guide our actions. As responsible agents, we can then be called (and should be ready) 'to answer for [our] wrongs'—an answering that involves appealing to the reasons for which we acted, and to their relationship to the reasons, identified by the law, that should have guided us. We must hope that if we do commit criminal wrongs (our primary hope, of course, must be that we do not commit them), we will be able to offer a justification, or failing that an excuse, for

[28] 'The mark of responsibility', p. 178; see at n. 13 above.

[29] Gardner, influenced by Joseph Raz, developed a sophisticated and subtle account of the different structures and categories of reason that bear on our conduct: see J. Gardner and T. Macklem, 'Reasons', in J. Coleman and S. Shapiro (eds.), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, 2002), p. 440.

[30] Gardner, 'In defence of *Offences and Defences*', 116.

[31] Gardner, 'In defence of defences', p. 80.

doing so: in offering such justifications and excuses we exercise, and thus assert, the 'basic responsibility' that marks our human agency.

III. Discrimination law

John Gardner never completed an intended general theoretical account of laws against discrimination. Nevertheless, he made a profound contribution to a better understanding of possible justifications for those laws in articles published in the decade commencing in 1989.

Gardner's first major contribution was in the article 'Liberals and unlawful discrimination'.[32] At the heart of this essay is the question why private bodies such as employers and landlords should be required to refrain from exerting any discriminatory preferences with regard to sex and race when entering into contracts with others. Gardner maintained that, although governments can be required to treat all their citizens equally, in a liberal state respect for maximising the freedom of individuals should argue against the imposition of such a duty on private citizens to treat others equally. Such a duty placed on employers, landlords and other private actors should only be legitimate within a liberal political theory, argued Gardner, if it met the normal conditions for state regulation, namely, the 'harm principle' or the requirements of a distributive end-state principle. In brief, the harm principle limits the exercise of state power to prevent one person from harming another. The distributive principle justifies regulation on the ground that it helps to achieve a fairer end-state of distribution of benefits and burdens in society by, for example, progressive taxation and welfare benefits.

Gardner was not the first to notice that the distinction drawn in discrimination law between direct and indirect discrimination apparently corresponds to these two kinds of justification for intervention by the state.[33] Direct discrimination corresponds to the idea that the state should intervene to prevent harm, in this case the deliberate imposition of a disadvantage on the ground of sex or race. Indirect discrimination may be justified as making a contribution to the reduction of inequalities in the distribution of benefits between different groups such as men and women. But Gardner subjected these associations to forensic inspection and revealed their inadequacies. He asked, for instance, in what sense is it a 'harm' in the required sense in liberal theory for an employer merely to decline to offer a job to a woman? And why is it appropriate

[32] J. Gardner, 'Liberals and unlawful discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1.
[33] E.g. C. McCrudden, 'Changing notions of discrimination', in S. Guest and A. Milne (eds.), *Equality and Discrimination: Essays in Freedom and Justice* (ARSP Beiheft 21; Stuttgart, 1985).

to require through the law of indirect discrimination a private employer to redistribute benefits such as job opportunities and promotion for the sake of achieving a fairer or more just distribution of benefits in society overall? Gardner also pointed out the inherent tension between these two liberal justifications for discrimination law. The tension is brought out in many contexts, but none more clearly than in calls for positive action (or reverse discrimination). The tension consists in the point that when one ground for intervention may be satisfied, the other almost certainly will not. The case for positive action in favour of minorities may satisfy a principle of end-state distributive justice, but will almost certainly conflict with the harm principle that restricts intervention to proven cases of past inflictions of harm.

