

REVIEW

Nicola Lacey, **A Life of H.L.A. Hart: The Nightmare and the Noble Dream**, Oxford, Oxford University Press, 2004.

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This book contains 364 pages of reconstruction and bold embroidery of the professional and personal life of the celebrated jurist and Oxford don, Herbert ('H.L.A') Hart. Pages 365 to 422 consist of enlivened notes for each chapter, academic and oral bibliography, identification of notable personages, and an extensive index. The publication commences with methodological statements about the art of biography, 'living with one's subject', which aspiring biographers in general should find useful.

Professor Nicola Lacey set out to present to the world an account of the life of a recognisable and internally tortured human being, not an 'impersonal icon' or idol. In zones of academic philosophy, including economic theory, idolatrous attitudes towards intellectual 'gurus' are not unknown even when such attitudes are being disavowed by disciples. On the evidence presented in this book Herbert Hart virtually perambulated from one existential crisis to another and Lacey does sustain measured warmth towards, and admiration for, her subject in all his agony. Lacey attained her informed regard for Hart by primary and secondary grappling with Hart's writings and by immersion in the rafts of letters, diaries and working-notes, and by reliance on sharp recollections of many notable people who were enticed to reveal Hartian events and idiosyncrasies.

Much is owed by Lacey to the encouragement and helpful labour of Hart's vibrant widow, Jenifer. There should be no doubt that Jenifer Hart wanted Lacey to produce a portable *tour de force* in biography. This Lacey has done on the foundations of mounds of hard data and the hillocks of personal detail. Hart in effect obliged his biographer. He was a very epistolary person. His diaries were self-epistolary and he never adopted the habit of 'spring cleaning' anything physical including records

of his thoughts and feelings and the opinions, especially the 'clever' observations, of various academic characters.

In his mature years, Hart was expected to be a public figure of many parts. The availability of the written records, as well as the willingness of well-placed individuals to bear witness, enabled Lacey to weave a synthesis of the chronology of Hart's roles in distinct spheres of professional activity and the directions of his thought and missions as a theorist within Anglophone philosophy in the twentieth-century.

Lacey maintains a perspicuous style of writing with immediacy of tone. Throughout the book she refers to Hart as 'Herbert'. This avuncular appellation operates as a kind of window into Hart's interior life or 'soul'. Speculation by Lacey about Hart's motivations for, and emotions about, his ventures in theory and concomitant interactions with other people of institutional significance are threaded together in most chapters by resort to cultured, if commonplace, psychologism. This works as a literary technique to re-create for the reader the dynamics of Hart's life without overt neo-Jungian flourishes. We should be grateful for the (counter-Germanic) earthiness of this approach to the subject.

Herbert Lionel Adolphus Hart (1907–1992) was born in the northern English town of Harrogate, the third child of Jewish parents who owned and operated a substantial clothing business. Lacey provides a brief sketch of the environment of Harrogate and the neighboring city of Leeds and concludes that the Harts, 'furriers and costumiers', were essentially non-religious and were socially assimilated to the Anglo-Saxon society around them. Students of the history of jurisprudence in English-speaking jurisdictions would be aware that Julius Stone was born in Leeds, in the same year, also to Jewish parents. In her biography of Stone,¹ Leonie Star provides an encapsulation of the material modesty of his background and the clear commitment of his family to Judaism and to Jewish communal culture. The socio-intellectual formation of these two contemporaneous jurists was very different, Oxford notwithstanding, and it was reflected in a mutual lack of professional regard and their non-engagement concerning the content of legal philosophy. On the evidence marshaled by Lacey, Hart and Stone were cool and quite feline towards each other with the exception of one social occasion in their later years as guests of the late and eccentric Australian politician W C ('Bill') Wentworth.

