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HERBERT HART ELUCIDATED

A. W. Brian Simpson*

A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM. By Nicola Lacey. Oxford and New York: Oxford University Press. 2004. Pp. xxii, 422. \$35.

There are a number of good biographies of judges, but very few of individual legal academics; indeed, so far as American legal academics are concerned, the only one of note that comes to mind is William Twining's life of Karl Llewellyn.¹ Llewellyn was, of course, a major figure in the evolution of American law, and his unusual life was a further advantage for his biographer. In this biography, Nicola Lacey² has taken as her subject an English academic who also had an unusual career, one whose contribution was principally not to the evolution of the English legal system but to legal philosophy. To write such a person's life requires, because of the very abstract questions involved, special qualities of understanding and exposition. Lacey has these qualities, and this is a fine piece of work and a good read.

The twentieth century produced two remarkable analytic philosophers of law. One was Hans Kelsen; he came from the civil law tradition. I never had the good fortune to meet him. The other was Herbert Hart; he was a common lawyer. I was his colleague in Oxford for many years, and, at a professional level, I knew him well. He organized an informal discussion group that met weekly in term time, and I attended this regularly from 1955 until I left Oxford in 1972. By that time, his successor, Ronald Dworkin, had been appointed and led the group, whose character naturally changed. In an interview in 1988, Herbert described this group as a "class," which it was not, but the use of the term is significant.³ Herbert viewed the function of the group as being the education of his intellectually deprived colleagues in the law faculty. Nicola Lacey captures his attitude in entitling her seventh chapter "Selling Philosophy to the Lawyers." I met him regularly on other occasions and indeed once attended a Hart family party in St. Anne's College, at which his son Charlie was providing the music. I never, however,

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1. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (photo. reprint 1985) (1973).

2. Professor of Criminal Law and Legal Theory, London School of Economics.

3. David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 *J.L. & Soc'y* 267, 277 (2005). Herbert mentioned the names of only three of those who attended—his coauthor Tony Honoré and Rupert Cross, both of the law faculty, and the philosopher Tony Woozley, who in fact only attended on a handful of occasions. *Id.*

received the accolade of being invited to the Hart country home, Lamledra, which was high on the cliffs in Cornwall.⁴

I also knew his wife Jenifer, again largely through professional contacts but partly through gossip. I corresponded with her extensively in connection with a book I wrote on detention without trial in the 1939–45 war.⁵ In what follows, I shall make use of recollections of these contacts with the Harts.

I studied law in Oxford from 1951 to 1954, and at that time the Oxford law school did not enjoy a high reputation in the university.⁶ Some of the men's colleges still admitted as undergraduates very dim young men—the women's colleges had higher standards. Sometimes this was done on account of the men's marked sporting ability, and sometimes because demand for places was nothing like as intense as it has since become. Since they had to pretend to study something, they were commonly dumped in the law school. It was still, in those unreformed days, possible to obtain a qualification known as a Fourth Class Honors Degree, for which little was required except a modest ability to read and write; a certain distinction attached to those who obtained this bizarre qualification. At the top end of the class there were of course able students, but the tail was long.

As for the legal academics, there were some of high ability; the quality of one's legal education depended on that of one's college tutor. My own tutor was Tony Honoré, a scholar of great distinction, who insisted on high standards and extensive reading. But the worst of the college tutors were spectacularly awful, and three in my time had received no academic legal education at all. One was a Wordsworth scholar, appointed to the law fellowship in his college since it happened to be vacant and told to get the subject up in the long vacation. He lectured on natural law; I never met anyone who attended his lectures. Another had been in pursuit of a position teaching philosophy, and was given a law fellowship until the philosophy position fell vacant. By the time it did, his indolence had become notorious, and so he remained the law tutor until his retirement.

Some colleges, indeed, took the view that academic study of the law was as out of place in a university as plumbing and refused to teach the subject at all, just as some colleges refused to teach English literature—this on the rather different ground that well-educated people did not need to be taught about English literature; it was something any educated person just took in his stride. Those undergraduates who planned to become barristers (who enjoyed high prestige in comparison with the solicitors) mostly studied subjects other than law. All this was, in due course, to change, but when I was

4. See pp. 175–77. There is an engaging account of Bohemian life at Lamledra in KAREN ARMSTRONG, *THE SPIRAL STAIRCASE: MY CLIMB OUT OF DARKNESS* 150–57 (2004). Karen Armstrong, a former nun, acted at one time as assistant nanny to the Hart children. P. 241.

5. A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1992).

6. Lacey provides some remarkable examples of the contempt for the law school, and in particular for “jurisprudence,” which was then commonplace. This encouraged the idea, which still exists, that in some sense Herbert's appointment as professor reinvented legal philosophy. See pp. 148–50.

first a fellow of Lincoln College, in 1955, I had to fight a continuous battle to prevent my colleagues' admitting weak candidates on the basis that if they could not cope with classics, or history, or whatever, they could always read law.

I was in my second year when Herbert was appointed Professor of Jurisprudence⁷ to succeed the American, Arthur Goodhart.⁸ I had never previously heard of Herbert's existence, which was hardly surprising since he had at this time exhibited virtually no interest in the academic study of the law, although he had written one article that had oblique relevance to law.⁹ Among the more serious law students, and there were some, his appointment caused great excitement. He was at the time a philosophy tutor in New College, and belonged to a subgroup of the Oxford philosophers of the period, dominated by one J.L. Austin,¹⁰ who engaged in what was then known as linguistic analysis.¹¹ Austin, whom I never met, had a reputation for cleverness, pedantry, and bullying.¹²

What was exciting about the appointment was that Herbert was thought to be a philosopher, and not a lawyer of any kind; the philosophers, it was generally thought, both by them and by others, really were serious intellectuals. So the story spread that the life of the law school was going to be transformed through his appointment to the chair. In an interview in 1988, he explained that he thought at this time that "jurisprudence . . . was in a very bad way. It had no broad principles, no broad faith; it confronted no large questions."¹³

At this time, the Oxford philosophers, especially the group to which Herbert belonged, were extremely confident of the significance of their

7. The job description at this time, embodied in the University Statutes, required the professor, as his first duty, to lecture on the history of laws, but not the least notice was ever taken of this.

8. Arthur Lehman Goodhart (1891–1978) was an extremely wealthy American who settled in England; after a period in Cambridge, he moved to Oxford as a Professor and became Master of University College. He published *Essays in Jurisprudence and the Common Law* in 1931 and *English Law and the Moral Law* in 1953. He also published *Poland and the Minority Races* in 1920. On Herbert's relationship with him, see pp. 170–71.

9. H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC'Y* 171 (1949). Later Herbert came to think that this article was flawed.

10. John Langshaw Austin (1911–1960) was White's Professor of Moral Philosophy in Oxford from 1952 to 1960. His *How to Do Things with Words* was published posthumously in 1962. Herbert thought Austin's influence on his own work had been very important. See pp. 142–43; Sugarman, *supra* note 3, at 273–74. Herbert was particularly impressed by Austin's theory of the performative use of language, in accordance to which certain actions (for example, promising) were performed by "speech acts." It must be some defect in me, but I have never been able to understand why the philosophers became so excited at this obvious point.

11. It needs to be explained perhaps that this was purely a philosophical movement; no scholars of linguistics were ever, so far as I know, involved or even interested. The Oxford philosophers who belonged to this group had not, at this time, been strongly influenced by Wittgenstein, whose work was little known in Oxford.

12. See pp. 133–36. He had drafted the regulations for students who became ill at examination time, and these rules exhibited no skill in drafting, which surprised me when I was involved in getting them altered in 1967.

