

# REVIEW ESSAY

## “Plucking the Mask of Mystery from Its Face”: Jurisprudence and H.L.A. Hart

A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM. By Nicola Lacey. Oxford: Oxford University Press. 2004. Pp. xxii, 422. \$35.00

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[J]urisprudence trembles so uncertainly on the margin of many subjects that there will always be the need for someone, in Bentham’s phrase, to “pluck the mask of Mystery” from its face.<sup>1</sup>

Herbert Lionel Adolphus Hart, or H.L.A. Hart as he is commonly known, is widely held to be one of the greatest legal philosophers of the twentieth century. Many would disagree, insisting that Hart is *the* greatest, without qualification.<sup>2</sup> However that may be, there is little doubt that Hart’s work has had a powerful impact on the fields of jurisprudence and legal philosophy throughout the English-speaking world and beyond. Hart was Chair of Jurisprudence at Oxford University from 1952 to 1968, and the books and articles he published during this period, including *Positivism and the Separation of Law and Morals*,<sup>3</sup> *Causation in the Law* (with A.M. Honoré),<sup>4</sup> *The Concept of Law*,<sup>5</sup> *Law, Liberty,*

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1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958), reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49 (1983) [hereinafter *ESSAYS*].

2. Opinions differ, and some would probably give the nod to the Austrian jurist, Hans Kelsen. But most scholars would agree that Hart and Kelsen are the century’s two greatest legal philosophers. See, e.g., Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 168 (2005) (describing Kelsen and Hart as “the two dominant figures in twentieth-century legal philosophy”); John Gardner, Book Review, 121 LAW Q. REV. 329, 333 (2005) (reviewing NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004)) (affirming that “only Hans Kelsen seriously challenges Hart’s claim to be the most important legal philosopher of the twentieth century”).

3. Hart, *supra* note 1.

4. H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985).

5. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

*and Morality*,<sup>6</sup> and *Punishment and Responsibility*,<sup>7</sup> set a standard of excellence and influence that few are likely to rival. Other important legal scholars have occupied the prestigious Oxford chair, including Henry Maine (1869–1883), Frederick Pollock (1883–1903), Paul Vinogradoff (1903–1926), and Hart’s successor, Ronald Dworkin (1969–1998), but, with the possible exception of Dworkin, none have been more influential than Hart.

Until recently, little was known of Hart’s private life. That has now changed with the publication of Nicola Lacey’s *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*.<sup>8</sup> Drawing on a wealth of material, including Hart’s diaries, correspondence, and personal papers, as well as interviews with his family, friends, former students, and colleagues, Lacey paints a warm, sensitive, and highly revealing portrait of the man she calls “quite simply, the pre-eminent English-speaking legal philosopher of the twentieth century.”<sup>9</sup> The book is a valuable source of information on Hart’s life and scholarly career, and a wonderful complement to the numerous book-length assessments of his work that have already been published.<sup>10</sup>

Lacey is Professor of Criminal Law and Legal Theory at the London School of Economics and a notable legal theorist in her own right, particularly in the fields of criminal law theory and feminist jurisprudence.<sup>11</sup> She brings to her task not only a deep familiarity with Hart’s scholarship and the literature it has generated, but also a personal acquaintance with Hart himself. Lacey met Hart in 1979, when she was a twenty-one-year-old graduate student and he was a seventy-two-year-old professor emeritus.<sup>12</sup> She eventually became close with Hart and his family, initially because her first husband was a musician who gave lessons to Hart’s disabled son, and later through her own appointment as an

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6. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

7. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968).

8. LACEY, *supra* note 2.

9. *Id.* at 1.

10. *See, e.g.*, MICHAEL D. BAYLES, *HART’S LEGAL PHILOSOPHY: AN EXAMINATION* (1992); ERIC J. BOOS, *PERSPECTIVES IN JURISPRUDENCE: AN ANALYSIS OF H.L.A. HART’S LEGAL THEORY* (1998); NEIL MACCORMICK, *H.L.A. HART* (1981); MICHAEL MARTIN, *THE LEGAL PHILOSOPHY OF H.L.A. HART: A CRITICAL APPRAISAL* (1987); ROBERT N. MOLES, *DEFINITION AND RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION* (1987); DANIEL W. SKUBIK, *AT THE INTERSECTION OF LEGALITY AND MORALITY: HARTIAN LAW AS NATURAL LAW* (1990); *see also* *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* (Ruth Gavison ed., 1987); *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* (P.M.S. Hacker & Joseph Raz eds., 1977); *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* (Jules Coleman ed., 2001) (hereinafter *HART’S POSTSCRIPT*); *THE JURISPRUDENCE OF ORTHODOXY: QUEEN’S UNIVERSITY ESSAYS ON H.L.A. HART* (Philip Leith & Peter Ingram eds., 1988).

11. *See, e.g.*, NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* (1988); Nicola Lacey, *Feminist Legal Theories and the Rights of Women*, in *GENDER AND HUMAN RIGHTS* 13 (Karen Knop ed., 2004); Nicola Lacey, *Penal Theory and Penal Practice: A Communitarian Approach*, in *THE USE OF PUNISHMENT* 175 (Seán McConville ed., 2003); Nicola Lacey, *Feminist Perspectives on Ethical Positivism*, in *JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM* 89 (Tom Campbell & Jeffrey Goldsworthy eds., 2000).

12. LACEY, *supra* note 2, at xvii; G. Edward White, *Getting Close to H.L.A. Hart*, 29 *MELB. U. L. REV.* 317, 318 (2005) (reviewing LACEY, *supra* note 2).

Oxford Law Fellow. In a “Biographer’s Note on Approach and Sources,” Lacey observes that her personal relationship with Hart “was of tremendous help in writing this book” and made it natural for her “to write and think of Herbert Hart as ‘Herbert.’”<sup>13</sup> Because of this, and her desire “to bring alive on the page the complicated, very human man whom so many readers of his academic work think of as the impersonal icon, H.L.A. Hart,”<sup>14</sup> Lacey refers to Hart by his first name throughout the text. This practice has drawn criticism from some reviewers,<sup>15</sup> but on balance it probably enables Lacey to achieve the “enviously humane and affectionate touch” for which she has been rightly praised.<sup>16</sup>