Gardner concluded this sceptical account of the adequacy of liberal theories of justification of discrimination law by making a radical innovation in the liberal theoretical perspective. He turned to the perfectionist model of liberalism that had recently been brilliantly articulated by Joseph Raz in *The Morality of Freedom.*[34] On this account of liberalism, state intervention can be justified on the different ground of securing autonomy for all its citizens. Raz stated that: 'The government has an obligation to create an environment providing individuals with an adequate range of options *and the opportunities to choose them*.'[35] Gardner used this formulation to combine in a coherent way both a version of the harm principle and a distributive principle. Failure to provide everyone with an adequate range of options and realistic opportunities to secure those opportunities amounts to a wider concept of harm that can justify state intervention: 'Securing (rather than merely permitting) access to opportunities is a governmental task; and an employer who fails to provide opportunities to a woman, because his criterion of selection disadvantages women, harms her in the sense required by the wide harm principle—he fails to enhance her opportunities in the way that respect for her autonomous agency requires.' On this theory, the government is under a duty to create a society where everyone can enjoy effective opportunities to enjoy an adequate range of options to enjoy a worthwhile life (of their own choosing). That duty justifies the imposition of laws against discrimination on employers because of their key role in the distribution of worthwhile opportunities in the form of jobs and careers.

In a later essay, 'On the grounds of her sex(uality)',[36] Gardner considered the justification for regarding certain grounds for discrimination such as sex and race as impermissible. He recognised that often these grounds for discrimination may be

[34] J. Raz, *The Morality of Freedom* (Oxford, 1986).

[35] Raz, *The Morality of Freedom*, p. 418; emphasis by Gardner, 'Liberals and unlawful discrimination', p. 19.

[36] J. Gardner, 'On the grounds of her sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 1.

forbidden because they are irrational, based on stereotypes and prejudice. But the law normally prohibits these grounds for discrimination even when there may be a rational basis for using them. Gardner considered the suggestion by Wintemute that the grounds for discrimination that are prohibited are either an immutable characteristic or a fundamental choice of the individual.[37] Whilst accepting that these labels fairly describe the prohibited grounds in discrimination law, Gardner made the important argument that in fact both justifications for the identification of prohibited grounds are based on the idea of autonomy. Discrimination on the basis of an immutable characteristic tends, at least if it is a frequent occurrence, to deny us a life in which we can enjoy the freedom to take up a succession of valuable opportunities. Similarly, Gardner argued that discrimination on the basis of fundamental choices such as religion or pregnancy also interferes too much with autonomy.

> There are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.[38]

The reliance on autonomy again permitted Gardner to suggest a more coherent basis for the selection of the prohibited grounds of discrimination. Characteristics do not need to be immutable for them to harm the experience of autonomy and making valuable choices. This justification instead opens up the possibility of extending the prohibited grounds for discrimination not only to sexual orientation and religion, but also more controversial grounds such as having a visible tattoo.

Gardner's essays on discrimination law also offered criticisms of other aspects of the law of discrimination. He subjected the idea that there is a private sphere that should be excluded from discrimination law to critical scrutiny, challenging for instance the persistence of the lawfulness of Gentleman Only clubs.[39] He also argued that the 'but for' test of discrimination adopted by the House of Lords in *James v Eastleigh* with respect to direct discrimination had been misunderstood by its proponents.[40] In the *James* case, the House of Lords had upheld a claim for direct sex discrimination when a woman aged under 65 was able to enter a public swimming pool for free on the ground that she was in receipt of a state pension once aged 60,

[37] R. Wintemute, *Sexual Orientation and Human Rights* (Oxford, 1995).
[38] Gardner, 'On the grounds of her sex(uality)', p. 171.
[39] J. Gardner, 'Private activities and personal autonomy: at the margin of anti-discrimination law', in B. Hepple and E. Szyszczak (eds.), *Discrimination: the Limits of the Law* (London, 1992), p. 148.
[40] *James v Eastleigh Borough Council* [1990] 2 All ER 607.

whereas her husband had to pay because he had not yet reached the age of 65 when men qualified for a pension. Using technical philosophical analysis, Gardner insisted that the 'but for' test of direct discrimination necessarily considered not only the outcome of a decision (a difference in treatment of the sexes), but also the reason of the alleged discriminator for the decision.[41] In other words, the test necessarily included the issue of why (i.e. the actual reason) the alleged discriminator had made the decision. In the *James* case, presumably the Council's reason was to provide a benefit to pensioners, not to discriminate on grounds of sex, so, contrary to the decision of the House of Lords, the but for test should have prevented a claim for direct discrimination (though perhaps not one of indirect discrimination).