13. Sugarman, *supra* note 3, at 275–76.

work. Their lack of self-doubt was indeed to be little dented by the publication, in 1959, of a devastating criticism of the movement, Ernest Gellner's *Words and Things*.¹⁴ Their initial reaction was the same as that of current law and economics devotees when they are confronted with radical criticism to which they can think of no response;¹⁵ they either ignored it, or were enraged by its impertinence, or both. Thus it was that the leading British philosophical journal, *Mind*, then edited by Gilbert Ryle,¹⁶ using what was known as the reversed in-tray system,¹⁷ refused to review Gellner's book at all, a decision that gave rise to public controversy (p. 138). But Gellner's attack had not been published when Herbert was appointed, and the prestige of Oxford philosophy, and in particular the version of it espoused by Austin and his followers, was largely unchallenged. I do, however, recall being aware of the fact that Cambridge had had, in a person called Ludwig Wittgenstein, someone thought to be rather special if rumor could be believed.¹⁸ So in the Oxford of the 1950s, the law school considered itself highly privileged to have acquired Herbert as professor. We expected great things.

I must here explain some differences between legal education as it then existed in England, and in particular in Oxford, and legal education in the more prominent American law schools. One such difference is the importance attached to the study of jurisprudence, or if you like another name, the philosophy of law. In the United States today, many law students can, for better or for worse, go through their entire law school education without taking a course in jurisprudence.¹⁹ I think that in the past, at least in the major law schools, this may not have been the case. In law schools following the English tradition, such a course is and long has been almost always compulsory. Underlying this insistence is the idea, not I think very clearly analyzed, that the philosophical study of law and legal institutions is, intellectually, the most important and the most valuable and challenging aspect

14. ERNEST GELLNER, *WORDS AND THINGS* (1959). Gellner (1925–1995) was, at the time, Professor of Philosophy, Logic, and Scientific Method at the London School of Economics. He later became Professor of Social Anthropology in Cambridge.

15. Or earlier, the "crits."

16. Gilbert Ryle (1900–1976) was Waynflete Professor of Metaphysical Philosophy and edited *Mind* from 1947 until 1971. He is best remembered for his *THE CONCEPT OF MIND* (1949), which attacks dualistic theories of the relationship between mind and body (the notion of the ghost in the machine). The title to Herbert's major work echoes Ryle's title. See p. 132.

17. Articles submitted were placed in a tray, and when publication of the next issue was imminent, the editor picked out from the top of the pile sufficient pieces thought publishable to fill the next issue. No system of peer review then complicated the task of the editor, whose decision was final.

18. Wittgenstein died on April 29, 1951, in Cambridge. At this time, his *Tractatus Logico-Philosophicus* was in print, but his later philosophy was only known through personal contacts, either direct or indirect, or the circulation of manuscript notes. In particular, neither the *Blue Book* nor the *Brown Book*, nor *Philosophical Investigations*, had been published. *Philosophical Investigations* was published soon after his death, in 1953.

19. See generally NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* (A.W. Brian Simpson ed., 2004).

of the academic study of the law. Hence the significance attached at the time to Herbert's appointment.

This was enhanced by a supposed contrast with his predecessor, Arthur Goodhart. Goodhart was both a charming and generous person; he enjoyed a high status in the barristers' legal world of the time; judges respected his views. He was an able and pragmatic common lawyer and an international lawyer.²⁰ His literary output was mainly confined to the writing of critical case notes in the *Law Quarterly Review*, an activity that to American legal academics would seem eccentric.²¹ Nobody, however, could mistake him for any kind of philosopher. It was his practice as professor to deliver lectures that took the form of a guided tour through the history of legal philosophy, starting, if I recall correctly, with Plato. He would then lead us from the ancient world to the Middle Ages with Aquinas et al., and then through Grotius and Pufendorf until we reached Jeremy Bentham, John Austin, and Henry Maine. To each were allocated a few moments. He then moved on to contemporaries such as Hans Kelsen.

At the time, with the arrogance of youth, we used to rather mock these lectures with much the same disdain as has been leveled against Bertrand Russell's *A History of Western Philosophy*. I now think rather better of such introductory tours of fields of scholarship; students did at least get to know some names, and could then, if interested, read some of their work in the original.²² Students have to begin somewhere. I myself, however, being influenced by the general disapproval, never attended Goodhart's lectures, but relied on reports and notes from others. The practice of circulating and indeed selling copies of notes of lectures was then quite common. Indeed, some lecturers delivered their lectures at dictation speed; it was part of the lore of the school that William Holdsworth, the legal historian, who died before my time, used to repeat each sentence three times through his walrus moustaches: "The law of England, I say the law of England, the law of England . . ." By this time even the most inattentive students would be aware that it was the law of England that was under discussion.

And this brings me to another difference. Students in American law schools spend a great deal of time attending classes that are, at least in theory, compulsory, and they prepare for them by reading truncated and mangled texts set out in case books. All members of the class have a shared experience of reading the same assigned materials. Nothing of the sort went on in Oxford. The law school offered formal lectures, but there was no obligation to attend them; I myself attended very few and, as I recall, fell asleep

20. His reputation as an international lawyer was achieved not through his writings but through his participation in gatherings of international lawyers. He may have taught the subject in Cambridge. He was a regular attendee at meetings of the Grotius Society, the English international law society.

21. For this, see DUXBURY, *supra* note 19, especially Chapters 4 and 6. He did publish three books. See *supra* note 8.

22. Students also relied on treatises that adopted the same form; Herbert strongly disapproved of such works. See, e.g., H.L.A. Hart, *Dias and Hughes on Jurisprudence*, 4 J. SOC'Y PUB. TCHRS. L. 143 (1958).

in a significant proportion of those I did attend. The educational system depended, for the serious, primarily on private reading, and what you read was not snippets, but whole cases, and whole books, and a small number of whole articles. The weaker students merely read secondhand accounts or relied on early forms of study aid.

Legal education also depended on the discussion of written work, presented in the form of essays, with one's college tutor, who provided criticism and guidance in reading. Tutorials,²³ as they were called, were compulsory and might occupy at the most two hours a week, although in my own case one of my tutors, the late Derek Hall, my legal history teacher, would also escort me to the Bodleian Library to secure direct access to legal manuscripts; tutorials with Derek were informal and sometimes took place in a café. We became good friends.²⁴ Teachers might also offer what were called seminars, at which short papers were read and discussed. These seminars were not limited to students in the hosting colleges. Anyone might attend, but only serious students did, and they were often joined by the more serious faculty members. Ideas were transmitted in part through published work but also in part through informal mechanisms such as conversation and discussion. Once Herbert was appointed to the chair, many of his ideas, like those of his mentor J.L. Austin, were transmitted through the faculty in this informal way, and through the discussion group that I have mentioned. And Herbert, like the better college tutors, also made himself available to serious students outside the formal lectures and weekly tutorials;²⁵ he was generous with his time.

In this world, academic reputation did not necessarily depend upon publication—when appointed, Herbert had, as I have said, published very little.²⁶ His reputation largely depended on the seminar he had given with J.L. Austin.

Although Herbert was perceived as a philosopher, not a lawyer, in reality he was a lawyer, and one who had had an extremely interesting career before becoming, by invitation, philosophy tutor in New College in 1945. I shall give a brief account of it, derived from Lacey's book. He had been an undergraduate at New College from 1926 to 1930, reading a course known as "Greats," comprising classics, ancient history, and philosophy. Two examinations were involved,²⁷ and he achieved the top first-class honors result

23. I have always suspected that the origin of the tutorial may have something to do with the employment of private tutors in aristocratic households, but I have no direct evidence of this.