*A Life of H.L.A. Hart* has sensational aspects, particularly the revelations featured prominently on the front flap<sup>17</sup> and back cover<sup>18</sup> of the hardcover edition that “behind his public success, Hart struggled with demons,” including his “Jewish background, ambivalent sexuality, and unconventional marriage”—all of which “contributed to a profound insecurity” that, with “allegations of espionage,” “nearly destroyed him.” Partly as a result of these revelations, but also due to its intrinsic interest, Lacey’s book has attracted widespread attention, and reviews of it have already appeared in the *Harvard Law Review*,<sup>19</sup> *Michigan Law Review*,<sup>20</sup> *Texas Law Review*,<sup>21</sup> and *Law Quarterly Review*,<sup>22</sup> as well as popular publications such as the *London Review of Books*<sup>23</sup> and *Times Literary Supplement*.<sup>24</sup>

As one might expect, reviewers have used the occasion to pursue a variety of themes, reflecting a broad range of academic interests. Thus Michael Kirby, Justice of the High Court of Australia and former student of Hart’s jurispruden-

13. LACEY, *supra* note 2, at xvii.

14. *Id.*

15. See, e.g., Thomas Nagel, *The Central Questions*, LONDON REV. BOOKS, Feb. 3, 2005, at 13 (objecting that Lacey “refers to [Hart] jarringly as ‘Herbert’ throughout, even when discussing his relations to other thinkers who are referred to by their last names”); Jeanne L. Schroeder, *Beautiful Dreamer: A Review of Nicola Lacey’s A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 77 U. COLO. L. REV. 803, 807 n.14 (2006) (“[G]iven Hart’s extreme sense of propriety, the use of his surname, like a hospital smock, might have better preserved his modesty during the intimate examination to which he is submitted.”).

16. Gardner, *supra* note 2.

17. “Nicola Lacey draws on Hart’s previously unpublished diaries and letters to reveal a complex inner life. Outwardly successful, Hart was tormented by doubts about his intellectual abilities, his sexual identity, and his capacity to form close relationships.”

18. “To generations of lawyers, H.L.A. Hart is known as the twentieth century’s greatest legal philosopher . . . . But behind his public success, Hart struggled with demons. His Jewish background, ambivalent sexuality, and unconventional marriage all contributed to a profound insecurity; allegations of espionage, though immediately quashed, nearly destroyed him. Nicola Lacey’s biography explores the forces that shaped an extraordinary life.”

19. Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (2006).

20. A.W.B. Simpson, *Herbert Hart Elucidated*, 104 MICH. L. REV. 1437 (2006).

21. Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 TEX. L. REV. 983 (2006).

22. Gardner, *supra* note 2.

23. Thomas Nagel, *The Central Questions*, LONDON REV. BOOKS, Feb. 3, 2005, at 12.

24. A.W.B. Simpson, *Stag-hunter and Mole*, TIMES LITERARY SUPPLEMENT (London), Feb. 11, 2005, at

tical “rival,” Julius Stone, examines Hart’s relationship with Stone, their respective influence in England and Australia, and their contrasting approaches to law, jurisprudence, Judaism, and Zionism;<sup>25</sup> A.W.B. Simpson, Hart’s former colleague and a noteworthy critic of *The Concept of Law* from a common law perspective,<sup>26</sup> provides a candid recollection of Hart and his impact on the Oxford legal community;<sup>27</sup> G. Edward White, author of biographies of Oliver Wendell Holmes, Jr.<sup>28</sup> and Earl Warren,<sup>29</sup> addresses the challenge of writing a biography of a famous academic whose family grants the biographer special access to the subject’s private papers without being unduly affected by this special access;<sup>30</sup> Frederick Schauer, a prominent legal philosopher working within the analytical tradition, attempts to reclaim some neglected aspects of Hart’s jurisprudence;<sup>31</sup> while John Gardner, the current holder of the Oxford Chair, discusses Hart’s philosophical influences, particularly J.L. Austin and Ludwig Wittgenstein.<sup>32</sup>

This Essay likewise traces an individualistic path, by examining a limited number of Hart’s ideas and Lacey’s interpretation of them from the perspective of my own interests in the contemporary cognitive sciences and their implications for jurisprudence and legal theory. The central argument I make is that while Lacey deserves considerable praise for her lucid and compelling account of Hart’s life and career, her exploration of his jurisprudential ideas and their roots in analytic philosophy lacks a sufficiently broad intellectual compass. Linguistics, psychology, and the philosophy of language and mind are much different today than they were in the 1940s and 1950s, yet Lacey does not discuss how such familiar events as the overthrow of logical positivism, the demise of behaviorism, the rise of generative linguistics, or the broader cognitive revolution<sup>33</sup> of which they were a part actually impacted Hart or should influence our understanding of his legacy. Surprisingly, none of these developments are taken up in this book, leading one to ponder the significance of their absence.

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25. Michael Kirby, *H.L.A. Hart, Julius Stone, and the Struggle for the Soul of Law*, 27 *SIDNEY L. REV.* 323, 336 (2005) (reviewing LACEY, *supra* note 2).

26. See A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* (SECOND SERIES) 77 (A.W.B. Simpson ed., 1973).

27. Simpson, *supra* note 20.

28. See, e.g., G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993); G. EDWARD WHITE, *OLIVER WENDELL HOLMES, JR.* (2006).

29. G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982).

30. White, *supra* note 12, at 317.

31. Schauer, *supra* note 19. Schauer’s review has since received a series of replies in the new *Harvard Law Review Forum*. See Ronald Dworkin, *Hart and the Concepts of Law*, 119 *HARV. L. REV. F.* 95 (2006), <http://www.harvardlawreview.org/forum/issues/119/jan06/dworkin.pdf>; David Dyzenhaus, *The Demise of Legal Positivism?*, 119 *HARV. L. REV. F.* 112 (2006), <http://www.harvardlawreview.org/forum/issues/119/jan06/dyzenhaus.pdf>; William Twining, *Schauer on Hart*, 119 *HARV. L. REV. F.* 122 (2006), <http://www.harvardlawreview.org/forum/issues/119/jan06/twining.pdf>.