In fact, the contrast between Hart and Stone should be marked, even to the untrained eye. Lacey confirms the impression that Hart was an Oxford don of his generation *par excellence* who was anxious to avoid giving offence to other members of the institutions to which he belonged, and who always observed an Anglomorph principle of philosophical

¹ Leonie Star, [Julius Stone: An Intellectual Life], (1992) ch 1.

economy in his writings. He also observed a highly disciplined practice in the length and frequency of footnotes and did not employ a regiment of researchers. For Hart the most appealing of Stone's monographs should have been the comparatively economical *Precedent and Law: Dynamics of Common Law Growth*², which was completed shortly before the death of Stone and, regrettably, after Hart had gone beyond the cusp of his time as an analytical legal theorist. This honed exposition of uses and applications of precedents, by itself, should have provided a sufficient reason for dialectical exchanges between them on the hammer and anvil of legal doctrine in courts – the leeways of choice which have to be made in appellate, and necessarily creative, judicial reasonings.

Unlike Stone, however, Hart was not a human object of anti-Semitism. Lacey could not detect serious signs of anti-Jewish prejudice directed at Hart. It appears that the sources of Hart's profound traumas were of a different order. Lacey arrests the reader not only by the employment of stylistic pungency at frequent points of interpretation but by laying bare with effulgence the core of various agonies of the man concealed behind the outward persona of the Oxonian 'Herbert'. Educated with distinction in classical languages, ancient history and philosophy ('Greats') at New College, Oxford, Hart entered his career with almost Edwardian upper middle-class self-expectations and habits of mind and behavior. Hart emerges from Lacey's account as an educated person of 'responsibility' who, in the main, dealt with familial tragedies and the hell that can well be other people with studied care ('temperance'), conditioned restraint and with what used to be called 'sheer human decency'. Lacey does not censor personal facts. She exposes: the civilised respect for the autonomy of his spouse Jenifer including her freedom to engage in passionate associations with other men including his close friend, the coruscating historian of ideas, Isaiah Berlin (Lacey supplies the relevant datum omitted in Michael Ignatieff, *Isaiah Berlin: A Life*³); the existence and care of his autistic son; the putative suicide of his father; the scurrilous and publicised attacks made upon him by an unbalanced former PhD candidate; and the frontal attacks on the foundations of his legal theory by his esteemed former pupil and successor in Oxford, Ronald Dworkin.

The spiritual well-springs of Hart's intellectual courage, discipline and social temperance; his stoicism, were drained temporarily by the grave 'insinuations' that his wartime position in MI5, alongside Anthony Blunt, would have enabled him to feed information to Jenifer, who had been a member of the British Communist Party. Herbert and Jenifer issued a writ for defamation but eventually settled the matter. Hart, however, suffered a nervous breakdown as a consequence and was treated clinically by electro-convulsive therapy. His conditioned stoicism

² Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985).

³ Michael Ignatieff, *Isaiah Berlin: A Life* (1998).

was insufficient to deal with this challenge to his integrity and he lacked a plebeian toughness of spirit to sail through the crisis from the outset.

Indeed the sub-title of this book could have been 'Agonies of a Civilised Don'. Lacey traces Hart's recovery from psycho-emotional disintegration following the 'spy scandal' allegations and his rehabilitation. This crisis occurred well after Hart's resignation from the Chair of Jurisprudence, and he resumed his life in Oxford as a refined figure who, in Lacey's view, 'had cultivated what we might call an assimilated – almost protestant – English persona'. Quotidian activities and encounters in the Hart household are elaborated with verbal drama in the 'confessional' memoir of an ex-nun, and a minder of Hart's disabled son, Karen Armstrong.⁴ Lacey acknowledges this memoir in the general bibliography, and both Armstrong and Lacey portray the strong atheism of Herbert and Jenifer Hart and its fusion with an ideological tolerance of the beliefs of others and with a very practical inter-personal humanism in the pursuit of *les petits plaisirs* of life, such as ocean bathing and walking in Cornwall, and making sandwiches with delicacy.