24. The late Sarah Cockburn, now best known through her detective stories written under the pseudonym Sarah Caudwell, used to conduct tutorials in the lounge of the Randolph Hotel, familiar perhaps to some readers from the televised Inspector Morse story, *THE WOLVERCOTE TONGUE*.

25. Holders of chairs were discouraged from conducting regular tutorials, lest, presumably, their dangerous opinions might infect the young.

26. In addition to the article mentioned in note 9 above, he had published two philosophical articles and edited work by H.W.B. Joseph, who had been his tutor in New College. Lacey lists all of Herbert's publications. Pp. 394–97.

27. Known as "Mods" (Honor Moderations) and "Greats."

in each;²⁸ in Oxford at that time a top first automatically led to invitations to become an academic in one of the colleges.²⁹ There was a social and an intellectual pecking order amongst the colleges, and New College was highly prestigious in both areas. Many of the undergraduates came from one of the leading private schools,³⁰ Winchester College. Herbert's plan to follow this by studying for a law degree, to be completed in one year, fell through, and in 1932, after taking the rudimentary bar exams, which would not have detained him long, and studying cases under supervision,³¹ he went into practice as a barrister at the Chancery bar. The work in which he was involved there would roughly cover what is called today in the United States trusts, estate planning, and tax law. He was very successful, but derived little personal satisfaction from this work. It offended him ethically; much of the work involved helping the rich avoid paying taxes; Herbert was himself from a relatively affluent background, but never thought of himself as rich.³² I suppose "rich," when it connotes disapproval, always means "richer than I am."

Then came the war; unfit for regular military service, Herbert, along with numerous other lawyers and intellectuals, was recruited in June 1940 into MI5, the domestic secret service.³³ They included the philosophers Stuart Hampshire³⁴ and Gilbert Ryle,³⁵ who left MI5 to join the overseas intelligence service, MI6, and the celebrated art historian, keeper of the Queen's pictures, and Soviet spy, Anthony Blunt.³⁶

Herbert worked on counterespionage, principally on the analysis of material acquired through the interception and decipherment of transmissions from the German Secret Service. The Germans had not, before the war, established an elaborate spy ring in the country.³⁷ But after the war began, a

28. It was still possible to take a pass degree course rather than an honors degree. To describe the requirements as modest would be to exaggerate.

29. The ranking of those awarded firsts was never officially published but was known informally. Thus in 1955 Ronald Dworkin obtained the top first in the law school.

30. Called "public schools" in England.

31. His tutor was C.A.W. Manning, who was the lawyer at New College. Herbert abandoned the plan to take the final examinations in the law school because he feared he would not obtain a first—better no law degree at all than a second-rate one. *See* p. 40; Sugarman, *supra* note 3, at 270.

32. *See* Chapter 1 for his childhood, family, and education. His father was a prosperous businessman in Harrogate, a wealthy northern spa town; he was a master tailor, furrier, and dress maker.

33. *See* p. 84; SIMPSON, *supra* note 5, at 37–40 & n.29.

34. Stuart Hampshire (1914–2004) was at this time Fellow and Tutor in Philosophy at All Souls College. He later became a professor at University College, London, and then at Stanford; he was Warden of Wadham College, Oxford, from 1970 to 1984.

35. *See supra* note 16.

36. *See* MIRANDA CARTER, ANTHONY BLUNT: HIS LIVES (2001), especially Chapters 10 and 11.

37. On the activities of MI5 during the war, *see* CHRISTOPHER ANDREW, HER MAJESTY'S SECRET SERVICE: THE MAKING OF THE BRITISH INTELLIGENCE COMMUNITY (1986); JOHN COURT CURRY, THE SECURITY SERVICE 1908–1945 (1990); F.H. HINSLEY & C.A.G. SIMKINS, 4 BRITISH INTELLIGENCE IN THE SECOND WORLD WAR: SECURITY AND COUNTER-INTELLIGENCE (1990); J.C. MASTERMAN, THE DOUBLE CROSS SYSTEM IN THE WAR OF 1939 TO 1945 (1972); NIGEL WEST

number of real spies, most of them quite incompetent and with little enthusiasm for the job, arrived, some by parachute, some by small boat, and some by regular transport. By late 1941, thirty-five had come illegally, and ten legitimately; eleven others had been collected—four, for example, on Jan Mayen Island in the Arctic.³⁸ By October 1942, sixty-three had been arrested in Britain, and thirty-three elsewhere.³⁹ Virtually all were captured long before they could do any harm. One committed suicide in Cambridge, and, although firm evidence is lacking, one or two more may have been surreptitiously killed, although I think this unlikely.⁴⁰

Those who were captured were either executed (the fate of sixteen of them), interned in one or other of MI5's prisons,⁴¹ or, if they were thought suitable, coerced by threats of execution to become double agents. Double agents were used to communicate misleading information to the Germans. The whole system was known as the double-cross system, the code name of the managing committee being the XX committee. Herbert did not himself run agents; he was concerned with analysis and research related to the double-cross system and other issues concerning counterespionage.⁴²

In 1941 Herbert married Jenifer Fischer Williams, the daughter of a distinguished international lawyer and public servant.⁴³ They had previously lived together. Jenifer had been raised in even more affluent conditions than her husband, and throughout her life engaged in a rebellion against her own background. She became private secretary to Sir Alexander Maxwell, the civil servant who was head of the Home Office; this was a very prestigious job.⁴⁴ She also gave advice as to suitable academics who might be invited to join the security service; it was indeed on her recommendation that Herbert

[pseudonym for Rupert Allason], *MI5: BRITISH SECURITY SERVICE OPERATIONS 1909–1945* (1981); A.W. Brian Simpson, *The Invention of Trials in Camera in Security Cases*, in 2 *THE TRIAL IN HISTORY: DOMESTIC AND INTERNATIONAL TRIALS 1700–2000* (R.A. Melikan ed., 2003). Of these works, those by Masterman, Curry, and Hinsley and Simkins were written by persons who worked in MI5 or in code breaking. West (Allason) relied on information leaked to him by officers or former officers of MI5. In the course of working on my book on detention, *supra* note 5, I interviewed a number of former members of MI5, some of whom worked in counterespionage. Under British official-secrets law, they were not supposed to talk to me.

38. 1 NIGEL WEST, *THE GUY LIDDELL DIARIES: 1939–1942* 315–17 (2005) (quoting a list compiled by Helenus Milmo, November 25, 1941).

39. 1 NIGEL WEST, *THE GUY LIDDELL DIARIES: 1942–1945* 15 (2005).

40. Lacey relies on an entry in the Liddell diaries referring to the “liquidat[ion]” of double agents (p. 99), but I think in the context this does not refer to killing, but merely to terminating a double agent’s activities. There is a story that two agents sent to rescue or perhaps assassinate Deputy Fuhrer Rudolf Hess, who had flown to Scotland in 1941, were summarily executed, but the story is suspect, and if two agents were killed, it was more probably by trigger-happy members of the Home Guard. See PETER PADFIELD, *HESS: THE FUHRER’S DISCIPLE* 251–52 (Cassell & Co. 2001) (1991).

41. MI5 ran an interrogation center, Latchmere House, known as Camp 020, and a long-term detention center at Huntercombe Place (now a golf course), known as Camp 020R. It also used some cells in Dartmoor Prison.

42. For his work, see pp. 84–101.

43. See pp. 36, 44. Jenifer’s father was prominent in connection with the League of Nations.

44. On Maxwell (1890–1963), see SIMPSON, *supra* note 5.

was recruited into MI5 (p. 84). In 1947 Jenifer gave up her career as a civil servant and returned to Oxford to live with her husband. In the same year in which he became professor of jurisprudence, she became a fellow and tutor in modern history at her old college, St. Anne's. In 1966, on the retirement of the then Principal, one Lady Ogilvie, Jenifer had hopes of succeeding her, but in vain.