32. See Gardner, *supra* note 2, at 330.

33. See generally HOWARD GARDNER, *THE MIND’S NEW SCIENCE: A HISTORY OF THE COGNITIVE REVOLUTION* (1987).

Although *A Life of H.L.A. Hart* is an intellectual biography, Lacey disclaims any attempt to provide an extended analysis of Hart's legacy.<sup>34</sup> Her book is therefore unlike some other notable monographs of the same general type which have appeared recently, such as Bart Schultz's biography of Henry Sidgwick,<sup>35</sup> Neil Duxbury's volume on Frederick Pollock,<sup>36</sup> or, somewhat further afield, Richard Burkhardt's study of Konrad Lorenz and Niko Tinbergen,<sup>37</sup> the founders of modern ethology, all of which critically evaluate their subjects' academic and professional accomplishments within broad intellectual parameters. That *A Life of H.L.A. Hart* does not do so is disappointing, but by no means fatal; on the contrary, Lacey's biography is a magnificent achievement within the confines she sets for herself. However, it does suggest that an important gap remains in our understanding of Hart and his place in the recent history of ideas. Even after the appearance of Lacey's marvelous book, we lack a proper overall assessment of Hart's contributions to the philosophy of law, the most definitive of which was published over twenty-five years ago.<sup>38</sup> This Essay therefore attempts to take an initial step in that direction, by examining a few select themes of Hart's legal philosophy and Lacey's interpretation of them in light of some recent developments in philosophy, linguistics, cognitive science, and law.

The Essay falls into four parts. Part I offers a brief sketch of Hart's life and career as described by Lacey in *A Life of H.L.A. Hart*. Readers already familiar with Lacey's book may wish to skim this section or skip ahead to Part II. Part II examines some of the major themes implicit in the book's subtitle, *The Nightmare and the Noble Dream*. At the close of Part II, I suggest that while Lacey deserves credit for her sympathetic portrait of Hart's complex inner life, she leaves unexplored some basic questions about Hart's jurisprudence and its connection to wider intellectual currents such as the modern revival of Universal Grammar and the broader cognitive revolution it helped inspire, along with the contemporaneous human rights revolution in constitutional and international law.

In Part III, which along with Part IV is the most substantial part of the Essay, I argue that one of the intriguing mysteries surrounding Hart's intellectual biography is his attitude toward these developments, which were already beginning to swirl around him during the period in which he occupied the Oxford Chair. Surprisingly, Hart wrote very little on these topics, despite having many opportunities to do so. Finally, in Part IV, I attempt to explain this puzzling state of affairs. Drawing on aspects of Hart's biography which Lacey brings to light, I

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34. LACEY, *supra* note 2, at xxii.

35. BART SCHULTZ, HENRY SIDGWICK: EYE OF THE UNIVERSE: AN INTELLECTUAL BIOGRAPHY (2004).

36. NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION (2004). Duxbury resists calling his book an "intellectual biography," *id.* at xi, but this distinction is immaterial to the point I am making.

37. RICHARD W. BURKHARDT, JR., PATTERNS OF BEHAVIOR: KONRAD LORENZ, NIKO TINBERGEN, AND THE FOUNDING OF ETHOLOGY (2005).

38. See MACCORMICK, *supra* note 10.

identify some of the factors which may have caused Hart to remain unaffected by these movements, despite their relevance to the theoretical traditions with which he was associated. I also attempt to put Hart's contributions to legal philosophy in proper perspective in light of these considerations.

## I.

*A Life of H.L.A. Hart* is divided into four parts. The first part ("North to South") consists of three relatively short chapters which trace Hart's early experiences as the third child of middle-class, first-generation Jewish parents of central European origin who ran a successful clothing business in Harrogate, a prosperous suburb in Yorkshire, England; Hart's years as an undergraduate at Oxford University in the late 1920s, where he studied "Greats" (i.e., classics, ancient history, and philosophy) and became friends with many future leaders of Great Britain; and Hart's early professional activities as practicing barrister in London from 1932 to 1940. The second part ("Change and Continuity"), also divided into three chapters, centers around Hart's relationship with Jenifer Fischer Williams Hart, the outspoken and politically active daughter of a British diplomat<sup>39</sup> whom Hart met in 1936 and married in 1941; Hart's war service in British military intelligence; and Hart's post-war transition from practicing lawyer and civil servant to the life of an Oxford philosopher.

The chapter which chronicles this transitional period in Hart's life ("Oxford from the Other Side of the Fence") is the book's longest and also one of the most interesting. It is here that Lacey begins to chart Hart's intellectual development and to situate him within the main philosophical currents prevalent in England in the 1940s and 1950s, primarily the so-called ordinary language philosophy of J.L. Austin, Gilbert Ryle, and others, but also logical positivism and the philosophy of Wittgenstein. In this chapter, Lacey also begins to explore the insecurity and self-doubt which, paradoxically, were to plague Hart throughout his remarkably successful career. To some degree these anxieties are understandable: when Hart returned to Oxford in 1945 and took up a position as a philosophy tutor, he did so after an interval of sixteen years. He was 38 years old and armed with only an undergraduate degree in philosophy. "By the standards of contemporary academic life, the idea that a former undergraduate with no further academic experience should be sought out for a permanent appointment over a decade after graduation is virtually unthinkable,"<sup>40</sup> Lacey observes. "Even by the standards of the 1930s and 1940s, it was extraordinary, and a testimony to the regard in which Herbert had been held as a student."<sup>41</sup>

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39. Jenifer Hart's father, Sir John Fischer Williams, was a prominent international lawyer who represented the British Government on the Reparations Commission in Paris after World War I and whose scholarship H.L.A. Hart cites in *The Concept of Law*. See JENIFER HART, *ASK ME NO MORE: AN AUTOBIOGRAPHY*, xi, 8 (1998) [hereinafter HART, *ASK ME NO MORE*]; HART, *supra* note 5, at 255-56 (citing John Fischer Williams, *Sanctions Under the Covenant*, 17 BRIT. Y.B. INT'L. L. 130 (1936)).

40. LACEY, *supra* note 2, at 114.

41. *Id.*

Still, it is surprising to discover how intellectually insecure Hart was at the time, as illustrated by a letter he wrote to his friend, Isaiah Berlin:

What I am tremendously doubtful about is the adequacy of my abilities and the strength of my interest in the subject . . . . My greatest misgiving (amongst many) is about the whole linguistic approach to logic, meaning . . . semantics, metalanguages, object-languages . . . . At present my (necessarily intermittent . . .) attempts to understand this point of view only engender panic and despair but I dimly hope that I cannot be incapable given time of understanding it. The solution or dissolution of philosophical problems in this medium is however at present incomprehensible yet terrifying to me. My main fear is that it is the fineness and accuracy of this linguistic approach which escapes my crude and conventional grasp and that it may be very difficult at 37+ to adjust one's telescope to the right focus . . . . As a result of this I have pictures of myself as a stale mumbler of the inherited doctrine, not knowing the language used by my contemporaries (much younger) and unable to learn it . . . .<sup>42</sup>

Hart taught philosophy at Oxford for seven years, from 1945 to 1952. During this period he published relatively little: only three papers and two book reviews, only two of which were directly related to law.<sup>43</sup> When Hart's predecessor, Arthur Goodhart, resigned as Chair of Jurisprudence in 1952, it was therefore largely on the strength of Hart's reputation for "cleverness"<sup>44</sup> and his connection with Austin, Ryle, and other influential Oxford philosophers that Hart was appointed to replace him. This raised eyebrows among the Oxford Law Faculty, with whom Hart had enjoyed little contact. "It's Goodhart without the good" is how a prevailing sentiment was expressed.<sup>45</sup> By contrast, Hart's appointment was a source of pride to the Oxford philosophical community, which saw Hart as one of their own and welcomed the opportunity to extend their influence. Lacey writes:

Quite apart from his high intellectual regard for Herbert, Austin's thinking was shaped by a belief that only a 'real' philosopher could elevate the Chair to a level of any intellectual credibility. This is strikingly reflected in his note of

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42. *Id.* at 115 (alteration in original).

43. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC'Y* 171 (1949) [hereinafter Hart, *The Ascription of Responsibility and Rights*], reprinted in *LOGIC AND LANGUAGE (FIRST AND SECOND SERIES)* 151 (Anthony Flew, ed., 1965); H.L.A. Hart, Book Review, 60 *MIND* 268 (1951) (reviewing JEROME FRANK, *LAW AND THE MODERN MIND* (6th prtg. 1949)); see also H.L.A. Hart, *A Logician's Fairy Tale*, 60 *PHIL. REV.* 198 (1951); H.L.A. Hart, *Is There Knowledge by Acquaintance?*, 23 *ARISTOTELIAN SOC'Y SUPP. VOL.* 69 (1949); H.L.A. Hart, *Signs and Words*, 2 *PHIL. Q.* 59 (1952) (reviewing JOHN HOLLOWAY, *LANGUAGE AND INTELLIGENCE* (1951)). In addition, Hart edited and wrote the preface to a book on Plato by Horace Joseph, one of his former teachers. See H.W.B. JOSEPH, *KNOWLEDGE AND THE GOOD IN PLATO'S REPUBLIC* (1948).

44. LACEY, *supra* note 2, at 151.

45. See HART, *ASK ME NO MORE*, *supra* note 39, at 131; A.M Honoré, *Herbert Lionel Adolphus Hart 1907–1992*, 84 *PROC. BRIT. ACAD.* 295, 302 (1994).

congratulation on Herbert's ultimate election: 'It is splendid to see the empire of philosophy annex another province in this way—not to mention the good you're going to do them.' One can imagine how members of the Law Faculty must have felt about this colonization, not to mention the triumphalism with which it was accomplished. For it was not only Austin's letter which illustrated the philosophers' sense of intellectual superiority: Magdalen Fellow Kurt Baier found it 'remarkable that lawyers can be so perceptive'; Richard Braithwaite wrote from Cambridge to celebrate Herbert's 'infiltration, or was it assault?', opining that 'Jurisprudence is quite futile unless it is treated as a branch of philosophy. But', he wondered, 'will you persuade the lawyers?'; Ryle was 'glad for the sake of the students who want to think'.<sup>46</sup>

In short, there was "a marked difference of tone between the philosophers and the lawyers. While the philosophers were warm and exultant, the lawyers were merely polite."<sup>47</sup> There were exceptions, however; Hart's closest friend on the Law Faculty, A.M. Honoré, wrote an unsigned notice for a university newspaper welcoming his appointment, while another lawyer, R.V. Heuston, wrote Hart to say he "looked forward to Herbert providing a 'town planning scheme' for the 'intellectual slum of English Jurisprudence.'"<sup>48</sup>

In retrospect, Heuston's remark was prophetic, for Hart's appointment became a significant turning point in modern Anglo-American legal thought. Hart revived the largely moribund discipline of English jurisprudence and restored it to a prominent position alongside its more influential German and American counterparts.<sup>49</sup> Indeed, over the next several decades, Hart managed, with the help of a talented group of students and colleagues, including Ronald Dworkin, John Finnis, Ruth Gavison, David Lyons, Neil McCormick, Herbert Morris, Joseph Raz, and Robert Summers, to launch a minor intellectual revolution in the philosophy of law, which quickly spread beyond its original borders and integrated parts of academic law and analytic philosophy in a manner now largely taken for granted, although not without its influential critics.<sup>50</sup>

In Part Three ("The Golden Age"), which is the heart of the biography and comprises nearly half of its 364-page narrative, Lacey describes the trajectory of Hart's career during this period in lush and illuminating detail. The centerpiece is a useful introduction to *The Concept of Law*, a book which eventually sold over 150,000 copies and cemented Hart's worldwide reputation.<sup>51</sup> How-

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46. LACEY, *supra* note 2, at 149.

47. *Id.* at 149–50.

48. *Id.* at 150.

49. See Honoré, *supra* note 45, at 302. See generally Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV. 1 (2005) (arguing that English jurisprudence between Austin and Hart was largely inert); W.L. Twining, *Academic Law and Legal Philosophy: The Significance of H.L.A. Hart*, 95 LAW. Q. REV. 557 (1979) (same).

50. See, e.g., RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (criticizing the influence of philosophers on legal scholarship).

51. LACEY, *supra* note 2, at 218–19, 222–33.

ever, Lacey also covers virtually every major event during this part of Hart's career, including his 1953 inaugural lecture<sup>52</sup> and subsequent exchange with Edgar Bodenheimer over the limits of analytic jurisprudence in the *University of Pennsylvania Law Review*;<sup>53</sup> his year-long visit to Harvard Law School in 1956–1957, which culminated in Hart's debate with Lon Fuller over legal positivism and natural law in the *Harvard Law Review*;<sup>54</sup> Hart's appointment in 1959 as President of the Aristotelian Society; his debate with Patrick Devlin over the legal enforcement of sexual morality;<sup>55</sup> Hart's first book, *Causation in the Law*, co-authored with Honoré;<sup>56</sup> his second visit to the United States in 1961–1962, when he spent a sabbatical at U.C.L.A. and traveled to Berkeley to debate Hans Kelsen;<sup>57</sup> his trip to Stanford University in 1962 to deliver the Harry Camp Lectures, which later became *Law, Liberty and Morality*;<sup>58</sup> and his first visit to Israel in 1964 to deliver the Lionel Cohen Lectures, which later became *The Morality of the Criminal Law*.<sup>59</sup>

For readers of this *Journal*, Lacey's chapter on Hart's visit to Harvard Law School in 1956–1957 will prove especially engaging. Here one learns that, in addition to forming a steady friendship with Fuller, Hart maintained regular contacts with Paul Freund, Erwin Griswold, Henry Hart, Roscoe Pound, and—most interestingly—Herbert Wechsler, who was also visiting Harvard that year while working as Lead Reporter on the American Law Institute's Model Penal Code. As Lacey recounts, Hart (Herbert, not Henry) and Wechsler engaged in lengthy discussions of criminal responsibility, punishment, and causation, the last of which convinced Hart to modify the approach to causation he and Honoré were then taking in *Causation in the Law*. As a result, Hart and Honoré

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52. H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954), reprinted in ESSAYS, *supra* note 1, at 21.

