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H. L. A. Hart: A Life in the Perspective of Law and Philosophy; A Life of H. L. A.: The Nightmare and the Noble Dream, by Nicola Lacey

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Review Essay

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REVIEW ESSAY

H.L.A. HART: A LIFE IN THE PERSPECTIVE OF LAW AND
PHILOSOPHY[©]

*A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE
DREAM* BY NICOLA LACEY (OXFORD: OXFORD UNIVERSITY
PRESS, 2004) 422 pages.¹

BY KEITH CULVER²

Interviewer: "How would you sum up your contribution to legal philosophy?"

Hart: "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."³

Whatever the ultimate value of H.L.A. Hart's contribution to legal philosophy, his contribution is no illusion, and it is much more than a contribution of a particular view of law and the merits of the methods of its construction. Assessment of that value is, however, maddeningly difficult, even once we work past Hart's own mixture of hope, doubt, and self-deprecation, and on to the words of his colleagues.

Ronald Dworkin began his seminal 1967 attack on "the ruling theory of law," proffered by Hart, explaining that "I choose to focus on his position, not only because of its clarity and elegance, but because here, as almost everywhere else in legal philosophy, constructive thought must start with a consideration of his views."⁴ A decade later, in the year of Hart's seventieth birthday, Peter Hacker and Joseph Raz introduced

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¹ [*A Life of H.L.A. Hart*].

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³ David Sugarman, "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman" (2001) 32 *J. L. & Soc'y* 267 at 293.

⁴ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at vii.

their Festschrift for Hart in a similar vein, identifying Hart as the foundational figure of the rebirth of English-speaking jurisprudence. They wrote:

At mid-century political philosophy was said to be dead and legal philosophy appeared to be dying. The only fruits that could be obtained from that field of intellectual activity were the gleanings from ancestral sowings. A quarter of a century later a transformed landscape is revealed—legal philosophy flourishes as never before. The responsibility for this renaissance is H.L.A. Hart's. His work provides the foundations of contemporary legal philosophy in the English-speaking world and beyond. His teaching, in Oxford and elsewhere, has inspired many a young philosopher to turn to jurisprudence in the reasonable expectation of a good harvest.⁵

Many have done just that. As Zenon Bankowski put it, "Then, there was only him. Now, a hundred flowers bloom. This is his lasting contribution."⁶ Those "flowers" were, of course, not simply inspired by Hart's championing the intellectual and practical rewards of legal philosophy. They were and are compelled by his arguments, even as those who have done most to explore those arguments move beyond them. Consider, for example, Joseph Raz's reflections on Hart's application of philosophy of language to problems in legal philosophy:

There are probably no general lessons to learn from the story I have told, but it strikes me as a sad one. Very little seems to have been gained in all of Hart's forays into philosophy of language. The problems with the explanation of responsibility, legal agents such as corporations, the nature of rights and duties, the relations between law and morality—none of them was solved nor their solution significantly advanced by the ideas borrowed from the philosophy of language.⁷

There is something of a puzzle in this. While Hart is lauded for his contribution to legal philosophy's "transformed landscape," Hart and Raz both express doubt regarding the merit of substantial portions of Hart's commitments and efforts. How, then, should we understand

⁵ P.M.S. Hacker & J. Raz, eds., *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977) at v.

⁶ *Supra* note 1 at 361.

⁷ Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" in Jules Coleman, ed., *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford: Oxford University Press, 2001) 1 at 5-6. Compare Hart's words in 1983 in the introduction to his *Essays in Jurisprudence and Philosophy*: "These and other insights of modern linguistic philosophy are I think of permanent value, and the analytical study of the law has been advanced by them, but I certainly see a number of defects in my deployment of these ideas in my early essays." See H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 4 [Hart, *Essays in Jurisprudence*].

Hart's legacy? As Hart saw so well, "jurisprudence trembles so uncertainly on the margin of many subjects that there will always be need for someone, in [Jeremy] Bentham's phrase, 'to pluck the mask of Mystery' from its face."⁸ Was Hart that someone? A large part of the answer to that question can be found in Nicola Lacey's admirable new biography of Hart: *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*.⁹

Writing a review essay on Lacey's superb book is both eased and complicated by other appreciations of it. Some have been written by those who knew Hart, his circle, and his intellectual circumstances. Some have been written for the popular press. Each approach is informed by the interests of its author and the interests of the intended audience; from those whose interests and careers intersected with Hart's, to those with relatively little interest in legal philosophy and rather more interest in Hart as a figure from the age in which Oxford grew from a haven for "bright young people" to its present enviable stature. These approaches seem, however, to leave something of a gap, missing the interests of the emerging generation of legal philosophers for whom Hart is a revered figure, yet a figure known only at a distance. Even for those of us in some sense close to Hart, as I was while a student of Wil Waluchow and Joseph Raz, Hart's life and character were not an ordinary topic of discussion. There was no unspoken injunction against inquiry into Hart's life: it was simply clear that arguments are separable from their authors, and as legal philosophers, our chief concern is with arguments. Then and now this seemed to me a reasonable response to the danger of undue psychologizing regarding the motivation of particular arguments.

Perhaps something like a wariness regarding this danger underpins Professor Thomas Nagel's controversial *London Review of Books* review of *A Life of H.L.A. Hart*.¹⁰ Nagel castigates Lacey for both philosophical failures in her appreciation of Hart's intellectual context and incautious emphasis on personal matters irrelevant to intellectual biography. An exchange of sharply phrased letters to the *London Review*

⁸ H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1957) 71 Harv. L. Rev. 593 at 594.

⁹ *Supra* note 1.