Two years later, Herbert, on the ground that he had nothing much left to contribute to the philosophy of law, resigned the chair and began to devote his time to editing the writings of Jeremy Bentham. From 1967 onwards he also engaged in public service as a part-time member of the Monopolies and Mergers Commission; the Chairman of this body was A.W. Roskill, who had worked in MI5 with Herbert, and the Minister who appointed him was Douglas Jay, a long-standing friend. In 1973 he was elected by the fellows of Brasenose College as their Principal, a position he held until 1978. In retirement, Herbert continued to engage in scholarly work, mainly in connection with the Bentham project. He also worked on a reply to his critics but never completed it.

He became a well-known figure in English public life and was offered a knighthood in 1966 but declined on principle; he was, however, showered with honors of one kind or another—thirteen honorary degrees, not to mention Harvard's Ames Prize. He had, by any standards, a glittering career in what now seems, in retrospect, a golden period for English academia. Jenifer's academic career followed a more modest course, although she built up a respectable body of published work. As an academic, she lived in the shadow of her husband. She remained a fellow of St. Anne's until 1981. Herbert died in 1992; Jenifer survived him, dying in 2005. They had four children, one of them tragically suffering brain damage through oxygen deprivation during birth; Lacey has given a touching account of the response of the family to this tragedy, bringing out the brilliance of the damaged child.

Two of the Hart children⁴⁵ were able to attend the book launch of Nicola Lacey's biography in London. Sadly, Jenifer was by then unable to come. Jenifer had, however, published her own autobiography, *Ask Me No More*, in 1998.⁴⁶ Although Herbert never completed an autobiography, he did leave some fragments, along with extremely revelatory diaries and many letters. To all this material Lacey was, somewhat surprisingly, given full access. This biography has appeared with the approval of the Hart family. He was also interviewed by David Sugarman in 1988, and the transcript has recently been published.⁴⁷ There are many people alive who knew the Harts, and Lacey has, so it seems to me, left absolutely no stones unturned in her research for the writing of this life. The end product is as good a biography of a distinguished academic as can be.

45. Charles and Joanna.

46. JENIFER HART, *ASK ME NO MORE* (1998).

47. Sugarman, *supra* note 3. David Sugarman is a Professor at Lancaster University Law School. For other interviews, see p. xxi.

Jenifer was well known in Oxford for her forthright expressions of radical opinion, somewhat eccentric clothing, and flamboyant and irregular love life, which expressed her rebellion against bourgeois morality. I recall attending an elegant cocktail party that, under the influence of alcohol, degenerated into a forum for hair pulling when Jenifer was confronted by the wife of one of her supposed conquests.⁴⁸ She used to assure her pupils, whom she advised to bathe less frequently and enjoy an active sex life,⁴⁹ that she had enjoyed—the figure was precise—twenty-nine affairs. To modern-day Americans, enslaved to showering and the obligation to expunge all traces of bodily emissions (these to be replaced with scented unguents of one kind or another), her lack of enthusiasm for bathing may seem curious. But it was indeed typical of the bohemian world, and Jenifer aspired to belong to that world.⁵⁰ Her conquests included such distinguished figures as Isaiah Berlin and Michael Oakeshott. Her choices were not so much those of a romantic but those of a true intellectual. Indeed, when I consider this aspect of her life alongside that of her St. Anne's colleague, the novelist and philosopher Iris Murdoch,⁵¹ I sometimes wonder if something defective about me kept me from being invited into the club myself. I was, I suppose, then too young and too chaste.

Her reputation for nonconformity was further enhanced when, in 1983, she announced that, back in the 1930s, she had been recruited by the Russians as a spy and joined the Home Office as a mole.⁵² It was further enhanced when her extremely, but not wholly, frank⁵³ autobiography was published in 1998, with a foreword by former lover Isaiah Berlin, Herbert's closest friend: as a Ghanaian proverb has it, if something is biting you, it must be *under* your clothes. Numerous versions of a story relating Herbert's response when told that one of his colleagues had fallen in love with Jenifer circulated in Oxford; he was supposed to have said "No, *nobody* could fall

48. Since the lady is still alive, I cannot name her. Her husband, a distinguished political scientist, fled, announcing loudly, "I disown them both"; so far as I am aware, he had not had an affair with Jenifer. The party took place in Wadham College, and was given by the late Peter Carter, a legal academic of some note, whose parties were locally held in the highest esteem. He tended to provide generous martinis, and British academics were then not fully familiar with their lethal nature.

49. Undergraduate students had "moral tutors," persons not in the same faculty, whose job it was to act as general advisers; this information comes from one of Jenifer's former moral "tutees," who, being a nicely brought up young woman, was somewhat taken aback.

50. See VIRGINIA NICHOLSON, *AMONG THE BOHEMIANS: EXPERIMENTS IN LIVING 1900–1939* (2002), especially Chapter 2 ("All for Love") and Chapter 7 ("New Brooms"), in which one section addresses the question, "What are the advantages of remaining dirty?"

51. See PETER J. CONRADI, *IRIS MURDOCH: A LIFE* (2001).

52. See pp. 3, 67, 338–39; see also Hart, *supra* note 46, at 61–79. Rumors of this had appeared earlier, with some suggestion that Herbert himself had been involved with the Russians. At this time, the press was full of allegations of Soviet penetration of the British Security Services.

53. She does not, for example, reveal her affair with Isaiah Berlin in it. No doubt autobiographies are never wholly frank.

in love with Jenifer.”⁵⁴ Her autobiography includes such gems as a reference to the eccentric Audrey Beecham, who “fell in love with me and extended my horizons.”⁵⁵

Herbert, in contrast, had absolutely no reputation for bohemian eccentricity, except that he was somewhat forgetful and untidy, with a tendency to go about with his shirt hanging out. In general he was the soul of dignity and apparent self-confidence; indeed he came to be viewed in Oxford as a guru. Unlike other gurus one might name, he wholly lacked any form of pomposity, although he did to some degree share the arrogance of the Oxford philosophers of this period. The only flaws in his character, if they were flaws, were a disposition to meddle in appointments that did not concern him and an occasional tendency to be overcome with righteous indignation. Thus, so far as the first is concerned, he played a very active role in the appointment of his successor, which violated a strong convention that this was improper.⁵⁶ His indignation was sometimes aroused over relatively trivial issues,⁵⁷ and sometimes in relation to individuals cast, in Oxford’s mildly left-wing circles, in the role of devils. Late in his life, Margaret Thatcher occupied the role of devil incarnate;⁵⁸ in my time, it was the university proctors, who played a very unimportant role in student discipline, having, for example, not expelled a student from the university in living memory.⁵⁹ It was the colleges, not the central university administration, that regularly did nasty things to students. But it was the proctors who excited Herbert’s ire as symbols of arbitrary power. I myself came in for much disapproval from Herbert when I served from 1967 to 1968 as one of the two proctors. But there was an admirable side to Herbert’s capacity for righteous indignation; he was deeply committed to the ethical dimension of his academic work. There was never any risk that Herbert would sell his soul, as do some academics, to the highest bidder.

Lacey’s book provides a fascinating account of the Hart ménage and its problems, although I think that she somewhat plays down the irregularities of life in the Cornwall country house. Karen Armstrong’s account of irregular couplings and the tolerated consumption of prohibited substances brings

54. Lacey has a different version of this on page 177, as does HART, *supra* note 46, at 164. See also MICHAEL IGNATIEFF, *A LIFE OF ISAAH BERLIN* 210–11 (1998). The affair with Isaiah Berlin was not common knowledge.