But Gardner's major contribution to the theory of discrimination law was to reject most of the mainstream theories that sought to justify the law on the basis of various conceptions of equality. American constitutional law had framed the question of the legitimacy of discrimination law in terms of the principle of equal protection of the law. In turn, that legal framework had and continues to have a strong influence on philosophical discussion of the foundations of discrimination law. By reorienting the theory of discrimination law towards freedom or autonomy, rather than equality, Gardner's account was both original and extremely fertile. It influenced many subsequent investigations of the foundations of discrimination law.[42] In particular, it was a major influence on the work of Gardner's doctoral student, Tarunabh Khaitan, in his prize-winning book *A Theory of Discrimination Law*,[43] where many of the more detailed implications of grounding discrimination law in autonomy are worked out and critically assessed. Khaitan makes the useful corrective point, however, that although the ultimate point (general justifying aim) of discrimination law should be regarded as promoting autonomy, the law has the foreseeable and arguably desirable side-effect of increasing equality in society.

IV. Law in general

In his book *Law as a Leap of Faith*,[44] John Gardner assembled with some modifications his principal articles that discussed the nature of law in general. In the Preface to the book, he is quick to deny that he is offering a general theory of law himself. His

[41] Gardner, 'On the grounds of her sex(uality)', pp. 181–2.
[42] E.g. H. Collins, 'Discrimination, equality and social inclusion' (2003) 66 *Modern Law Review* 16; S. Moreau, 'In defense of a liberty-based account of discrimination', in D. Hellman and S. Moreau (eds.), *Philosophical Foundation of Discrimination Law* (Oxford, 2013), p. 71.
[43] T. Khaitan, *A Theory of Discrimination Law* (Oxford, 2015).
[44] J. Gardner, *Law as a Leap of Faith* (Oxford, 2012).

purpose is rather to clarify and if possible correct mistakes made by others and to try to introduce some useful and interesting concepts of his own within a limited compass. '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.'[45] He does not seek to avoid proposing a general theory of the nature of law because he rejects the idea of an essence or inherent nature of things like law. Nor does he agree with a view that he attributes to Dworkin that a general theory of law is philosophically uninteresting and of no importance.[46] His position is rather that law is such a complex phenomenon that it resists the kinds of simple accounts of the nature of law that tend to form the meat of textbooks on jurisprudence. His contribution is, he claimed, to sort out some of the confusions and over-simplifications from which theories of the nature of law tend to suffer. Having recognised that narrow focus of the book, it should also be recognised that much of it is devoted to an examination of the work of legal positivists such as H. L. A. Hart and Hans Kelsen with a view to producing what he described as a 'makeover' of legal positivism.[47] It is possible to view the general direction taken in the book as a restatement of the perspective of legal positivism, which makes many crucial concessions to critics of legal positivism, though it remains incomplete in its account of the nature of law.

Gardner argued that all law is made by people, though not necessarily intentionally or with an awareness of what they are doing.[48] For instance, customary law is made by the actions of lots of individual actors converging around an approved rule. In Hart's theory of a legal system,[49] the officials (or senior judges) accept as a matter of practice a rule of recognition and a rule of change that determine which rules count as laws of that particular legal system. All these laws, including legislation and customary law, are 'posited' in the sense that they are made by people. In addition, in harmony with theories of legal positivism, Gardner accepted that whether a given norm is legally valid turns on whether it forms part of the system of norms that are identified by their sources, not their merits. In other words, the identification of the applicable legal rules depends on how they were made, such as by legislation or a decision of a judge that has precedential value under the rules of recognition of the legal system. Importantly, the validity of a legal rule does not depend on whether the standard it adopts is morally right or generally regarded as such. These are the classic positions of legal