¹⁰ "The Central Questions" *London Review of Books* 27:3 (February 2005) 12 [Nagel, "Central Questions"].

of Books has followed, ending rather strangely with Nagel's appeal to something like old-fashioned decency as the basis for one criticism, responding to objectors that

I agree with the writers of both these letters that the use of intimate material presents difficult issues, and that reasonable people can differ. My review expressed a personal view, that their use should be more restricted than is now customary, without the subject's express or implied consent, until a substantial time after his death.¹¹

Nagel presses on, condescendingly telling those who protested against his objection to Lacey's reading of J.L. Austin that "I was a student of J.L. Austin, and cannot help having a different view of his philosophical temperament and a different understanding of his influence on his contemporaries from what one could gather from his meagre published writings. (He died at the age of 48.)"¹² This appeal to personal experience and reminder of the well-known fact of Austin's early death is odd in itself, and especially odd when addressed to Simon Blackburn and Jeremy Waldron, eminent scholars well aware of the context of Austin's work. Yet Nagel's concerns are, to some extent, comprehensible and reasonable if one takes the internal, participant perspective of those who recall firsthand the intellectual milieu of the Oxford of Hart's times.

For Nagel and those who share his views, Lacey's reporting of unpleasant aspects of Hart's life may well appear unseemly and unnecessary, of little relevance to understanding Hart's arguments. Yet quite apart from the dangers of psychologizing arguments to the point where their logical strength is a lost factor in their assessment, there are equally significant dangers inherent in failing to understand arguments in the social context in which they arose and were treated as reaching salient conclusions or raising problems in novel and compelling ways.

There is little question that the new generation of legal philosophers can evaluate arguments on their own merits; yet this generation is very much in need of insight into the social context in which arguments were made. Lacey's thorough, balanced, and philosophically nuanced biography provides a superb resource for our understanding of Hart's social context. And I, at least, am grateful that Lacey resisted the urge felt by Nagel to omit discussion of painful parts

¹¹ Thomas Nagel, "Letters" *London Review of Books* 27:4 (February 2005) 4.

¹² Nagel, "Central Questions," *supra* note 10 at 12.

of Hart's life. Lacey has written this biography of Hart at a time when his students and some of his contemporaries are still available to give first-hand impressions of Hart and the notoriously self-conscious Oxford world. Far from embarrassing Hart, Lacey's fulsome use of Hart's and others' perceptions of themselves, one another, and their times show him to be a humane and duty-driven man, all too sensitive to the importance of doing well by friends and colleagues, while striving to leave legal philosophy in a better state than that in which he found it.

I. A LIFE IN LAW AND PHILOSOPHY

Lacey's title borrows from Hart's essay "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream,"¹³ an exploration of the "nightmare" situation in which the need for legal determinacy is persistently overwhelmed by variable exercise of judicial discretion,¹⁴ and the contrasting "noble dream" of legal determinacy in a legal order where "judges should apply to their cases existing law and not make new law."¹⁵ This arresting contrast is quickly put into context, as Hart explains the means by which he gained it, saying that "there are important aspects of even very large mountains which cannot be seen by those who live on them but can be caught easily by a single glance from afar."¹⁶ Characteristically, Hart's initial bold claims are followed by a precise indication of the borders of his argument:

But great areas of thought are not to be assessed by aphorisms torn from their context, and remembering Henry James's warning, I shall, in devoting most of this lecture to the concentration of American thought on the judicial process, claim only that this *is* one salient feature of American jurisprudence contrasting strongly with our own.¹⁷

It would be overreaching to suggest that Hart's life mirrored the oscillation visible in the structure of "American Jurisprudence through English Eyes," yet there is more than just heuristic value in an account of Hart's life that takes very seriously his sense that he lived in the midst

¹³ (1977) 11 Ga. L. Rev. 969, reprinted in Hart, *Essays in Jurisprudence*, *supra* note 7 at 123.

¹⁴ *Ibid.* at 126.

¹⁵ *Ibid.* at 132.

¹⁶ *Ibid.* at 123.

¹⁷ *Ibid.* at 124.

of temptations to extremes, his typical choice of a carefully identified mean between those extremes, and his occasionally falling prey to some extreme. Lacey's approach to these tensions is extraordinarily graceful, sometimes using section titles to suggest but not legislate an understanding of the consequences of a particular train of events in Hart's social circumstance, perceptions, and choices. Even as Lacey opens *A Life of H.L.A. Hart* recounting quite lightly the events leading to Hart's last period of flourishing, in his late seventies, she works beneath the warning offered in the introduction's title, "An Outsider on the Inside." This gestural approach to final judgement about Hart's life brings all available evidence to the reader and suggests rather than forces conclusions. Lacey expresses this dimension of her methodological commitments clearly at the outset:

I have tried to write about Herbert Hart in a way which opens up the different levels of meaning which might be given—indeed which, at different moments, he gave—to his life, without in the process being irritatingly tentative. I have also tried to end on a note which does justice to his achievements without obscuring his complexities. In these terms, the writing was a journey of "interpretation" rather than "discovery": though in saying this, I do not mean to imply that biography raises no questions of truth and falsehood, fact and fiction.¹⁸

Achievement and complexity are the unquestionable hallmarks of Hart's life, and Lacey's achievement lies in her unravelling of the tangle between the two. The relation between these hallmarks is usefully approached from the contrast between Lacey's work, *A Life of H.L.A. Hart*, and Professor Tony Honoré's brief yet comprehensive summary of Hart's career. This summary is well worth reproducing in full, as the backdrop against which Lacey's interpretation must be projected. Honoré wrote:

H.L.A. (Herbert) Hart (1907-1992) was the son of a Jewish tailor of Polish and German descent. He was educated at Bradford Grammar School and New College Oxford, where he obtained a brilliant first class in Classical Greats. He practised at the Chancery Bar from 1932 to 1940 along with Richard (later Lord) Wilberforce. During the war, being unfit for active service, he worked in MI5. During this time his interests returned to philosophy and in 1945 he was appointed philosophy tutor at New College. He was strongly influenced by the linguistic philosophy then current in Oxford, but employed its techniques more constructively than did most members of the movement. In 1952, given his chancery background, he was persuaded by J.L. Austin to be a candidate for the Oxford chair of Jurisprudence when Professor Arthur Goodhart resigned. He was elected and held the chair until 1969.