55. HART, *supra* note 46, at 53. Audrey Beecham used to amuse herself by, amongst other things, driving around Oxford shooting at bystanders with an air pistol.

56. See pp. 291–92. One of the electors to the chair, Robert Heuston, rang me at the time to discover the identity of the “Dworkin” whose claims Herbert had been pressing on him, and whom he thought to be an academic then at Southampton University, Gerald Dworkin. I was tempted to assure him mischievously that this was the right person, but resisted. Lacey reproduces this story but wrongly supposes that the Dworkin at Southampton was a philosopher; he had no philosophical background whatever and was an academic lawyer with interests that included jurisprudence.

57. For an example, see p. 320.

58. See pp. 356–57.

59. The proctors had a wide range of administrative duties serving, for example, as directors (called delegates) of the University Press. It was, however, their disciplinary duties that attracted public attention.

out the fact that Herbert did, perforce, live much of his life in bohemia.⁶⁰ But I was little aware of this, and I can well recall my own astonishment when, after I had left Oxford, I learned that he had suffered a breakdown, triggered by Jenifer's public announcement of her early career as a communist spy in waiting. This had inevitably given rise to speculation that Herbert himself had been a spy. He had been hospitalized in the Warneford psychiatric hospital, commonly called Warneford College for the many students and occasional dons who passed into its care; it was under the supervision of Dr. Seymour Spencer, who had great problems in recalling the names of the other doctors who worked there.⁶¹ For a don to go there was unusual indeed. Some degree of psychological disturbance was as commonplace in Oxford as it is in American law schools, but was not usually viewed as a reason to seek medical care. So it had to be pretty bad, and it was.

The truth is, as Nicola Lacey's biography now makes clear, that at a personal level I hardly knew Herbert at all. As an individual, he suffered from three sources of anxiety that were completely unknown to me. One was a deep lack of confidence in his abilities as a philosopher, a factor that may have encouraged his move to the philosophy of law and the law faculty, where, amongst the minnows, as he and other philosophers saw things, he perhaps felt less threatened. Another was a profound insecurity over his sexuality. The trouble with his marriage, he is supposed to have said, was that Jenifer was not interested in food and he was not interested in sex. Was he really gay? Apparently he never quite knew, and the question is probably misconceived.

The third was anxiety as to what he should do about the fact that he was a Jew. For myself it was only after a considerable number of years that I became aware that he was a Jew, albeit not a practitioner of the Jewish faith, for he was an atheist. When I did discover this, it never seemed to me to be a particularly significant fact about him. I was not alone in my ignorance; Lacey records Ronald Dworkin's surprise when, after his appointment as Herbert's successor, he learned this. Apparently Herbert encountered, or at least believed he had encountered, some anti-Semitism. This surprises me, since I never came across this in Oxford, but then I am not a Jew.⁶² Herbert, as he grew older, came to be increasingly concerned over his Jewish identity, and in particular over the attitude he should adopt toward the State of Israel. In the end, he left his library to the Hebrew University.

In his earlier life, he appears to have been dedicated to assimilation into the English upper middle class; Lacey records what was to me the astonishing fact that he even engaged in stag and fox hunting, and this apparently in

60. See Armstrong, *supra* note 4, at 150–57.

61. In connection with examinations taken by hospitalized students, I visited the Warneford; Seymour Spencer was unable to introduce me to his colleagues, since, as he explained, he had no idea of their names.

62. One incident took place outside Oxford, when he was excluded from joining the Oxford and Cambridge Club. P. 54. The other significant event involved Hertford College, and it is not clear that anti-Semitism was involved at all. See pp. 313–14.

full fig (pp. 49–51). These sports have recently become illegal in Britain, much of the left-wing hostility to them having little to do with solicitude for the unfortunate animals involved, but rather with the class war, these sports being popularly thought to be associated with an odious aristocratic way of life. In reality, most fox hunting was a proletarian sport, but stag hunting with hounds, which was highly ritualized, was certainly not a blue-collar recreation, nor was the type of fox hunting in which he participated. I should have expected all forms of hunting with hounds to have excited Herbert's righteous indignation, but not a bit of it; I simply failed to understand the complexity of his character.

This complexity is unravelled for us by Lacey, and her biography can be judged simply as a perceptive and very well-written account of the life of a distinguished academic, and one that provides a fascinating window into the world of the Oxford dons back in what now seems their golden age. But one colleague asked me, after I gave a short lunchtime talk on the book, whether I thought that all the revelations as to Herbert's private and family life cast any real light on his academic work, and I must confess that it is not very obvious that they do. What could possibly be the relationship between anxieties over sexuality and the relationship between law and force or the analysis of the nature of legal obligation? In general, I suppose we value good biographical writing for the insight it gives us into the human condition (whatever that really means) and also, I suspect, because there is a voyeur in all of us, whose interest is particularly roused by lives of people whom we have known, if only through their writings or other achievements. And in the case of a theoretical writer such as Herbert, his writings and the development of his ideas form an important part of his life, even if it may not be closely connected with his other experiences. Sometimes the connection may be there, but be largely speculative. Lacey has contrived without any mystification to explain the theoretical issues that concerned Herbert but has not attempted to show any close connection between his philosophical concerns and his somewhat tortured personal and emotional life.

There may nevertheless have been linkages. To give one example of a possible connection, when I knew him, Herbert was strongly opposed to capital punishment; he also seemed to me to be somewhat evasive over his wartime work, which in fact involved him, albeit somewhat indirectly, in the execution of German agents and the blackmailing of others to make them become double agents. Lacey indeed records a story he told to the effect that he actually prosecuted one such spy, a story that could not possibly have been true: MI5 officials, many of whom were lawyers, never conducted prosecutions, and a barrister with a Chancery background would have been wholly incompetent to perform this function.⁶³ This story, if it had any real

63. See p. 99. Spies were normally prosecuted either by the Attorney General or Solicitor General, or by Valentine Holmes, who was senior Treasury Counsel. WEST, *supra* note 37, at 337, has it that the leading prosecuting counsel in Scott-Ford's trial was George McClure; I find this implausible, although he may well have been involved. The story as Herbert told it appears to have been garbled, so much so that one wonders if Herbert had anything to do with the case at all.

basis, probably relates to a young sailor named Duncan Scott-Ford,⁶⁴ who sold information as to convoys' sailings to German agents in Portugal and was convicted under the Treachery Act and hanged in November 1942. It may, very much less probably, refer to another sailor, one George Armstrong, who had also provided or offered to provide similar information. He was executed in 1941.⁶⁵ Herbert appears to have been distressed by the fact that a confession was extracted by improper means.⁶⁶ Lacey suggests that his later attitude toward capital punishment may have been a consequence of his close connection with the practice during the war; this is not at all implausible.

In another example, it was with notable vehemence that he attacked Patrick Devlin⁶⁷ when, in his Maccabean Lecture on Jurisprudence, Devlin cast doubt on John Stuart Mill's theory of the relationship between law and morals, which had been relied upon in the Wolfenden Report.⁶⁸ This government committee had recommended the liberalization of the law relating to homosexual conduct between consenting adults, and this proposal was eventually adopted in 1967.⁶⁹ Herbert's vehemence may perhaps be explained by his own sexuality.