53. See Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080 (1956); H.L.A. Hart, *Analytical Jurisprudence in Mid-Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957); see also Edgar Bodenheimer, *Analytical Positivism, Legal Realism, and the Future of Legal Method*, 44 VA. L. REV. 365 (1958) (responding to Hart's reply).

54. See Hart, *supra* note 1 at 627; Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). The Hart-Fuller debate did not end here but continued for over a decade. See HART, *supra* note 5, at 195–207 (discussing Fuller and the separation thesis); LON L. FULLER, *THE MORALITY OF LAW* 133–45 (1964) (criticizing *The Concept of Law*); H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing and responding to FULLER, *supra*); LON L. FULLER, *THE MORALITY OF LAW* 187–242 (rev. ed. 1969) (responding to critics, including Hart).

55. See Patrick Devlin, Maccabean Lecture in Jurisprudence: The Enforcement of Morals (March 18, 1959), reprinted in PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1 (1965) (defending the legal enforcement of morality); H.L.A. Hart, *Immorality and Treason*, LISTENER, July 30, 1959, at 162 [hereinafter Hart, *Immorality and Treason*], reprinted in THE PHILOSOPHY OF LAW 83 (Ronald Dworkin ed., 1977) (criticizing Devlin); see also HART, *supra* note 6 (same); H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW: TWO LECTURES* (1965) [hereinafter HART, *THE MORALITY OF THE CRIMINAL LAW*] (same); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1968) (same).

56. See HART AND HONORÉ, *supra* note 4.

57. See H.L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709 (1963).

58. See HART, *supra* note 6.

59. See HART, *THE MORALITY OF THE CRIMINAL LAW*, *supra* note 55.

decided to reconstruct their book in the form of a debate with the policy-oriented approach to causation espoused by Wechsler and other American lawyers.<sup>60</sup>

Lacey's chapter on Hart's visit to Harvard is also full of interesting and amusing anecdotes, including one which sheds light on Hart's relationship with Dworkin, who was a student at Harvard Law School at the time. Here one discovers that as early as the mid-1950s, Hart had expressed anxiety about the implications of Dworkin's ideas for his own legal theories, which Hart had encountered when he served as an examiner on Dworkin's undergraduate law exams at Oxford in 1955. Hart was therefore keen to seek out Dworkin and have dinner with him during his subsequent visit to Harvard.<sup>61</sup> Another interesting story reveals that the famous Hart-Fuller debate almost never came to pass because of some overly intrusive edits by the editors of the *Harvard Law Review*.<sup>62</sup> There are some notable omissions here and elsewhere,<sup>63</sup> however, which are surprising in an intellectual biography such as this one. For example, although Hart held an appointment in the Philosophy Department during his Harvard visit, Lacey does not say whether he had any contact with W.V.O. Quine, the dominant figure in American philosophy at the time, or what Hart thought of Quine's influential criticisms of the analytic-synthetic distinction.<sup>64</sup> What, for instance, was Hart's reaction to the reply to Quine which his Oxford colleagues, H.P. Grice and P.F. Strawson, had written the previous year?<sup>65</sup> Surprisingly, there is no discussion of this topic here or elsewhere in this book, nor of its implications for Hart's understanding of the scope and methods of analytical jurisprudence.

Suffering from "a loss of intellectual confidence and the feeling that he had no further original contribution to make,"<sup>66</sup> Hart took an early retirement from the Oxford Chair in 1968, after helping to facilitate the selection of Dworkin as his successor. Nevertheless, he continued to lecture and write on philosophical topics, and he remained an active member of the Oxford community. From 1968 to 1972, Hart held a Senior Research Fellowship at University College, and in 1972 he was elected Principal of Brasenose College, a position he held until his retirement in 1978. During this period, Hart also assumed a leading role in The Bentham Project, a long-standing (and ongoing) effort to organize, edit, and publish the huge mass of mostly unpublished manuscripts Bentham

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60. LACEY, *supra* note 2, at 188, 209–14.

61. *Id.* at 185–86.

62. *Id.* at 200.

63. *See infra* notes 122–43 and accompanying text.

64. *See* W.V.O. Quine, *Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20 (1951). We do learn that Hart was close with Burton Dreben and Morton White, LACEY, *supra* note 2, at 179, 186, but Lacey does not discuss their views on the analytic-synthetic distinction either, a subject to which White had also recently contributed. *See* Morton White, *The Analytic and the Synthetic: An Untenable Dualism*, in JOHN DEWEY: PHILOSOPHER OF SCIENCE AND FREEDOM 316, 324 (Sidney Hook ed., 1950).

65. *See* H.P. Grice & P.F. Strawson, *In Defense of a Dogma*, 65 *PHIL. REV.* 141 (1956).

66. LACEY, *supra* note 2, at 297.

had bequeathed to University College, London, at his death. For his part in this project, Hart brought forth together with J.H. Burns a new edition of two of Bentham's major works, *An Introduction to the Principles of Morals and Legislation*<sup>67</sup> and *A Comment on the Commentaries and a Fragment on Government*.<sup>68</sup> Hart also served as sole editor of Bentham's *Of Laws in General*,<sup>69</sup> and he wrote a series of important essays on aspects of Bentham's legal and political thought, which later appeared in a 1982 volume, *Essays on Bentham*.<sup>70</sup>

In the last section of the biography ("After the Chair"), Lacey chronicles these and other events in Hart's life which occurred between 1968 and 1992, when he passed away at the age of eighty-five. These chapters often make for sad and painful reading, because Hart's final years were not, generally speaking, happy or contented ones. In 1983, four years after a major spy scandal in Britain in which Anthony Blunt, a fellow intelligence officer with whom Hart shared an office during World War II, was exposed as a KGB agent, Jenifer Hart gave a series of interviews in which she spoke candidly of her pre-war Communist sympathies, as well as certain contacts she had then with individuals she later realized were Soviet agents. News outlets began covering the story, and shortly thereafter the *Sunday Times* published an article under a sensational headline which insinuated that Hart himself may have been guilty of espionage.<sup>71</sup> The Harts sued for defamation and their friends rallied around them in a show of support, but the experience turned out to be devastating for Hart, who eventually suffered a nervous breakdown and had to be admitted to a psychiatric hospital, where he underwent electro-convulsive shock therapy.<sup>72</sup>

As Lacey recounts, Hart's last decade was also marked by his complex and increasingly strained relationship with Dworkin<sup>73</sup> and by Hart's ongoing struggle to formulate a definitive response to numerous criticisms of *The Concept of Law*, particularly those pressed by Dworkin in *Taking Rights Seriously*<sup>74</sup> and *Law's Empire*.<sup>75</sup> "Dutiful to the last," she writes, "he could not bring himself to give up the effort, but his energy was running out."<sup>76</sup> Hart's response to his critics remained largely unfinished at the time of his death, but one relatively polished section responding to Dworkin was published posthumously in 1994,

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67. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1780/1789).

68. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., Univ. of London 1977) (1774–1776).

69. JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., Univ. of London 1970) (1782).

70. H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY (1982) [hereinafter ESSAYS ON BENTHAM]. Hart also published a collection of his philosophical essays in 1983 spanning the entire length of his career. See ESSAYS, *supra* note 1.

71. "I Was a Russian Spy" Says *M15 Man's Wife*, SUNDAY TIMES, July 17 1983, cited in LACEY, *supra* note 2, at 339.

72. LACEY, *supra* note 2, at 344–45.

73. *Id.* at 330–35.

74. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

75. RONALD DWORKIN, LAW'S EMPIRE (1986).

76. LACEY, *supra* note 2, at 352.

as an appendix to the second edition of *The Concept of Law*.<sup>77</sup> “Hart’s Postscript,” as it has become known, has since generated a significant secondary literature of its own<sup>78</sup> and has become an important, if controversial, part of Hart’s legacy.<sup>79</sup>

## II.

The subtitle of *A Life of H.L.A. Hart*, and the title of its final chapter, is drawn from a lecture Hart delivered in 1977 and later published in the *Georgia Law Review*,<sup>80</sup> in which Hart contrasts two competing tendencies in American jurisprudence: the “nightmare” that judges always or frequently make law<sup>81</sup> and the “noble dream” that they never or rarely do.<sup>82</sup> Hart describes these tendencies as “two extremes with many intermediate stopping places.”<sup>83</sup> He associates the first with prominent American legal realists like O.W. Holmes, Karl Llewellyn, and Jerome Frank, and the second primarily with Ronald Dworkin, whom Hart, with a nod to Shakespeare, calls “the noblest dreamer of them all.”<sup>84</sup>

Lacey’s subtitle is well chosen, for it encompasses multiple meanings and furthers several different objectives, all of which are helpful in understanding the significance of Hart’s life and accomplishments. One of these objectives is to recall that Hart’s contributions to the theory of adjudication and to legal theory generally are notable for their moderation and good sense, indeed that Hart often conceived of those contributions in Aristotelian fashion as a mean between extremes. This much is evident in the *Georgia Law Review* essay itself, where after giving the nightmare and the noble dream their due, Hart endorses

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77. H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

78. LACEY, *supra* note 2, at 353.

79. See generally HART’S POSTSCRIPT, *supra* note 10. For Dworkin’s response to Hart, see Dworkin, *supra* note 31; Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004).

80. H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977). The title of Hart’s essay echoes in turn a famous article by the German jurist, Gustav Radbruch. See Gustav Radbruch, *Anglo-American Jurisprudence through Continental Eyes*, 52 LAW Q. REV. 530 (1936).

81. Hart, *supra* note 80, at 972 (“Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them . . . . The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment—on an extreme view, always, and on a moderate view, very frequently.”).

82. *Id.* at 978 (“Like its antithesis the Nightmare, [the Noble Dream] has many variants, but in all forms it represents the belief, perhaps the faith, that, in spite of superficial appearances to the contrary and in spite even of whole periods of judicial aberrations and mistakes, still an explanation and justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide.”).

83. *Id.* at 971.

84. *Id.* at 981–82. Hart does not explain the Shakespeare reference, but presumably he has in mind Antony’s description of Brutus as “the noblest Roman of them all.” See WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 5, sc. 5.

the “unexciting truth” that judges sometimes make law and sometimes find it.<sup>85</sup> This remark echoes a famous passage in *The Concept of Law*: “Formalism and rule-skepticism are the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them.”<sup>86</sup> Moreover, the same theme pervades Hart’s entire corpus and in many ways encapsulates it. Hart explains the main thesis of *The Concept of Law* in these terms,<sup>87</sup> and he uses the same device in the book’s opening chapter to characterize certain excessive tendencies of natural law and legal realism.<sup>88</sup> Likewise, in *The Morality of the Criminal Law*, Hart defends a “moderate” position on the elimination of mens rea in criminal liability, in contrast to both the forward looking doctrine of radical utilitarian reformers like Lady Barbara Wooten and the backward looking approach of traditional retributivists like James Fitzjames Stephens.<sup>89</sup> In *Between Utility and Rights*,<sup>90</sup> Hart seeks to navigate the twin shoals of “the old faith in utilitarianism and the new faith in rights.”<sup>91</sup> In *Causation in the Law*, Hart and Honoré attempt to occupy a middle ground on the issue of proximate causation, that is, “to reject causal minimalism without embracing causal maximalism.”<sup>92</sup> Throughout his career, Hart can be seen resisting the pull of bold and exciting but ultimately excessive and untenable arguments, and Lacey presumably wishes to recall this about him.

Lacey’s subtitle is also significant because it helps to focus our attention on an important but easily overlooked part of Hart’s career, namely, the period stretching from the mid-1970s until his nervous breakdown in 1983, whereupon his productivity slowed considerably.<sup>93</sup> This is when Lacey first met Hart, and along with the other images her book evokes, she presumably wishes us to remember Hart as she remembers him then: accomplished, confident, distinguished—“to all external appearances, a contented, successful, emotionally and

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85. Hart, *supra* note 80, at 989.

86. HART, *supra* note 5, at 144.

87. *Id.* at 208 (“The idea of a union of primary and secondary rules to which so important a place has been assigned in this book may be regarded as a mean between juristic extremes. For legal theory has sought the key to the understanding of law sometimes in the simple idea of an order backed by threats and sometimes in the complex idea of morality. With both of these law has certainly many affinities and connexions; yet, as we have seen, there is a perennial danger of exaggerating these and of obscuring the special features which distinguish law from other means of social control.”).