¹⁸ *Supra* note 1 at xix.

From 1952 on he delivered the undergraduate lectures that turned into *The Concept of Law* (1961, posthumous second edition 1994). He also lectured on right and duties, but these lectures were never published. He held seminars with Tony Honoré on causation, leading to their joint work *Causation in the Law* (1959, second edition 1985). His visit to Harvard in 1956-7 led to his Holmes lecture on "Positivism and the Separation of Law and Morals" (1958) and a famous controversy with Lon Fuller. Returning to the UK he engaged in an equally famous debate with Patrick (later Lord) Devlin on the limits within which the criminal law should try to enforce morality. Hart published two books on the subject, *Law, Liberty and Morality* (1963) and *The Morality of the Criminal Law* (1965). A wider interest in criminal law, stimulated by Rupert (later Professor Sir Rupert) Cross was signalled by his "Prolegomenon to the Principles of Punishment" (1959). Nine of his essays on the criminal law were collected in *Punishment and Responsibility* (1968). In 1968 he was asked by Oxford University to chair a commission on relations with junior members, then at a low ebb, and produced a notably perceptive and constructive report.

Feeling that his powers were waning Hart resigned his chair in 1969, to be succeeded by Ronald Dworkin, a severe critic of his legal philosophy. He now devoted himself mainly to the study of Bentham, whom, along with Kelsen, he regarded as the most important legal philosopher of modern times. Ten of his essays were collected in *Essays on Bentham* (1982). From 1973 to 1978 he was Principal of Brasenose College. In his last years he was much concerned to find a convincing reply to Dworkin's criticisms of his version of legal positivism. A sketch of Hart's reply is to be found in the postscript to the second edition of *The Concept of Law*.

Hart's main aim as a lecturer and writer was to tell the truth and be clear. He was the most widely read British legal philosopher of the twentieth century and his work will continue to be a focus of discussion.¹⁹

Consider, in light of this diplomatic account of Hart's life, Lacey's closing assessment in the final pages of *A Life of H.L.A. Hart*, marking in stark terms the gulf between his private and public personae:

It was appropriate that the public tributes to Herbert's life focussed on his colossal achievements, his large contribution to the infusion of legal policy with liberal values, his awesomely cultured persona, and his distinctively humane personal qualities. This public story of Herbert Hart's life was, of course, true; its validity in no way compromised by the equally true story of his struggle to overcome depression, his incompletely resolved attitude to both his sexuality and his Jewish and class origins, his volatile shifts between intellectual confidence and insecurity, his unconquerable emotional reserve, and his long-standing sense of not really being what he actually was: an influential and respected insider in the social and professional worlds in which he moved. Rather, in the light of these complexities, his intellectual, institutional, and personal achievements appear all the greater.²⁰

¹⁹ Tony Honoré, "H.L.A. (Herbert) Hart (1907-1992)," online: Legal Philosophy in Oxford <<http://www.law.ox.ac.uk/jurisprudence/hart.shtml>>.

²⁰ *Supra* note 1 at 363.

Honoré emphasizes achievement and adds gracenotes of complexity. Lacey places achievement in an enlarged context dominated by sometimes disturbing evidence of interwoven elements of complexity. Simply putting one picture over the other does not do much to demonstrate the full merit of Lacey's work, since the traits and events she identifies often well up and subside in Hart's life, only to resurface later in similar form, and sometimes in combination.

The tension between confidence and insecurity accompanied many crucial events in Hart's life, with confidence rooted in achievement, and insecurity rooted not just in a feeling of being an outsider, but in a deeper worry about the value of the life resulting from the choices he made—often after agonizing thought and discussion. This is not simply a matter of ordinary fluctuations between emotional highs and lows, but a persistent, acute, and sometimes paralyzing sense of the possibility of ruinous failure. No single instance of this enduring tension is especially telling—there is simply a series of events varying in their particular ingredients and effect on Hart's life. Let me trace a few illustrative examples in Hart's academic life, against the backdrop of Honoré's sketch.

Where Honoré passes seamlessly from Hart securing a "brilliant first class in Classical Greats" to Hart's next step toward his successful legal practice "at the Chancery Bar from 1932 to 1940,"²¹ Lacey's narrative provides one of many episodes of swings between intention, hope, achievement, and troubled reflection. She writes:

His refusal to contemplate achieving anything other than first class marks gives a sense of the exceptionally high standards which Herbert set for himself. But it was also born of the fact that, despite his resolve to go to the Bar, he was far from having abandoned his academic aspirations at Oxford. His reputation as an outstanding intellect had already brought him the offer of a lectureship in philosophy at Jesus College only months after his graduation. But his sights were set higher still. In 1929 he entered the Prize Fellowship competition at All Souls, the University's only college devoted exclusively to research.²²

Failure after his first attempt in this competition brought depression: "[R]eferences in later letters to a 'breakdown' at the time of the first failure show that he took it very hard."²³ Hart recovered and

²¹ *Supra* note 19.

²² *Supra* note 1 at 41.

²³ *Ibid.* at 42.

tried again, and again did not succeed and was troubled by this failure. Lacey writes: "When, at the end of a year during which he studied hard while supporting himself by teaching English, French, and even Scripture to public schoolboys at Rugby, he was rejected a second time, the disappointment was acute."²⁴ The imprint of a familiar pattern is visible here. In the wake of great achievement—a first, an enviable reputation, and an offer of employment—Hart's capacity to enjoy the fruits of that achievement was limited by his tendency to press still harder to achieve more, and achievement of anything less than the sought after goal brought upheaval.