But attitudes are one thing and philosophical theories another, and I doubt if incidents in Herbert's life, over and above his association with Oxford linguistic-analysis philosophy, in particular with J.L. Austin, can be linked to his philosophical views. And even in relation to J.L. Austin, the evidence, although it points to his strong influence, does not make it possible to determine with any certainty which aspects of Herbert's legal philosophy were in some sense derivative of Austin's ideas. Herbert was engaged in writing *The Concept of Law* principally between 1956⁷⁰ and 1961; Austin died in 1960, and Lacey has not found evidence that Austin

64. On Duncan Alexander Croall Scott-Ford see CURRY, *supra* note 37, at 14, 386; HINSLEY & SIMKINS, *supra* note 37, at 337; SIMPSON, *supra* note 5, at 242, 429 (based on NA HO 45/25763); WEST, *supra* note 37, at 336-38; Simpson, *supra* note 37, at n.95 (based on HO 45/25595, PCOM 9/2121). Scott-Ford was arrested at Salford Docks in Liverpool, which fits the story. The account given by R.W.G. Stephens in CAMP 020: MI5 AND THE NAZI SPIES, 195-98 (Oliver Hoare ed., 2000) claims that he willingly cooperated. Stephens, known as "Tin Eye," was the commandant of the interrogation center at Latchmere House, known as Camp 020.

65. George Armstrong was tried in camera under the Treachery Act on May 8, 1941, and was executed on July 9, 1941. He had been arrested in Boston, Massachusetts, and then deported. He was arrested on arrival in the United Kingdom in Cardiff. He was a member of the Communist Party of Great Britain. See NA HO 45/25595 (press release); FO 371/5084 (list of executions); see also WEST, *supra* note 37, at 321-23.

66. There is some evidence that one Helenus Milmo, known as "Buster" from his success as an interrogator, was responsible; he later became a High Court Judge.

67. Devlin later became a House of Lords judge as Lord Devlin.

68. The Wolfenden Report was produced by a committee chaired by Sir John Wolfenden to review the law relating to homosexuality and prostitution.

69. See pp. 220-21.

70. See pp. 190, 222. Ultimately the book derived from lectures given in 1952. Given the delays associated with legal publishing in those days, the text was probably completed in 1960.

played any direct role, as by commenting on drafts.⁷¹ Lacey has, however, managed to come up with some interesting evidence on the influence of Weber on Herbert's legal philosophy, and she suggests that Herbert was somewhat evasive in not acknowledging this (pp. 230–31). The volume annotated by Herbert on which this is all based was published in an edition edited by Max Rheinstein in 1954,⁷² but it is not clear when Herbert acquired a copy and made these annotations. So the evidence is not conclusive. Herbert's own contention was that his ideas on this topic were derived in part from a book by Peter Winch, published in 1958, *The Idea of a Social Science and its Relationship to Philosophy*.⁷³ It is difficult for anyone who knew him to believe that Herbert would have deliberately obfuscated. One further issue is the possible influence of Wittgenstein.⁷⁴ Herbert had read the *Blue Book* and *Brown Book*, which circulated in manuscript, and was impressed by *Philosophical Investigations* when it was published in 1953. He was indirectly in touch with Wittgenstein's later philosophy through his friend George Paul, who had been Wittgenstein's pupil.⁷⁵ But it is not easy to detect in *The Concept of Law* any influence, and Lacey suggests that if such influence can be detected, it was mediated by the work of Friedrich Waissman, a former collaborator with Wittgenstein who had settled in Oxford.⁷⁶

Herbert's major contribution to the philosophy of law was certainly the concise and highly readable *The Concept of Law*, although it is one of those books that becomes more difficult the more often it is read. It was published in 1961 and is still in print nearly half a century later, having sold over 150,000 copies—not much for a popular novel, but a huge sale for a work

71. The preface to *The Concept of Law* mentions four people who had read drafts: Tony Honoré, George Paul, Rupert Cross, and Peter Strawson. I suspect that it would have been a brave and indeed masochistic person who would have asked Austin to comment on a draft. H.L.A. HART, *THE CONCEPT OF LAW* vi (2d ed. 1994).

72. MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Simon and Schuster 1967) (1954).

73. PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATIONSHIP TO PHILOSOPHY* (Percy Lund, Humphries & Co. 1963) (1958).

74. See pp. 139–140.

75. P. 170. Paul died in an accident in 1962. See pp. 225, 279; see also *supra* note 11.

76. P. 140. Waissman, a refugee who was a sad, lonely, and to some degree embittered person, died in 1959. Herbert attended his funeral, and arrived late and shivering for the meeting of the discussion group in consequence. He explained that there was no religious ceremony, and the philosophers, after silently consigning Waissman to his grave, were about to leave, when Gilbert Ryle, feeling that something should be said about the deceased scholar, leapt onto a convenient tabular grave stone and delivered an extempore Periclean funeral oration. It was raining heavily and blowing strongly at the time, and the proceedings, conducted by the Oxford philosophers all attired in soggy, flapping academic dress, resembling nothing so much as a group of immense crows clustered around carrion, excited the puzzled curiosity of some passing peasants. Waissman's *The Principles of Linguistic Philosophy* was published in 1965; one of his articles is cited in HART, *supra* note 71, at 297.

on legal philosophy.⁷⁷ As is the way with notable books, it has spawned a very considerable secondary literature, and the academic career of Ronald Dworkin was launched by his self-presentation as Herbert's major critic.

At the time when this book was written, the principal function of legal philosophy was to provide an answer to a very general and extremely puzzling question, "What is law?" This was not a practical question; those who asked it and spilled much ink in attempting to answer it were commonly well versed in the practicalities of operating a legal system—giving legal opinions, arguing legal cases in court, delivering court judgements, or whatever. It was a question of a conceptual nature, about meaning. Herbert argued that it was more useful to identify a number of distinguishable puzzles, or intellectual anxieties, that underlay the general question, and he thought there were three of them.

One was the relationship between law and force or coercion: is a legal system best understood as a system of instructions backed by coercive force? The second was the problematic distinction between law and ethics or morality—how, for example, does a legal obligation such as paying taxes differ from a moral or ethical obligation to pay taxes, if indeed there is such a thing? What is the connection between law and ethics, and is some kind of relationship necessary to the very existence of law? The third is less easy to state simply; to what extent is law a matter of rules? This in its turn generated a number of subsidiary issues. What is a rule? What do we mean when we say a rule, or a legal rule, exists? What does it mean to say that courts apply legal rules, and is it in any sense true that they do so?

Since Herbert's time, the emphasis in western legal philosophy has been on the analysis of the process of adjudication, which closely relates to Herbert's third issue. Thus Dworkin's legal theory is concerned with little else, and not even with adjudication in some general sense, but only with adjudication by the Supreme Court of the United States. But Herbert's *The Concept of Law* does not explicitly have a great deal to say on adjudication as such. It does, however, have a great deal to say on a further question that did not feature in the trilogy I have set out—what is meant when we say that a legal system exists? In what sense do laws form a system, and what is meant by existence when predicated on such a system? Can laws exist without forming part of a system?

Although Herbert set out to write a book on the concept of law, he ended up writing a book on the concept of a legal system. He conceived of a legal system as a set of rules all identified by a master rule, which he called a rule of recognition, and his book develops a complicated and somewhat incoherent analysis of the rules of a legal system into two other types of rules. One kind of rule imposes obligations; such rules he calls primary rules. The other kind of rule confers powers; such rules are called secondary rules. For such a system to exist the lumpen proletariat must go along with the primary

77. A second edition (as opposed to a reprint) was published in 1994 with a new "Postscript" that was edited from a text found after his death. Herbert had for many years worked on a reply to his critics, but had never been able to complete it.

rules, and a subclass of citizens, called officials, must in some sense accept the master rule or rules, but only in the sense that they use it or them. They do not have to think that the rules identified by the master rule possess any legitimacy or moral force. Neither they, nor anyone else, must, in some logical sense of “must,” have any moral or ethical commitment to the system. So a legal system is, as a matter of logic, distinct from ethics or morals. For Herbert was a committed positivist, in that he believed that there was no logically necessary connection between law and morals or, to put it more simply, between the existence of law and legal institutions and any ethical notion of legitimacy.