Whatever the swirls of his domestic and public lives, Hart as a philosopher drew upon, and elevated, experience. This was a category-commitment. In philosophy and its application to 'law' Hart held firmly to an established rock of British empiricism and remained trenchantly anti-metaphysical. Although not a professional philosopher, Lacey provides adequate synopses of Hart's propositions, especially those expounded in *The Concept of Law*.⁵

The evolution of Hart from Chancery barrister to Fellow and Tutor, New College, then Professor of Jurisprudence in Oxford and member of the Monopolies and Mergers Commission and to the last appointment of note, the Principalship of Brasenose College provides the core sequence of the book. The final chapter, 'The Nightmare and the Noble Dream' is taken from Hart's lecture 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream'⁶. In this exposition, reproduced in an essay in *Essays in Jurisprudence and Philosophy*,⁷ Hart counter posed reductionist versions of legal realist and declaratory positions: the conviction that judges 'always make and never find the law they impose on litigants' as opposed to the proposition that judges never really 'make' decisional law. For Hart both were illusory as descriptions of a general state of affairs (and, of course, both can operate as pedagogical as well as legal professional caricatures). The rest was already English positivist history forged by, and as an intellectual consequence of, *The Concept of*

⁴ Karen Armstrong, *The Spiral Staircase* (2004).

⁵ H L A Hart, *The Concept of Law* (1961).

⁶ H L A Hart, 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' (1977) 11 *Georgia Law Review* 969.

⁷ H L A Hart, *Essays in Jurisprudence and Philosophy* (1983).

Law. This work gave rise to the academic Hart industry and a revival of analytical or 'normative' jurisprudence as a field of enquiry. Lacey places *The Concept of Law* and its genesis in Hart's notes for lectures in the context of the post-War ascendancy of linguistic philosophy guided by the Oxford don John Langshaw ('J L') Austin. Reading the descriptions of Hart's central propositions of the systemic union of primary and secondary rules, indeterminacy of language, judicial discretion and the conceptual failure of what had been taken to be the nineteenth century 'command' theory of law, it becomes clear that Lacey does owe a special debt to Neil MacCormick.⁸ But Lacey is not overwhelmed by it. As a social scientist, she identifies with precision the philosophically sound but restricted and counter-sociological bounds of Hart's conceptual quest:

Herbert suggested that sociology can never match the test of empirical rigor which it sets for itself. 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.

Empiricists, like birds, have transmogrified into species. Hart was classifiable as a concept-empiricist infused categorically with linguistic analysis through J L Austin and Friedrich ('open texture') Waismann. With philosophical advice, Lacey could have simply made the point that Hart believed in the role of the sane and discerning societal observer capable of making and conceptualising a set of observation-statements. What is science? Lacey is concerned to conserve Hart's reputation as an abstract philosopher, however, and competently places his neo-utilitarian political and moral philosophy (itself speculative) as a project necessarily separate but related at societal nerve-ends (such as grounds for disobedience of valid but evil law) from the grand exercise in legal theory expressed in *The Concept of Law*. In the Oxford analytical tradition Hart, after all, did not waste words in his Preface: 'My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena.'

Australian readers of Lacey's narrative of Hart's theory of positivism could supplement their reflections by reference to a 'naïve empiricist' critique of Hart and MacCormick on Hart in *John Austin*.⁹ Unlike Hart, Professor Morison rejects both 'conceptualism' for the organisation of the subject-matters of the law and attribution of any 'performative' role for the language of the law. Juristic readers from New South Wales, if not beyond, equipped with ontological lenses of an older prescription will recognise in

⁸ Neil MacCormick, *H.L.A. Hart* (1981).

⁹ W L Morison, *John Austin* (1982) ch 6.