It would be misleading to suggest, however, that all of these upheavals were damaging or counterproductive. Honoré notes that Hart "held seminars with Tony Honoré on causation, leading to their joint work *Causation in the Law* (1959, second edition 1985)" and goes on to describe Hart's visit to Harvard in 1956-57.²⁵ These were not entirely discrete events. Even as Hart enjoyed a signal triumph in delivery of his Oliver Wendell Holmes Lecture on "Positivism and the Separation of Law and Morals," other aspects of his experience of American approaches to jurisprudence caused misgivings and compelled Hart to action. Lacey quotes Hart's own unusually positive assessment of his delivery of the paper: "Uncharacteristically, he realized that the lecture had gone well: 'The Holmes curiously enough was a very great success. 250 or more and I had really prepared in the end something I thought quite good, and fairly polished.'"²⁶ While pleased with the reception given to this paper, Hart was troubled by his long and productive discussions with Herbert Wechsler regarding jurisprudential issues in criminal law, eventually deciding that *Causation in the Law* would need substantial redrafting to incorporate greater emphasis on policy issues connected with judicial and legislative handling of these issues. Hart's anxiety regarding his co-author's response to Hart's new insights was ultimately unfounded as Honoré agreed to undertake revisions, yet even with this matter out of the way, Hart's diary records his misgivings regarding his own capacity to refashion his contribution: "*Down panic, down* Better—a bit. Preface and Chapt I of book—passable. Felt at

²⁴ *Ibid.*

²⁵ *Supra* note 19.

²⁶ *Supra* note 1 at 197.

least the way more clearly defined. ... Of course part is that I don't *quite* know what I think and another part that this scale job demands better organizing powers than mine."²⁷ The end result of these efforts was widely lauded, revised in 1985 (largely by Honoré), and continues to be read as a seminal contribution to the topic.

In a similar vein, Hart's resignation from the Chair of Jurisprudence is not just a story of his sense that "his powers were waning," as Honoré puts it.²⁸ Lacey traces this complex path with great sensitivity, seeing in Hart's *Punishment and Responsibility* a loss of the kind of relentless urge to excellence expressed in Hart's earlier work: "But in *Punishment and Responsibility*, while references and the criticisms which they contain are minutely—almost obsessively—noted, their provocation is not really taken up. This foreshadowed his later frustrating and energy-draining preoccupation with responding to his critics."²⁹ When Hart resigned the Chair, all were surprised, and few were invited into Hart's thoughts to understand his choice. Lacey explains: "His admission to [his daughter] Joanna of his feelings about *Punishment and Responsibility* was one instance. Another was his remark to Joseph Raz, during one of their weekend excursions to the country, that he felt he had said everything he had to say and was perplexed about what to work on next."³⁰

There is a remarkable similarity here between the lives of Hart and Isaiah Berlin, as these old friends each struggled to surmount the obstacles that seemed, at least to them, to be crucial to their intellectual reputations. As Hart turned to editing Bentham and worrying about a reply to critics following his departure from the Chair, Berlin failed to complete the book on romanticism he had long expected to produce. Berlin's editor, Henry Hardy, explains that Berlin had hoped to write the book

²⁷ *Ibid.* at 211.

²⁸ *Supra* note 19.

²⁹ *Supra* note 1 at 283.

³⁰ *Ibid.* at 289.

ever since giving the (unscripted) A.W. Mellon Lectures on this subject, in March and April 1965, at the National Gallery of Art in Washington. In the years that followed, especially after his retirement from the Presidency of Wolfson College, Oxford, in 1975, he continued to read widely with a book on romanticism in mind, and a large mass of notes was accumulated But the new synthesis continued to elude him, perhaps partly because he had left it too late, and so far as I am aware, not so much as a sentence of the intended work was ever written.³¹

Further similarity follows, as Berlin's *Roots of Romanticism* and Hart's "Postscript" to *The Concept of Law* were both assembled by editors from incomplete draft material. Unlike Berlin, however, Hart managed to at least begin to face his challenge, albeit in halting steps spurred on by his editing of Bentham and the rich threads of argument begun by Bentham.³² Lacey rightly points to the importance of Hart's response to Dworkin in "Legal Duty and Obligation," written for *Essays on Bentham*.³³

³¹ H. Hardy, "Editor's Preface" in Isaiah Berlin, *The Roots of Romanticism* (Princeton: Princeton University Press, 1999) at ix-x.

³² Lacey's use of Hart's diaries is especially poignant here, recording the worries of a man in his seventies attempting to restore the wholeness of a point of view developed two decades before:

Quite panic-generating! But remember there is time and a *larger framework may present itself into which these revisions fit and mistakes calmly confronted: Stand back!*

And the next day:

So pick up task (struggles with my *soul* (a) to do this large task at all (b) to be able to be honest about errors without *wrecking* the book *Courage and calm both needed!* (*fantastic at 72!*)

Last night kept awake for a time by panic thought about this! Why not cool: what does it matter to confess errors even as large as this at my age? (Life of errors: why have I had success?)

As was usual with Herbert, the anxieties, broken nights, chaotic note-books, and intimidating list of "PLAIN ERRORS AND DIFFICULTIES TO BE MET" gradually generated steadily accumulating insights, as he worked his way exhaustively (and exhaustingly) through and took detailed notes on a huge number of critical articles, most of them by American authors. "Illuminating talks" with Joseph Raz contributed to this progress, and he began to feel his "spirits rising" and even to envisage "an Indian summer of work for publication."

See *supra* note 1 at 336.

³³ H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) 127 [Hart, *Essays on Bentham*].