Herbert brought to the task of addressing these issues his extensive practical legal experience and his wide knowledge of philosophical literature. He was also a master of clear and simple exposition; nothing written by Herbert ever degenerated into the pretentious gobbledegook that today so disfigures the law reviews. But in attempting to make sense of the way we think and talk about the institution of law, Herbert suffered from serious limitations. He was quite uninterested in the history of legal institutions. He knew little or nothing of comparative law or of the variety of legal traditions, which might have suggested that there was no such thing as a concept of law, but rather differing conceptions of law and legality, and of the place of legal institutions in the organization of social life. Although much influenced by Kelsen, he never seems to have attended to the fact that Kelsen’s legal theory evolved in the civil law tradition in which law that is the product of legislation occupies center stage, which is not the case in the common law world. In the course of writing *The Concept of Law*, he developed some interest in legal anthropology, but not enough to avoid serious mistakes—he thought, for example, that early or primitive legal systems did not contain what he called secondary rules, saying who can do what and how, whereas in fact all early societies had elaborate rules on whom one could marry. More radically, as he explained in 1988 to David Sugarman, describing his time as a barrister, “I soon began to discover that *I had no real interest in law as such*. My fundamental interests were in philosophy and, until my practice got too big, I read on the side a lot of philosophy.”⁷⁸

Law, as he explained, merely provided him with issues on which he could “philosophize”; I think he was referring to the fact that the operation of the law makes use of notions, such as responsibility and voluntary acts, in which he and other Oxford philosophers were at this time interested. After he joined the law faculty, it might be thought that he would have established intellectual contacts with legal academics and learned a little from them, but in Oxford he established a close rapport with only two members of the faculty. One was Rupert Cross, a commonsensical and pragmatic common lawyer, expert on the law of evidence, whom he came to respect.⁷⁹ From Cross he accepted guidance on the law relating to criminal responsibility, on

78. Sugarman, *supra* note 3, at 271 (emphasis added).

79. Rupert Cross (1912–1980) was a fellow of Magdalen College Oxford from 1948; he succeeded Harold Hanbury as Vinerian Professor 1964–79. He was blind.

which in due course he wrote a fair amount. His practice at the Chancery bar did not touch on criminal law at all.⁸⁰ Cross, however, although he taught seminars with Herbert, never became a coauthor. The other was Tony Honoré, with whom he wrote *Causation and the Law*.⁸¹ Lacey gives an extremely interesting account of this collaboration that brings out tensions that derived from Herbert's basic belief that lawyers had nothing interesting to tell philosophers about the matters in which he was interested. Given this underlying problem, it is somewhat remarkable that Herbert and Honoré produced such a distinguished book; their collaboration as writers did not, however, survive the experience. Honoré had interests in legal doctrine and its evolution, and in the history of legal institutions and cultures, that Herbert wholly lacked.⁸²

Herbert's low opinion of academic lawyers and their interests was somewhat undermined when he visited the United States and in particular Harvard Law School from 1956 to 1957. Lacey gives a fascinating account of his experiences, which must have been unsettling to an Oxford philosopher, accustomed to viewing academic lawyers in the main with disdain. There he did establish intellectual relations with a number of his colleagues; he was impressed by the quality of some of them. They compared, he thought, extremely favorably with their English equivalents; it was in the law school rather than in the philosophy department that the ablest minds were to be found. The more important were Lon Fuller and Herbert Wechsler, who was visiting Harvard at the time. Herbert nevertheless vehemently claimed that Fuller's legal philosophy was fundamentally flawed in a celebrated exchange in the *Harvard Law Review*.⁸³ Although Wechsler, like Cross, certainly helped to encourage Herbert's interest in criminal law and penology, he too held theoretical views that Herbert thought mistaken. I recall well Herbert's presentation on his return to the discussion group of a paper that was severely critical of Wechsler's view that there could exist "neutral principles" of constitutional law.⁸⁴ But he respected both Fuller and Wechsler.

Another Harvard academic who excited his respect was Henry Hart. But some other American scholars excited reactions little short of contempt; the unfortunate Professor Bodenheimer, who had attacked views set out in Herbert's inaugural lecture in Oxford, was savaged in an article

80. Cross was a friend of mine; together we once put on a seminar that we wanted to advertise as "Lowbrow Jurisprudence," but my recollection is that the faculty insisted on some more boring title.

81. H.L.A. HART & TONY HONORÉ, *CAUSATION AND THE LAW* (1959).

82. I appreciate that some of Honoré's theoretical writings on Roman Law are controversial; it would be quite inappropriate for me to address such controversies.

83. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); see also Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

84. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

published in 1957.⁸⁵ There is indeed no evidence that Herbert's experiences in his visit to the United States had the least influence on the legal theory he set out in *The Concept of Law*. They did, however, lead to a major revision of the draft of *Causation and the Law*, and to the development of an enhanced engagement with problems of punishment and responsibility (p. 188).

Herbert's two notable academic duels, one with Lon Fuller over the merits and possibility of legal positivism, and the other with Patrick Devlin over the merits and possibility of adhering to John Stuart Mill's contention that the law should proscribe only conduct that harms others, continue to be widely read even today. So far as the first is concerned, the ideas presented by Herbert were to be more fully developed in *The Concept of Law*, and so far as the second is concerned, the dispute between Herbert and Devlin was in effect a rerun of the nineteenth-century controversy between Mill and James Fitzjames Stephen, and did not throw up anything new in the way of fundamental ideas.⁸⁶ Herbert also produced distinguished work on issues surrounding the ethics of punishment and the concept of criminal responsibility, and later in his career devoted much energy to the publication of modern editions of the work of Jeremy Bentham, whom he regarded as the greatest English legal philosopher. He was not himself particularly cut out to be an editor, but the value of the Bentham project, which continues, is obvious. His principal contribution to legal philosophy remains, however, *The Concept of Law*.

That book has become the point of departure for a great proportion of subsequent writing in legal philosophy; following the example set by Ronald Dworkin, you either attack it, as he did, or defend it, as, for example, Joseph Raz has done, albeit with qualifications. The secondary literature is now immense, and the publication in 1998 of a fragmentary reply to his critics on which Herbert worked for many years has spawned a further secondary literature in the collection of essays published in 2001 as *Hart's Postscript: Essays on the Postscript to The Concept of Law*.⁸⁷ In a sense it has been downhill all the way—downhill, that is, from the lucidity and elegance of Herbert's writing to the unattractive elaborations of some of his critics and defenders, downhill from Herbert's direct analysis of law and legal institutions to writings about what other people have said about what other people have written about law and legal institutions. In British military

85. His inaugural lecture, H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1959), was attacked by Edgar Bodenheimer in Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of its Usefulness*, 104 U. PA. L. REV. 1080 (1956). For Herbert's reply, see H.L.A. Hart, *Analytical Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 593 (1957). For another example of Herbert's ability to be scathing about other scholars, see his ferocious review, *Dias and Hughes on Jurisprudence*, *supra* note 22.

86. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY: AND THREE BRIEF ESSAYS* (Univ. of Chi. Press 1991) (1873). Stephen's book first appeared in 1873, attacking JOHN STUART MILL, *ON LIBERTY* (Rowman & Littlefield 2004) (1859).

87. *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* (Jules Coleman ed. 2001).

circles there was, in my time, a bawdy monologue, much recited in pubs, which took the form of a bestiary. One of the creatures featured in it was the Fu-Fu Fly, which was said to fly in ever diminishing circles until it finally vanished up its own bottom, from which secure if unsanitary location it looked out at the world with scorn and derision. That, leaving on one side scorn and derision, is more or less the present picture in relation to much of the secondary literature on *The Concept of Law*.