[45] J Gardner, 'Fifteen themes from law as a leap of faith' (2015) 6(3) *Jurisprudence* 601, 606.
[46] 'Law in general', chapter 11 in Gardner, *Law as a Leap of Faith*.
[47] Gardner, *Law as a Leap of Faith*, vi.
[48] Chapter 3, 'Some types of law', in Gardner, *Law as a Leap of Faith*.
[49] H. L. A. Hart, *The Concept of Law* (Oxford, 1961).

positivism often identified with the work of H. L. A. Hart, which in turn were developed from the classic formulations of John Austin.[50]

Having identified legal positivism with this narrow set of propositions, often described as the 'sources thesis', Gardner was able to reject many criticisms of legal positivism on the ground that they miss their mark. For instance, the idea that there are moral qualities in the nature of law, famously described by Lon Fuller as the 'inner morality of law' and by others as 'the rule of law' or the justice of general rules in treating like cases alike apparently poses no objection to Gardner's account of legal positivism. As long as conformity to those inner moral standards is not a condition of validity for a law, Gardner argued that legal positivists can accept the existence of these moral qualities of law.[51] For instance, if the moral qualities of law include that it should be clear and only prospective in its imposition of duties, those virtues of law can be acknowledged as its own special moral qualities, without sacrificing the sources thesis. An obscure and retrospective law is valid if enacted in accordance with the rule of recognition, even though it fails to meet the special moral qualities that laws normally possess. While this interpretation is a possible account of legal positivism, there remains the troublesome issue, which Gardner acknowledged,[52] that the stress on the fact that law can be discovered from its sources, with the emphasis on the mechanical nature of this task, seems to indicate the presence of a view among legal positivists that the virtue of the sources thesis is that it makes the law discoverable and its content transparent, values which do seem to tie legal positivism indissolubly to the advancement of a particular view of the moral importance of the rule of law. On this point, however, Gardner insisted that legal positivists need not endorse the idea of the value of tying the nature of law to the ideal of the rule of law, for the theory of legal positivism is merely about the validity of law under the sources thesis and the rejection of any requirement that a law should be morally proper or just. In so far as leading legal positivists such as H. L. A. Hart muddied the waters by linking the sources thesis to the ideal of the rule of law, Gardner dismissed those contributions as 'bungled and preliminary attempts to formulate the sources thesis'.[53]

Having narrowed the theory of legal positivism down to the sources thesis, it then became possible for Gardner to reject other positions that are regularly attributed to legal positivists. It is often said that legal positivists believe that there is no necessary connection between law and morality, but in Gardner's view that is a false attribution.[54] A positivist can believe that law is very much like morality and in general

[50] J. Austin, *The Province of Jurisprudence Determined*, ed. Rumble (Cambridge, 1995).
[51] Gardner, *Law as a Leap of Faith*, p. 33.
[52] Gardner, *Law as a Leap of Faith*, p. 26.
[53] Gardner, *Law as a Leap of Faith*, p. 49.
[54] Gardner, *Law as a Leap of Faith*, chapters 2 and 9.

mirrors its requirements, whilst at the same time insisting that conformity to morality is not a requirement of legal validity (unless perhaps the rule of recognition explicitly requires for the purpose of legal validity the conformity of a rule with a particular moral standard as may be the case in some constitutions). It is also said sometimes that legal positivists are committed to a formalist style of interpretation of legislation in which one should simply apply the rules, but a particular style of interpretation does not appear to be entailed by the sources thesis. It would be consistent with legal positivism for the valid laws to be interpreted according to their literal meaning, their purpose, or, if available, the intention of the original maker of the law. More generally, as confined by Gardner to the sources thesis, legal positivism does not appear to require particular stances on any other much debated issues in jurisprudence, or at least, as Gardner observed, these issues can be treated relatively independently.