Throughout the course of Hart's sharp shifts between intellectual confidence and despair, similar swings were evident in his attitude to the tangle of people, commitments, and events of his private life. Hart's intermittent engagement with his Jewish patrimony, his tentative homosexual feelings, his sense of his own emotional arrest at the point of truly deep engagement with others, and particularly his wife, Jenifer Hart—all of these undeniable facts of Hart's life and emotional constitution are in some way counterbalanced, albeit not always successfully, by his efforts to overcome them.

Hart's capacity for friendship, for example, was enormous and enormously resilient. Sir Christopher Cox, once Hart's tutor at New College, was a sounding board, an advisor, and a very demanding friend. Cox lived for a time in a cooperative arrangement with the Harts and others during the war, and notwithstanding Cox's evident intellectual power, his coarseness, depressions, and general eccentricity could only be tolerated by a great friend willing to take all as it came.³⁴ Fortunately, Cox recognised Hart's friendship for what it was, and Lacey reports Cox's frank acknowledgement of his debt in a letter congratulating Hart on his 1968 election to an Honorary Fellowship of New College: "This is tremendous news and for none more than one who owes you a very, very great deal—through the ages ...".³⁵

Other friends tried Hart's patience in even more violent ways, with effects careering on into Hart's family life. Perhaps the best indication of Hart's resilience is in his reaction to being told by Jenifer Hart in 1959 that she was pregnant: "His first question was, 'Was it his?' I assure him it is, but make him say whose he thinks it is if not."³⁶ Hart had good reason for concern, since he knew of Jenifer Hart's affair with Isaiah Berlin: "Herbert's 'ignorance' of the affair survived Berlin's confession to him, on at least two occasions, that he was in love with Jenifer."³⁷ When Jacob was born, Hart set aside his concerns regarding

³⁴ Any doubt regarding the burden Cox imposed on friendship can be easily dispelled. Consider, for example, the conduct Hart reports in a letter to Jenifer Hart: "Cox is in insanely wild spirits—obsessed again about his breasts. He cuddles them a great deal and this morning offered to squirt milk from them into my tea. He is so fat there that when it is shoved forward out of his pyjamas jacket it looks like the real thing. It gives him great pleasure." See Lacey, *supra* note 1 at 108.

³⁵ *Ibid.* at 109.

³⁶ *Ibid.* at 237.

³⁷ *Ibid.* at 177.

paternity as it became evident that Jacob suffered severe developmental difficulties; and while in the longer term both Jenifer and Hart worked effectively to assist Jacob, in early efforts, Lacey writes, "Herbert [Hart] was the driving force, with Jenifer remaining reluctant to face up to the real scale of Jacob's disabilities."³⁸

This willingness to face up to trying circumstances was by no means a one-off. Hart frequently brought his capacity for acute analysis to his own inner life, with results whose excruciating honesty must have been at least as disconcerting for Hart as they are for any reader of his diaries. While he visited Harvard in 1957, for example, his diary records his thoughts on his frail marriage and his homosexual leanings:

Meanwhile ... a noble letter from Jen which must have cost her hell to write. She says things could be alright if we could resume: what a blow my last 10 years of declining interest in that has been. Once we've spoken as much as this we can start afresh but there are the "perversions of my make up."³⁹

His letter in response to Jenifer is open and optimistic, generously taking on his share of the causes of their troubles:

It was *noble* of you to write like that and it must have been hell to write so, but I'm sure it will do a lot of good: I'm sure we can extricate ourselves from the psychological jam: and of course you mustn't ascribe it to any failure on your part. How could you, how could anyone cope better with my mixture of infantilism, pride, crudity?⁴⁰

It is extremely difficult to know what to make of these unburdenings beyond observing that their effects fell short of disaster: the Harts were married for fifty years and Lacey reports that Jenifer Hart was "horrified" by suggestions that she might resolve issues with Herbert Hart by separating from him.⁴¹

However discomfiting it may be to take up these examples of Hart's complex private life, the effort is worthwhile, I think, for those of us concerned to know how to mine more out of Hart's insights, and, crucially, when to stop. The idea that Hart's life divides between the nightmare and the noble dream is, in light of these examples, little more than an arresting phrase soon left behind as we examine Hart's life more

³⁸ *Ibid.* at 238.

³⁹ *Ibid.* at 204.

⁴⁰ *Ibid.* at 205.

⁴¹ *Ibid.* at 362.

comprehensively. What Lacey shows us in this deeper investigation is Hart's resilience in the face of his difficulties, a man exceptionally aware of what he at least thought his innermost desires, strengths, and weaknesses were, and prepared to confront those desires, strengths, and weaknesses when not overcome by depression. Hart's resilience had consequences for the choices he made, and in those choices there may be important resources for our understanding of aspects of Hart's legal philosophy.

II. EXPERIENCE AND THE RELATION BETWEEN LAW AND PHILOSOPHY

Lacey's work shows that at various times Hart found himself feeling that he lacked philosophical resources to continue. This is in itself an illuminating piece of biography, as it suggests that the limits to what may be teased out of Hart's arguments may be reached sooner rather than later. Hart did not just run out of time in which to offer responses to critics. Rather, as he said in the "Postscript" to the second edition of *The Concept of Law* (whose first part is consumed with a response to Dworkin and whose second part was not written but was to be composed of a response to other critics), his critics had been right in "more instances than I care to contemplate."⁴²

The limits of Hart's arguments may be further illuminated by consideration of what he did when philosophical success eluded him or could not be approached on satisfactory terms, from his turning to legal practice upon completion of his undergraduate degree, to his wartime experience of MI5, and on to his personally rewarding experience in the Monopolies and Mergers Commission, and later, his service as Principal of Brasenose College. Unlike many professional philosophers, the sum of Hart's professional experience was not philosophical. Hart's varied work in MI5 included a May 1945 investigative trip to Germany carried out after he had accepted a position at New College, Oxford. Hart's keen interest in what he saw led him to wonder whether he had made the right choice in returning to academic life and "made him wish that he had accepted the legal post in Germany which the civil service had