Herbert himself came to have serious doubts about the merits of *The Concept of Law*, which, on one occasion, he called "that wretched book."⁸⁸ It does indeed suffer from some serious flaws and obscurities and contains claims that not everyone finds convincing. Lacey's biography provides a lucid account and evaluation of the criticisms that have been made. I shall mention only three further defects, selecting those that have featured hardly at all in the critical literature.

The first was a byproduct of the school of philosophy to which Herbert belonged. He conceived of a legal system as a system of rules, identified by a master rule, and then, without making this explicit, proceeded on the unstated assumption that rules must have texts; hence, problems over the proper application of a rule came to be viewed by him as problems created by the open texture of language.⁸⁹ This is well brought out in *The Concept of Law* when he discusses adjudication under the subheading "Interpretation."⁹⁰ This is quite radically mistaken; it is entirely possible for rules to exist without being codified in text at all. For instance, there is in English middle-class circles a rule, and one pretty widely respected, that when you are invited out to dinner you arrive bearing a bottle of wine. Not uncommonly the issue arises—what bottle will do? Must it be French? Or will Chilean be acceptable? White or red? Pinot Noir or Merlot? How expensive? Should the bottle be wrapped? If white, must it be transported chilled for immediate consumption? Or does this indicate an ungenerous desire to drink some of it oneself? Can one simply return the bottle that one's friends presented last time they were invited to dinner? Surely not. Is a bunch of flowers an acceptable substitute? What is the point of the convention anyway? These problems over the requirements of social convention have nothing whatever to do with the open texture of language, nor are they solved by attending to the text of the rule, for there is no text, and it would not help us if there were. Adjudication is often like that.

The second defect is that the book devotes virtually no attention whatever to the working of the common law tradition; indeed, the common law does not appear in the index and is hardly mentioned in the entire book. Had he attended to it, Herbert might have seen that his central concept, that of a rule of recognition, is an aspirational and idealized way of referring to the

88. P. 233. In his interview with David Sugarman, he also indicated that his book might be thought to be "misleading." See Sugarman, *supra* note 3, at 282.

89. He also used the image of the core and the penumbra; tricky cases were the product of the fact that the meaning of words became disputable in their penumbral area.

90. HART, *supra* note 71, at 204.

fluid conventions of legal argument and justification, not a description of some kind of metaphysical reality. Common law adjudication has no rules of recognition, written or unwritten. All it has is a set of conventional practices used to demonstrate propositions about what the law is, and the forlorn hope that these propositions may be frozen and encapsulated in some definite text. And uncertainties and disagreements as to how one argues the law are not problems about the open texture of the rule or rules of recognition. Herbert never engaged in any form of empirical study as to how, in the common law tradition, law emerges out of the process of argument and adjudication.

The third defect is that Herbert never gave the simplest account of the way in which law is supported by the use of coercive force. This support is provided through contract, defenses, and exceptions. For example, when one of the German spies whom Herbert was concerned about as an MI5 officer was executed by chief public executioner Albert Pierrepoint and his assistant, this came about through contract; Albert and his assistant were retained and paid for their work, in which Albert indeed took great pride.⁹¹ If you or I dragged someone to a gallows and hanged him, we should be in some legal trouble; but not Albert, for a complicated structure of defenses and exceptions to legal rules put him in the clear. It is, of course, necessary to the existence of a legal system in a practical sense that there must be people like Pierrepoint around and willing to do nasty things for money; even if everyone, or most people, were to submit voluntarily to being hanged or whatever—as indeed most people did since it was made plain that resistance was useless—you still, of course, would need an executioner.⁹² Nor does the law usually specify what may or may not be done to compel submission—it only has to be what is reasonably necessary. Everything beyond that is left open, and anything goes. Agents of coercion, such as prison officers, receive special training in violence and are today equipped with suitable hardware, such as stun guns and the like.⁹³

It might be imagined that a book that does not satisfactorily solve the problems it raises is some sort of failure, but to take this view would be to misunderstand the nature of philosophical inquiry. Philosophers do not solve problems; they generate them. From time to time philosophers have of course imagined that they have solved philosophical problems; the best known example is that of Wittgenstein, who, after the publication of his *Tractatus Logico-Philosophicus*, thought there was, for himself at least, no

91. Under the law at the time, relations between persons and the state were not contractual in the sense that they involved an enforceable contract. The executioner was not, however, employed by the state.

92. For a horrific account of this incident, see ALBERT PIERREPOINT, *EXECUTIONER PIERREPOINT* 138–41, 179 (1974), in which the spy is given the pseudonym Otto Schmidt. Terms of contract with Pierrepoint are reproduced between pages 104 and 105 in Pierrepoint's book.

93. See A.W. Brian Simpson, *Shooting Felons: Law, Practice, Official Culture, and Perceptions of Morality*, 32 *J.L. & Soc'y* 241, 247 (2005) for an account of one use of coercive violence (shooting with buckshot) to prevent the escape of felons from prison.

more work to be done and gave the subject up entirely.⁹⁴ In due course, however, he decided that this was a mistake, returned to philosophy, and raised new anxieties in those who could follow him. When Herbert resigned from the chair in Oxford, this was surely not because he thought he had solved all the problems he had raised, but merely that he suspected he had nothing further to say of any real value; he had done his best. In this display of modesty he was almost certainly mistaken.

So far as legal philosophy is concerned, one can be a happy and successful lawyer all one's life without worrying for a moment about the nature of legal obligation, or the sense in which rules can be said to exist, et cetera. It is, at least for most people, the consequence of reading legal philosophy that its victims, or devotees, come to think that there are profound and important intellectual puzzles about such concepts. If you think philosophizing matters—and I have always wondered how the question of whether it matters could be answered, or indeed whether the answer matters one way or the other—then the principal merits of Herbert's distinguished book do not lie in the solutions offered by him, but rather in the identification and analysis of the problems presented by his attempt to elucidate, as he put it, the concept of law. Elucidation, a concept that I often heard him use, is perhaps best explained by an analogy. If you visit an art gallery in the company of a communicative person who has a deep knowledge of the history and philosophy of art, you come away with the feeling that you now understand much more clearly what the artists were trying to do, why the paintings are as they are, where the artists have perhaps not achieved what was intended, what symbolism lurks in the compositions, and so forth and so on. But at the end of the day, no profound problems or puzzles may have been solved, and nothing concluded. Indeed, the process of elucidation throws up new fields for inquiry. This was the sort of work on which Herbert was engaged. As he himself put it in the preface to *The Concept of Law* back in 1961, "My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena."⁹⁵

In 1988, when asked to sum up his contribution to legal philosophy, he modestly replied:

I don't know what to say. I hope it has both enabled people to take a wider view of the nature of law and the problems that arise in the running of the legal system and [also that] it has given them a sensitivity to accuracy, clarity of expression, and its details. [But] it may be an illusion.⁹⁶

Herbert's real genius was indeed as a teacher, doing what the best teachers do: stimulating intellectual interest in their pupils in the subject they profess, not providing them with the correct answers, especially in areas where such things simply do not exist. We are fortunate indeed to have now

94. See generally NORMAN MALCOLM, *LUDWIG WITTGENSTEIN: A MEMOIR* (2d ed. 1984); RAY MONK, *LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS* 169–251, 309–27 (2000).

95. HART, *supra* note 71, at v.

96. Sugarman, *supra* note 3, at 293.

a sensitive and perceptive biography that enhances our understanding of this remarkable legal philosopher. Herbert himself has now been elucidated, insofar as anyone so complicated can be, and, as with the elucidation of the concept of law, we are left with new puzzles to address. I think he would be pleased about this.