> [O]nce one has tackled the question of whether a certain law is valid there remain many relatively independent questions to address concerning its meaning, its fidelity to law's purposes, its role in sound legal reasoning, its legal effects, and its social functions, to name but a few. To study the nature of law one needs to turn one's mind to the philosophical aspects of these further questions too. To these further questions there is no distinctively 'legal positivist' answer, because legal positivism is a thesis only about the conditions of legal validity.[55]

Armed with this defence of the theory of legal positivism, John Gardner turned his attention to various claims about the nature of the central case of law. Here he maintained the position that indeed there are conceptually necessary connections between law and morality. One connection, which draws on the work of Raz and Alexy,[56] is that law by its nature holds itself out as morally binding, even though that may be a mistake or a pretence.[57] Law always claims moral authority and expresses itself in the language of rights, obligations and duties. It is possible, of course, that the law has endorsed a mistaken view of what morality should require, but it claims nevertheless the moral authority to impose its own interpretation of what obligation applies to the circumstances. In this sense, legal positivists can maintain their familiar contention that there can be immoral laws. A second conceptual link presented by Gardner is that legal reasoning is moral reasoning with one or more legal premises.[58] For instance, if there is a conflict between two legal norms, their reconciliation must be achieved by additional legal reasoning that necessarily involves moral norms. Similarly, if there is a gap in the legal rules with respect to a particular situation, legal

[55] Gardner, *Law as a Leap of Faith*, p. 49.
[56] R. Alexy, *The Argument from Injustice: a Reply to Legal Positivism*, trans. B. Paulson and S. Paulson (Oxford, 2002); J. Raz, 'Legal validity', in J. Raz, *The Authority of Law* (Oxford, 1979), pp. 154–7.
[57] Chapter 5, 'How law claims, what law claims', in Gardner, *Law as a Leap of Faith*.
[58] Chapter 7, 'The legality of law', in Gardner, *Law as a Leap of Faith.*

reasoning must fill that gap by extending the local rules through additional reasons that are moral reasons. Gardner placed no limits on the kinds of moral reasons that might assist in this kind of elaboration of law.[59] He recognised, however, that as well as ordinary moral reasons, judges must take into account the special moral obligations of their position as officials of the legal system and the distinctive moral qualities of law that Fuller described as the inner morality of law.

V. Tort law and the nature of private law

In his final years, most of John Gardner's published work concerned theories of the law of tort and more general reflections on the nature of private law. Most of these essays were published in a posthumously published collection of journal articles with some additions in *Torts and Other Wrongs*,[60] which was supplemented by further reflections on the morality of the law of tort in the earlier monograph *From Personal Life to Private Law*.[61] The law of tort (or delict) is that part of the law that provides individuals with rights of action to obtain redress for wrongs committed against them that cause personal injury, damage to property and other similar harms. The law of tort is part of what lawyers classify as private law, which includes the law of contract and the law of property. Private law invariably entitles one person (the plaintiff) to bring a claim against another, usually a claim for damages or financial compensation, for a loss that the other person wrongfully caused to the plaintiff—for instance, that wrong might consist of an accident causing personal injury, financial loss by breach of contract or the misappropriation of another's property.

Since the 1970s, a fierce debate had evolved about the nature of the law of tort. The traditional 'moralist' view was that tort law merely provided isolated measures of corrective justice between two individuals. Where a wrong had been identified, on the complaint of the plaintiff, the law required the defendant to pay the plaintiff compensation.[62] In contrast, various kinds of instrumentalist or consequentialist accounts of the law of tort insisted that the purpose of the law should be understood in terms of social and economic goals. One goal might be, for instance, achieving compensation for accidents rather like a system of insurance. Another goal might be efficiency in the

[59] J. Gardner, *Law as a Leap of Faith*, p. 192.
[60] J. Gardner, *Torts and Other Wrongs* (Oxford, 2019).
[61] Gardner, *From Personal Life to Private Law*.
[62] E.g. J. Coleman, 'The morality of strict tort liability' (1976) 18 *William and Mary Law Review* 259; J. Coleman, 'Corrective justice and wrongful gain' (1982) 11 *Journal of Legal Studies* 421 (1982), 421; S. Perry, 'The moral foundations of tort law' (1982) 77 *Iowa Law Review* 449; E. Weinrib, 'Toward a moral theory of negligence law' (1983) 2 *Law and Philosophy* 37.

sense of maximising the wealth of society by imposing liability on those who could, at the least cost, avoid the harm caused by accidents.[63] These instrumentalist accounts of tort law were often not so much an account of legal practice, but rather formed the basis of a critique that suggested that tort law was not fit for its social and economic purpose and needed reform, even radical reform including abolition. John Gardner entered the debate by making the unpopular claim that both sides had valid insights, which could even be combined. He then added two important amendments to the traditional moral account of the law of tort.