⁴² H.L.A. Hart, *The Concept of Law*, 2d ed. by J. Raz & P. Bulloch (Oxford: Clarendon Press, 1994) at 239 [Hart, *The Concept of Law*].

offered the previous year.”⁴³ Instead, he wrote an article on his experiences for *The Economist*,⁴⁴ and went on to Oxford. The insights Hart accumulated on this trip are not well recorded beyond his *Economist* article, yet there is something quite tantalizing in his remark that he gained what he recalled as the “impression of a crazy gang [in other words, Hitler’s government] living hand to hand—pulling off gigantic bluffs.”⁴⁵ How did this experience inform his sense of the distinction between legal and moral obligation? Is there anything in this experience motivating Hart’s response in “Positivism and the Separation of Law and Morals” to those “German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system”?⁴⁶

Similar reflections might arise out of consideration of Hart’s other experiences outside academic life. Eight years in legal practice gave him the foundation that gave his friend Douglas Jay reason to invite Hart in 1966 to serve as a part-time member of the Monopolies and Mergers Commission, which he did with great success and great interest until 1972 and his appointment at Brasenose. Lacey reports that Hart “was regarded as an outstandingly effective member of the Commission, applying not only his legal skills but also his general critical acumen in putting searching questions to the business people who appeared before the panel.”⁴⁷ Hart’s own feelings about his participation were wholly positive: “I loved [it]; it was fascinating: [One] had a sense of really being in the works. . . . I can’t imagine anything else I would have enjoyed as much as that.”⁴⁸ Hart’s later work on the governance structure of Oxford University provided him with a similar opportunity to blend principle with practice.

There are no firm grounds for association of these experiences with particular ideas in Hart’s philosophy of law. Yet there may be—in Hart’s diverse experience of a particular legal system, his experience of the collapse of another, and his experience of university-based systems

⁴³ Lacey, *supra* note 1 at 122.

⁴⁴ H.L.A. Hart, “Berlin—September 1945” *The Economist* (29 September 1945) 446.

⁴⁵ Lacey, *supra* note 1 at 120.

⁴⁶ *Supra* note 8 at 616.

⁴⁷ *Supra* note 1 at 284.

⁴⁸ *Ibid.*

of rules—a series of hints about the way we might regard his ambiguous engagement with empirical phenomena. In a particularly revealing passage, Lacey explores the extent of Hart’s engagement with sociology, long thought to be at best a case of too little, too late, and never really sufficient to explain Hart’s often-cited suggestion in the “Preface” to *The Concept of Law* that the book could be regarded as an exercise in “descriptive sociology.”⁴⁹ Lacey reports that Jean Floud, an Oxford sociologist sympathetic to Hart’s work, “pressed Herbert on why he had not taken more seriously the great early sociologists Max Weber and Emil Durkheim, and it was under her influence that he read Durkheim and Talcott Parsons and began to think about the implications of their thought for criminal law.”⁵⁰ Lacey further suggests that in light of his 1967 paper “Social Solidarity,” Hart is reasonably viewed as having an undesirable blind spot with regard to the recognition due sociological contributions to legal theory. Lacey writes:

His view boiled down to the idea that because the social sciences can never produce evidence as compelling as the natural sciences, they are not worth pursuing. This is a convenient rationalization for staying firmly within philosophical method, which is not the sort of enterprise which concerns itself with empirical data in the first place.

Herbert was, after all, a philosopher, and he worked within a philosophical community which conceived its own boundaries narrowly. But his scepticism about the potential for a fruitful exchange between legal theory and the social sciences had to do with more than just his disciplinary background. Philosophy was the imperial discipline at Oxford, and being a successful philosopher—even from the margins of the Law Faculty—meant being an insider.⁵¹

Lacey’s judgement here is certainly plausible, and bolstered by her discussion of Hart’s insistence that his set of questions was distinguishable from those of sociologists and historians;⁵² yet I take it as a virtue of her approach that it is possible to see the way to another view of the evidence she has gathered. I am surprised that Lacey asserts so firmly that the philosophical method is “not the sort of enterprise which concerns itself with empirical data in the first place” and that Hart was a philosopher who accepted this view.

⁴⁹ *Supra* note 42 at vii. On this matter see Leslie Green, “General Jurisprudence: A 25th Anniversary Essay” (2005) 25 *Ox. J. Legal Stud.* 565 at 576.

⁵⁰ *Supra* note 1 at 260.

⁵¹ *Ibid.* at 261-62.

⁵² *Ibid.* at 229-30.

Since at least W.V. Quine, philosophers have taken seriously the possibility of “naturalised philosophy,” that is, philosophy that is in some sense continuous with the natural sciences.⁵³ Philosophy plainly is, at least on this view, the sort of enterprise that can and ought to concern itself with empirical data. Questions remain, of course, regarding the status of the insights provided by social scientists, and here it seems right to distinguish between Hart’s concerns regarding the fruitfulness of the methods of social science and his approach to empirical evidence. Hart’s inclination against social science was not blind, and the facts of Hart’s life indicate a more complex, less than fully worked out relation of his legal philosophy to empirical phenomena. In his normative work in *Punishment and Responsibility*, for example, a great deal of empirical data is utilized; Lacey reports that, in 1970, Hart “worked with David Soskice, a young economics colleague at University College, to trace the statistical evidence which might illuminate declining recourse to dangerous ‘back-street’ abortions and hence bolster the utilitarian case for maintaining and indeed extending legal access to abortion.”⁵⁴ Hart’s teaching commitments within the University also demonstrated keen concern with the relevance of empirical data to legal theory. Lacey notes that Hart participated in a seminar on norms conducted by Brian Barry and Jean Floud, and “in 1966 joined forces with them in a seminar on ‘Sociological Evidence for Legal and Political Theories’.”⁵⁵