88. *Id.* at 8 (“[T]he assertion that ‘an unjust law is not a law’ has the same ring of exaggeration and paradox, if not falsity, as ‘statutes are not laws’ or ‘constitutional law is not law’. It is characteristic of the oscillation between extremes, which make up the history of legal theory, that those who have seen in the close assimilation of law and morals nothing more than a mistaken inference from the fact that law and morals share a common vocabulary of rights and duties, should have protested against it in terms equally exaggerated and paradoxical. ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.’”).

89. HART, *THE MORALITY OF THE CRIMINAL LAW*, *supra* note 55, at 5–29, 24–25.

90. H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1983), *reprinted in* ESSAYS, *supra* note 1, at 198.

91. *Id.* at 221.

92. HART & HONORÉ, *supra* note 4, at xxxv.

93. LACEY, *supra* note 2, at 328–53.

financially secure man.”<sup>94</sup> Additionally, it was during this period that Hart wrote not only his *Georgia Law Review* essay, but also the chapters of what became *Essays on Bentham*, plus a whole series of additional publications, including sparkling commentaries on six highly influential books of moral and political philosophy: John Rawls’ *A Theory of Justice*,<sup>95</sup> Robert Nozick’s *Anarchy, State, and Utopia*,<sup>96</sup> Ronald Dworkin’s *Taking Rights Seriously*,<sup>97</sup> J.L. Mackie’s *Ethics: Inventing Right and Wrong*,<sup>98</sup> Gilbert Harman’s *The Nature of Morality*,<sup>99</sup> and Peter Singer’s *Practical Ethics*.<sup>100</sup> Though not widely read today, all of these essays are insightful and repay careful reading. As Lacey observes, unlike some of his other writings, “the tone of these essays of the mid-1970s is assured and decisive; it is as if Herbert’s primary focus on the work of other scholars relieved him of a sense of pressure to speak in his own voice and enabled him, paradoxically, to do just that.”<sup>101</sup> Lacey finds Hart’s initial responses to Dworkin during this period especially noteworthy,<sup>102</sup> describing them as “assured and magisterial,”<sup>103</sup> in contrast to “the tragedy of the ‘Postscript,’”<sup>104</sup> whose quality she finds “uneven”<sup>105</sup> and other scholars have described as “frail and defensive,”<sup>106</sup> “not wholly convincing,”<sup>107</sup> even “petulant, whiny . . . [and] peevish.”<sup>108</sup> By drawing attention to this unduly neglected period of Hart’s career, therefore, Lacey implies that his legacy vis-à-vis Dworkin should depend less on the *Postscript* than on the more confident arguments of these earlier publications.

Finally, Lacey’s subtitle implies that Hart’s life itself was both a nightmare and a noble dream. This is in many ways the book’s unifying theme; according to Lacey, the “contrasts between external success and internal perplexities, between being an insider but feeling like an outsider, constituted dynamic

94. *Id.* at 1.

95. H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534 (1973), reprinted in *ESSAYS*, *supra* note 1, at 223 (discussing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)).

96. Hart, *supra* note 90 (discussing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974)); H.L.A. Hart, *1776–1976: Law in the Perspective of Philosophy*, 51 N.Y.U. L. REV. 538 (1976) [hereinafter Hart, *1776–1976*], reprinted in *ESSAYS*, *supra* note 1, at 145 (same).

97. See, e.g., Hart, *supra* note 80 (discussing DWORKIN, *supra* note 74); Hart, *supra* note 90 (same).

98. H.L.A. Hart, *Morality and Reality*, N.Y. REV. BOOKS, Mar. 9, 1978, at 35 (reviewing J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977) and GILBERT HARMAN, *THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS* (1977)).

99. *Id.*

100. H.L.A. Hart, *Death and Utility*, N.Y. REV. BOOKS, May 15, 1980, at 25 (reviewing PETER SINGER, *PRACTICAL ETHICS* (1979)).

101. LACEY, *supra* note 2, at 326.

102. See Hart, *supra* note 80; Hart, *supra* note 90; and Hart, *1776–1976*, *supra* note 96. See also H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM*, *supra* note 70, at 127–61.

103. LACEY, *supra* note 2, at 333.

104. *Id.* at 353.

105. *Id.*

106. Gardner, *supra* note 2, at 7.

107. Honoré, *supra* note 45, at 318.

108. Schroeder, *supra* note 15, at 814, 816.

tensions which shaped almost all of Hart's work and relationships."<sup>109</sup> Lacey focuses throughout the book on four of Hart's "internal perplexities"<sup>110</sup>—his sexual orientation, Jewish identity, intellectual insecurity, and unconventional marriage—and she produces ample evidence to suggest that Hart did, indeed, struggle with them to varying degrees. For example, we learn that Hart was by his own account a "suppressed homosexual," whose lack of sexual appetite for his wife caused a severe strain on their marriage;<sup>111</sup> that Jenifer Hart had numerous affairs with other men, including his best friend, Isaiah Berlin, and the political philosopher, Michael Oakeshott;<sup>112</sup> that Hart suffered periodic doubts about the worth of his ideas and grappled his entire life with depression, anxiety, and panic attacks;<sup>113</sup> that he was torn between his "underlying sense of Jewish identity and an intellectual commitment to its moral irrelevance";<sup>114</sup> and that although Hart often projected "a highly anglicized, patrician, almost colonial persona"<sup>115</sup> and was largely welcomed into elite English culture, he also endured some appalling acts of anti-Semitism.<sup>116</sup>

Yet, as critics have noted, the connection between these revelations and the growth and development of Hart's ideas is not altogether clear.<sup>117</sup> Moreover, one cannot help wondering whether by focusing on these rather sensational aspects of Hart's personal life, Lacey has missed an opportunity to explore certain basic questions about his legal philosophy and its links to wider philosophical currents. I mentioned one example earlier: Hart's attitude toward the analytic-synthetic distinction. Recently, Brian Leiter, Ian Farrell, and other scholars have drawn attention to the potential implications of Quine's criticisms of the distinction for the viability of conceptual analysis as a jurisprudential method,<sup>118</sup> and since this issue seems likely to become a focal point of future

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109. LACEY, *supra* note 2, at 3.

110. *Id.*

111. *Id.* at 61, 74.

112. *Id.* at 174, 177–78.

113. *See, e.g., id.* at 3, 115, 127, 291, 297.

114. *Id.* at 271.

115. *Id.*

116. *See, e.g., id.* at 33–35, 54, 313–14.