Morison a determined application of 'Andersonianism' to law.¹⁰ To save this Austin (not J L Austin) from consignment to the ashes of command theory and arid formalism in the expression of law, by reference to what Austin said and not what was later attributed to Austin, Morison reveals the naïve basis of his own commitment to a search for descriptive 'empirical equivalents' for concepts and principles of law free from entrapment in official dialectics used for legal professional purposes.¹¹

As *The Concept of Law* became influential in law schools, apart from university philosophy departments, it was the legal positivism of Hart, not the originating concept-empiricism *per se* that became the focus of attention. Even before 1961, Hart had to defend his positivism in the United States. In Chapter 8, Lacey paints a colourful and amusing picture of Hart at Harvard in 1956-7. It was in the Harvard Law School that Hart seems to have met primal opposition to positivism. Lacey distills his stay in Harvard, including the academic duel with the naturalist Lon Fuller that issued in the pages of the *Harvard Law Review*.¹² The material collected by Lacey for the account of Hart at Harvard unmasks what this reviewer would classify as a *fear* of positivism. In contemporary language, without imputed texture, such a fear could be diagnosed as a real 'phobia'. For instance, Lacey unearths evidence of a disposition or 'attitude' in an oral statement overhead by Hart about himself that 'you know he's a positivist, *but* he's quite a nice man... (emphasis supplied)'. Some Americans, reflecting a tendency to create and declare 'realities', could not accept a definition of 'law' as a system of power-rules unmediated by naturalist norms that are conceived as either anchored in another world or inherent, in some sense, in secular notions of law itself. Supra-empiricism on the part of natural lawyers, as well as historicist mystifications on the part of Common Law romantics, were not within the bounds of Hart's view of truth. Concept-empiricism enabled Hart to speak of a developed legal system as 'Janus-faced' in one direction towards social obedience and in the other the internalised acceptance, by officials of the system, of secondary norms. It justified the title of the book which, to his surprise, became for the *cognoscenti*, as well as masses of students, his *magnum opus*. In philosophy as a discipline such status always invites demolition, or at least definition of 'points of departure'. Such is the game. Lacey concludes the intellectual biography of her subject with a record of Hart's acute agony over the representation of his kind of theory of law by the political theorist and hermeneutician of law, Ronald Dworkin.

¹⁰ Ibid 169.

¹¹ Ibid 180-1.

¹² H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

It is a notorious fact that Hart was unable to complete the Postscript in reply to Dworkin even after the appearance of *Hercules* and the publication of *Law's Empire*.¹³ Lacey confirms the suspicion (not aroused by the compilers of the Postscript in final form, Penelope A Bulloch and Joseph Raz) that Hart could not make sense of 'Dworkin's approach to questions such as the nature of truth claims and the status of morality'. This summation is convincing and amounts to damnation of romanticism and moral advocacy disguised as descriptive revelation of states of juridical affairs. Commitment to empiricism and to professional *gravitas* inhibited Hart in the struggle against this form of American intellectual licentiousness.

Analytical jurisprudence, not conflated with moral philosophy and the worthy foci of political legitimacy, human rights and justice and the vistas of macro-sociology, is asked only occasionally to provide a central language for intellectual discourse about law. Analytical legal theory could simply become a *recherché* subject for specialists. Although, as MacCormick has observed:

The positivist thesis makes it morally incumbent upon everyone to reject the assumption that the existence of any law can ever itself settle the question what is the morally right way to act.¹⁴

In this biography Lacey has composed a rich account, with fine lineaments of detail, of the integrity of a philosopher-lawyer who attempted to open philosophy to lawyers on their turf. Hart should be saluted for his contribution to the struggle to define a vitally autonomous space for law in the twentieth-century and beyond, and to provide a clear frame of reference for the study of authoritative legal data. The accusation that for legal theory he promoted exclusively the study of what William Twining classified as 'high theory' would not have bothered him.¹⁵ In perspective it was conceived as part of larger battles against both the bewitchments of metaphysics, and fashions in cynical legal realism. Hart's 'concept of law' will at least become part of the history of ideas about law, from an age of positivisms.

Lacey salutes the memory of a virtuous man. Throughout the book the salutation conveys empathy and it is not difficult to ascribe to this biographer a genuine refrain: 'Herbert, I feel your pain'.

¹³ Ronald Dworkin, *Law's Empire* (1986).

¹⁴ MacCormick, above n 8, 25.

¹⁵ William Twining, 'Some Jobs for Jurisprudence' (1974) 1 *British Journal of Law and Society* 149.