In all of this there is an obvious contrast between Hart’s use of empirical evidence in his contributions to normative philosophy and his comparative independence from such evidence in “descriptive and general”⁵⁶ analytical legal philosophy. What can be made of this? And more importantly for present purposes, what can intellectual biography do to deepen our understanding of the reasons for this contrast? It is likely too simple a solution to suppose that Hart was so thoroughly in the grips of Austinian linguistic philosophy that his philosophical contribution to law could be little more than a paean to linguistic philosophy. As Brian Leiter observes:

⁵³ See e.g. W.V. Quine, “Epistemology Naturalized” in *Ontological Relativity: And other Essays* (New York: Columbia University Press, 1969) 69.

⁵⁴ *Supra* note 1 at 302.

⁵⁵ *Ibid.* at 272.

⁵⁶ Hart, *The Concept of Law*, *supra* note 42 at 240.

Leslie Green has argued that the role of ordinary language philosophy in Hart's project has been overstated. ... In one sense this is true: there is only one *explicitly* ordinary-language argument in the book, the appeal to the difference in ordinary language between having an "obligation" and being "obliged" to do something as a way of showing that the Austinian analysis of the concept of law mischaracterizes the normativity of law. ... But insofar as Hart also subscribes to the Razian conception of legal theory described by Dickson—and I take it he does—then he shares a philosophically more important affinity with ordinary language philosophy: namely, the assumption (the *confidence*) that there are deep truths about reality, including social reality, to be found via careful consideration of ordinary concepts, whether or not we access those truths via explicit invocation of ordinary language.⁵⁷

Leiter's assessment, unfortunately buried in a footnote, is exactly right in its depiction of Hart's confidence in the value of consideration of ordinary concepts. Behind this confidence there remains a mystery to the extent that Hart supposed his hermeneutic concept of law answered different purposes than those urged by historians and sociologists, yet as an exercise in "descriptive analytical jurisprudence" it was not a piece of armchair philosophy but "a contribution to the study of human society and culture."⁵⁸ As a contribution to the study of human society, empirical evidence must enter. But how? How much? And from where?

Apart from Hart's admittedly incomplete statement and deployment of a descriptive-explanatory method in *The Concept of Law* (and given revised expression in the Postscript), there are other indications of the kind of empirical phenomena to which the method is to be applied. Lacey herself points to one of Hart's motivations for taking up the study of Bentham; Hart's admiration for what in the "Introduction" to *Essays On Bentham* he describes as "Bentham's extraordinary combination of a fly's eye for detail, with an eagle's eye for illuminating generalizations applicable across wide areas of social life."⁵⁹ The metaphor contained here, taking distance as an expression of a particular viewpoint, is repeated elsewhere, in the essay that inspired Lacey's title. In "American Jurisprudence through English Eyes," Hart justifies the lecture of an English lawyer to an American audience on their own experience with the reminder that aspects of large mountains

⁵⁷ Brian Leiter, "Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence" (2003) 48 Am. J. Juris 17, n. 93. See also Leslie Green, "The Concept of Law Revisited" (1996) 94 Mich. L. Rev. 1687; Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001).

⁵⁸ H.L.A. Hart, "Comment" in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987) 35 at 36–37.

⁵⁹ H.L.A. Hart, "Introduction" in Hart, *Essays on Bentham*, *supra* note 33, 1 at 4.

unnoticed by those on them can be seen “at a single glance” by those looking from a distance. Just what the “single glance” method consists of remains unclear, even as Hart is prepared, in some fashion, to apply it, as the detail he takes up is often concerned with clearly legal, and not exclusively philosophical, detail.

In “Legal Duty and Obligation,” the essay written for *Essays on Bentham* in which Hart begins to respond to Dworkin and to Raz, Hart welcomes Raz’s development of “detached normative statements” as “a valuable supplementation to my own distinction drawn in *The Concept of Law* between external statements about the law and internal statements made by those who accept the law.”⁶⁰ Yet Hart dissents from part of Raz’s analysis, and he does so on grounds ineluctably connected to the question of the role of empirical evidence in Hart’s legal theory. Hart writes:

I would quarrel, however, for reasons I explain later both with Raz’s characterization of the legal point of view from which he considers such detached statements are made and with his account of what is involved in the judges’ acceptance of the laws of their system. Into both of these Raz injects a moral element which is, I think, unrealistic but is necessary for his account of the normativity of legal statements of duty.⁶¹

At the root of Hart’s objection is a complaint that Raz gains consistency at the cost of an “unrealistic” account of an important dimension of his account of legal normativity. Description from afar of mountains in the distance is nonetheless description of mountains, Hart seems to say, and propositions about those mountains must correspond to verifiable facts about those mountains. Yet it is unclear in this passage and elsewhere just what Hart supposes is unrealistic about Raz’s view, and more importantly, which facts gained in what way allow Hart to reach this conclusion. I and many others have been puzzled by Hart’s claim, and have tried to flesh it out to evaluate its worth against Raz’s alternative.⁶² In “Legal Obligation and Aesthetic Ideals: A Renewed

⁶⁰ H.L.A. Hart, “Legal Duty and Obligation” in Hart, *Essays on Bentham*, *supra* note 33, 127 at 154-55 [Hart, “Legal Duty”].

⁶¹ *Ibid.* at 155.

⁶² A useful account of some of the tensions surrounding Hart’s and Raz’s views on legal normativity can be found in Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001). See especially lecture nine on “Authority and Reason” and lecture ten on “Practical Difference.” Both lectures were originally delivered as part of Coleman’s Clarendon Lectures in Law in 1998.