With respect to the debate between the 'moralists' and the instrumentalists, Gardner argued that all theories should be instrumentalist to some extent. For example, he claimed that everyone should accept that tort law, or private law, should be efficient.[64] Whatever tort law/private law's goal may be, it should achieve that goal as effectively as possible. So he thought that, up to a point, there is no real contest between instrumentalist theories and others and that all theories are instrumentalist.[65] That is not to say he that agreed with the economists on what tort law should be efficient *at*—certainly not wealth-maximisation. But its goal might be, quite possibly, the doing of corrective justice, and, in so far as the doing of corrective justice efficiently triggers issues of distributive justice, the doing of distributive justice as well.[66] 'We should think about which institutional set-up is most efficacious in righting the wrong, least wasteful, and most sensitive to the circumstances of the case.'[67] At the same time, Gardner accepted the emphasis of the moralists on the reasons the law itself gives for judgments with regard to torts as a necessary part of an explanation and justification of tort law. This emphasis is linked to his deeply held view that legal reasoning in private law is a translation of ordinary moral reasoning in a person's life.

One important contribution to the moralist account suggested by Gardner was his justification of reparative duties. Many traditional accounts of the law of tort hold that a tort is a wrong that breached the primary rules that set standards of conduct such as a duty of care, for which a court would grant a corrective justice remedy in the form of damages under a body of secondary rules that were independent of the primary duties of care. Gardner rejected this view in favour of what he described as 'the continuity thesis'.[68] This thesis states that the reasons which grounded a primary

[63] G. Calibresi, *The Costs of Accidents: a Legal and Economic Analysis* (New Haven, CT, 1970); R. Posner, 'A theory of negligence' (1972) 1 *Journal of Legal Studies* 1 29.

[64] J. Gardner, 'What is tort law for? Part 1. The place of corrective justice' (2011) 30 *Law and Philosophy* 30 1; and reprinted in Gardner, *Torts and Other Wrongs*, chapter 2.

[65] J. Gardner, 'Tort law and its theory', in J. Tasioulas (ed.), *The Cambridge Companion to the Philosophy of Law* (Cambridge, 2018).

[66] Gardner, *Torts and Other Wrongs*, chapter 3.

[67] Gardner, 'Tort law and its theory', p. 21.

[68] Gardner, 'What is tort law for? Part 1'.

obligation to *x* (or not-to-*x*) continue to demand conformity after the breach of the primary obligation. While the primary obligation may be breached and come to an end (e.g. my primary obligation not to damage your car comes to an end once I've destroyed your car: the car no longer exists, so there can be no obligation not to damage it), the reasons which justified that primary obligation—say, your well-being—continue to demand conformity, and *these reasons* are what justify secondary obligations to compensate. By compensating you, I imperfectly conform to the well-being reason which justified my earlier (now disappeared) primary obligation not to damage your car. I imperfectly comply with this reason by compensating you just in so far as your well-being is restored to the level which it would have been in had I complied with the primary obligation in the first place. In this, he started a disagreement with Ernest Weinrib, whose view is that compensatory duties are a continuation of the *primary* duty itself.[69] For Gardner, what continues is the underlying reason for the primary duty, not necessarily the primary duty itself. His view also contrasts with consequentialist views which locate the justification of secondary duties in the realm of incentives for future conformity with other primary duties. This misses, Gardner argued,[70] the sense in which the secondary duty is grounded immediately in the breach of the primary duty; we already have a reason to compensate when a primary duty is breached, without engaging in a consequentialist weighing-up of whether optimal deterrence would be achieved by now requiring a person to compensate. The obligation to compensate is tied in that way to, and grounded in, what happened in the past.