Legal Positivist Theory of Law's Normativity,"⁶³ I tried, for example, to expand on Hart's assertion that not just moral reasons, but "any reasons" will do as grounds for officials' acceptance of their duties. I departed from Hart's argument in response to Raz, which follows:

Far better adapted to the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a categorical reason to do but, as the etymology of "duty" and indeed "ought" suggests, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be properly demanded or extracted from them.⁶⁴

Hart argues that while judges must have "comprehensible motives" for accepting "enactments by the legislature as determining the standards of correct judicial behaviour and so as constituting reasons for applying and enforcing particular enactments,"⁶⁵ moral motives are not required. It is enough that judges "simply wish to continue in an established practice or that they had sworn on taking office to continue it or that they had tacitly agreed to do so by accepting the office of judge."⁶⁶ In trying to discern what might count as some of the "any reasons" that would demonstrate the unrealistic nature of Raz's argument, I developed an account of non-moral aesthetic ideals as a possible motivation for judicial acceptance of law in Hart's sense of acceptance, and attempted to ground that account on empirically substantiatable examples.

I remain convinced of the probative value of that argument, but I am now less sure of its force, and my uncertainty is driven by Lacey's account of Hart's motivations, engagement with empirical phenomena, and response to exasperated insistence that he ought to give greater consideration to sociology and history. I suspect now that my extension of Hart's vision is just that—an extension of Hart's vision at the same eagle's eye level resting on the "single glance" approach to apparently obviously salient empirical phenomena. The trouble with this extension, of course, is that this method of acquiring empirical data contains no

⁶³ Keith Culver, "Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law's Normativity" (2001) 14 *Ratio Juris* 176.

⁶⁴ Hart, "Legal Duty," *supra* note 60 at 159-60.

⁶⁵ H.L.A. Hart, "Commands and Authoritative Legal Reasons" in Hart, *Essays on Bentham*, *supra* note 33, 243 at 265.

⁶⁶ *Ibid.*

epistemic tests for reliability of the single glance, no criterial or other filters for relevance, and so on. This leaves Hart with few options with which to sustain his theory. He is committed to claiming that Raz's account is inferior because it is unrealistic, yet there cannot be assessment of the realistic quality of a theory of law as a social practice without empirical evidence, and Hart has set aside the social sciences as sources of empirical evidence and has only made a gesture toward the method for acquiring the required empirical evidence. The gesture may be sufficient if Hart or Hartians are willing to settle for a "thin" version of the concept of law, or what I have described as an "essentially vague" concept of law,⁶⁷ but Hart's wish to speak of "realistic" legal theory likely precludes this move. All that is left is the hope that there is something left to be found in Hart's arguments to drive a more robust approach to inclusion of empirical data.

Lacey's biography inclines me toward thinking that Hart knew perfectly well the value of empirical evidence to the realism of legal theory, and explored methods of incorporating that evidence into both his normative legal philosophy and his descriptive, normatively uncommitted legal philosophy, as seen in his participation in a seminar with Barry Stroud, and what John Finnis reports as his carefully marked up copies of work by Weber. Yet Hart simply couldn't see his way from his preferred eagle's eye view to a convincing account of the relation of empirical phenomena to that view. I suspect Brian Leiter's demand that legal philosophy be naturalized is now the only way to go for positivists who wish to go beyond exaggerated lexicography and haphazard, "single glance" incorporation of empirical data into the descriptive component of their nonetheless general legal theory. Perhaps this is a step too far for Hart, whose legal philosophy was intended to be properly philosophical, but whether Leiter is right is a matter for argument elsewhere.

What matters here is that Lacey's biography of Hart can be seen to matter not just to intellectual history but to legal philosophy. Lacey gives us the resources to see that, in Hart's own view, his argument was at an end: "I have to admit that in more instances than I care to contemplate my critics have been right."⁶⁸ We must stop looking to

⁶⁷ Keith Culver, "Leaving the Hart-Dworkin Debate" (2001) 51 U.T.L.J. 367.

⁶⁸ Hart, *The Concept of Law*, *supra* note 42 at 239.

Hart's arguments for further hints to be expanded into the "real" comprehensive Hartian view of things: we must press on without Hart.

III. CONCLUSION

Were it not for Professor Nagel's review, I might have written differently, perhaps confining myself to evaluating Lacey's work *qua* intellectual biography. Nagel's reaction has opened a different path, demanding consideration of the distinction between biography and history and the possibility that biography ought to condition intellectual history in ways typically given too little consideration in, at least, the limited context of legal philosophy. In making a case for a relation between Hart's life and his legal philosophy, I have necessarily encountered, albeit only tentatively, the question of how we ought to understand the relation of personal history to application of research method, arguing that in Hart's case there are discernible connections between his life and his philosophy that give us valuable insight into the limits of his arguments.

My discussion was straightforward and at least intuitively plausible; yet it is not the sort of discussion routine in legal philosophy. No one in philosophy of biology doubts for a moment that Darwin's biography is relevant to the development of his key insights, in turn driving a revolution in understanding of the problems of philosophy of biology. Why should philosophy of law be any different? Why is Hart's time in MI5 not legal positivism's voyage on *H.M.S. Beagle*? The answer, of course, lies in a version of the question Hart faced, and was unable to answer, in seeking an empirically robust philosophy of law. Why is it that lived experience, some of which is ostensibly the raw data of social science, is not relevant to understanding Hart's arguments while it is precisely that *kind* of data that must be included in any full-blooded response to the questions of legal philosophy? However we go about facing the challenge Hart left behind, and however we bring the single glance from afar into systematic legal philosophy, the fact that our next questions are so clearly laid before us owes a great deal to Lacey's wonderful biography and its stretch beyond biography into substantive legal philosophy.