A second important contribution to the moralist accounts of the law of tort concerned his views on strict liability. Strikingly, John Gardner thought that strict liability was the morally 'primary' or 'basic' position, and that fault liability was something that was a legal add-on.[71] His idea was that in morality we are on the hook for outcomes we produce even without fault. But for various reasons to do with the rule of law, difficulties of allocating causal responsibility, and so on, the law might choose to depart from that basic moral position. Most people start with something like the idea that culpable wrongdoers ought to bear the costs of their wrongs, then do some intellectual gymnastics to bring in pockets of justifiable strict liability. On Gardner's view, the pressing question is how to justify so much *fault* liability when morality has us already on the hook for outcomes produced without fault. Why believe that in morality we are accountable for outcomes not traceable to fault? Part of the idea is that our reasons for action are basically strict in character. We do not merely have

[69] E. Weinrib, *The Idea of Private Law* (Cambridge, MA, 1995).
[70] Gardner, 'What is tort law for? Part 1'.
[71] J. Gardner, 'The negligence standard: political not metaphysical' (2017) 80 *Modern Law Review* 1; reprinted in Gardner, *Torts and Other Wrongs*, chapter 7.

reasons to *try*, Gardner pointed out, but reasons to *succeed* in not producing certain (harmful) outcomes. Indeed, we can only make sense of reasons to try if we have reasons to succeed. If we have reasons to succeed in not producing certain outcomes, then by the 'continuity thesis', we also have reasons to compensate when we do produce those outcomes, so far as compensation will serve as imperfect conformity to those reasons.

VI. From personal life to private law

In some important respects, John Gardner's monograph *From Personal Life to Private Law* brought together his ethical values, his views of what constitutes a good life, his aspirations as a legal scholar and his theories about the nature of law. In the introduction to the book, he explained that his ambition was to show how law, especially private law, is no more than a translation of ordinary personal relations between friends, family, neighbours and colleagues. '[W]hat private law would have us do is best understood by reflecting on what we should be doing quite apart from private law, which obviously entails reflection on the reasons why we should be doing it.'[72] To explore this proposition, he wanted to draw on his personal experiences such as family life and stories from literature to examine those reasons for what we should be doing, with the ultimate goal of shedding light on what tort law and private law more generally are or should be doing. He wanted to do this in a way that might be accessible to the general reader, using anecdotes, literary stories and parables, though in this aspiration he recognised he was only partly successful.

This close linkage between personal life and private law, in which the reasons and concerns are common to both, is linked to his earlier discussion of the nature of law in general, for he argues that private law uses law's moral authority to reach determinate and therefore useful answers about what we should do in circumstances where there is more than one defensible thing to do.[73] Similarly, the law of contract recognises special relationships that people enter into, for the purpose of supporting those relationships, contributing to their availability, affirming their social significance, or emphasising their solemnity.[74] But Gardner is clear that the purpose of private law is not primarily about promoting autonomy in the sense of choices about how we live

[72] Gardner, *From Personal Life to Private Law*, p. 8.
[73] Gardner, *From Personal Life to Private Law*, p. 13.
[74] Gardner, *From Personal Life to Private Law*, p. 46.

our lives. Instead, the purpose of private law is to protect our security, the continuity of our lives and to conserve value.[75]

In all these discussions of theoretical perspectives on law and life, what comes through is a 'brilliant, ebullient mind' blessed with 'an infectious and lively enthusiasm for thinking about how he or you or I might live a life—how we might be able to respond to the opportunities and the necessities it involves, and how we might hold each other responsible in a community'.[76]

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[75] Gardner, *From Personal Life to Private Law*, p. 231.
[76] T. Endicott, 'John Gardner 1965–2019', https://www.law.ox.ac.uk/news/2019-07-12-john-gardner-1965-2019.