117. *See, e.g.,* Nagel, *supra* note 15, at 12 ("[Lacey's] claim that the personal material is needed to write an intellectual biography is a pretence"); Simpson, *supra* note 20, at 1449 (doubting whether "all the revelations as to Herbert's private and family life cast any real light on his academic work"); White, *supra* note 12, at 330 ("[I]t is hard to see how the domestic and sexual dynamics of the Hart household had an effect on the development of Hart's ideas and the course of his career"). *See also* Déidre M. Dwyer, *The Three Lives of Herbert Hart*, 26 OXFORD J. LEGAL STUD. 411, 417–21 (2006) (examining several difficulties with Lacey's reliance on Hart's diaries and private correspondence and suggesting that her use of this personal material is only partially justified).

118. *See, e.g.,* Farrell, *supra* note 21, at 1001 n.88; Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART'S POSTSCRIPT, *supra* note 10, at 355, 366–70; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 44–50 (2003); *see also* John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, in CURRENT LEGAL ISSUES: LAW AND PHILOSOPHY (Ross Harrison ed., forthcoming 2007).

debates in the philosophy of law, one wishes that Lacey had shed light on Hart's own views of the matter. Another example is Hart's apparent debt to Strawson: although much ink has been spilled over Hart's controversial remark in the Preface to *The Concept of Law* that his book could be viewed as "an essay in descriptive sociology,"<sup>119</sup> Lacey does not explore whether, as seems likely, Hart's remark was originally simply a paraphrase of the subtitle of Strawson's 1959 book, *Individuals: An Essay in Descriptive Metaphysics*,<sup>120</sup> and if so, what if anything follows from this fact.<sup>121</sup> Yet issues like these are really just the tip of the iceberg. Here are some further questions about which one is naturally curious but which *A Life of H.L.A. Hart* fails to illuminate:

1. What was Hart's view of psychological behaviorism and its impact on the philosophy of language and mind? Did he welcome the efforts of Skinner, Watson, and other behaviorists to make psychology scientific by ridding it of references to unobservable mental states?<sup>122</sup> To what extent, beyond the similarity of their titles, is *The Concept of Law* indebted to Ryle's *The Concept of Mind*?<sup>123</sup> Did Hart embrace Ryle's criticisms of "the dogma of the Ghost in the Machine"?<sup>124</sup> In particular, did he concur with Ryle that common beliefs about "Reason and Conscience" are a "nursery myth"?<sup>125</sup> What role did behaviorism play in Hart's preoccupation with the ontological status of legal rules?<sup>126</sup> Was it a latent commitment to behaviorism that led him to assume that for a rule to be something other than a mere habit, it must be prescriptive or normative?<sup>127</sup>
2. What did Hart think of the analogy Rawls drew in *A Theory of Justice* between moral theory and generative grammar?<sup>128</sup> Did he share Dworkin's view that Rawls' analogy was "exciting" because it implied the

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119. HART, *supra* note 5, at v ("Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false.").

120. See P.F. STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* (1959).

121. Although Lacey takes up Hart's remark in her Leon Green '15 Lecture in Jurisprudence at the University of Texas Law School, she does not discuss the parallel to Strawson's title there either. See generally Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945 (2006). For Hart's own brief explanation of his prefatory remark, which does not refer to Strawson or any other writer, see David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J. LAW & SOC'Y 267, 291 (2005).

122. See generally B.F. SKINNER, *VERBAL BEHAVIOR* (1957); JOHN WATSON, *BEHAVIORISM* (1925).

123. GILBERT RYLE, *THE CONCEPT OF MIND* (1949).

124. *Id.* at 15–16.

125. *Id.* at 315.

126. See, e.g., HART, *supra* note 5, at 8 ("What are rules? What does it mean to say a rule exists?").

127. See, e.g., *id.* at 9 (contrasting "mere convergent behavior and the existence of a social rule"); *id.* at 10 ("What then is the crucial difference between merely convergent habitual behavior in a social group and the existence of a rule of which the words 'must', 'should', and 'ought to' are often a sign?"); *id.* at 11 ("What can there be in a rule apart from regular and hence predictable punishment or reproof of those who deviate from the usual patterns of conduct, which distinguishes it from a mere group habit?").

128. See RAWLS, *supra* note 95, at 45–52.

existence of “innate categories of morality common to all men, imprinted on their neural structure”?<sup>129</sup> Did he concur with Hare that the analogy is fundamentally inapt?<sup>130</sup> Was Hart intrigued that Fuller had also compared rules of justice with rules of grammar?<sup>131</sup> Did he recognize that Ryle, Ross, and Oakeshott had done so as well?<sup>132</sup> What did Hart make of the fact that Simpson’s interpretation of classical common law theory also drew the same comparison: “Formulations of the common law are to be conceived of as similar to grammarians’ rules, which both describe linguistic practices and attempt to systematize and order them”?<sup>133</sup> How did Hart react to Simpson’s contention that *The Concept of Law* simply ignores the common law and therefore is necessarily defective?<sup>134</sup>

3. What was Hart’s response to generative linguistics itself? Did he welcome the modern revival of Universal Grammar?<sup>135</sup> Did it spark an interest in Bentham’s writings on Universal Grammar,<sup>136</sup> or lead him to investigate the connections Bentham drew between Universal Grammar and Universal Jurisprudence?<sup>137</sup> Did it cause him to reassess the philosophical significance of Bentham’s theory of fictions?<sup>138</sup> What did Hart think of his colleagues’ reactions to Chomsky’s research program? Did he share Austin’s enthusiasm for *Syntactic Structures*?<sup>139</sup> Was he sympathetic to Ryle’s criticism of Chomsky’s defense of innate ideas?<sup>140</sup> Did he share Strawson’s interest in Chomsky’s work on deep structure and grammatical transformations?<sup>141</sup>

129. DWORKIN, *supra* note 74, at 158.

130. See R. M. Hare, *Rawls’ Theory of Justice*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE* 81, 85–86 (Norman Daniels ed., 2d prtg. 1989).

131. See LON L. FULLER, *THE MORALITY OF LAW* 5–13 (rev. ed. 1969).

132. See, e.g., MICHAEL OAKESHOTT, *The Tower of Babel*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 59, 61–62 (1962); W.D. ROSS, *FOUNDATIONS OF ETHICS* 169 (1939); RYLE, *supra* note 123, at 316.

133. Simpson, *supra* note 26, at 94.

134. See generally *id.*

135. See generally NOAM CHOMSKY, *CARTESIAN LINGUISTICS: A CHAPTER IN THE HISTORY OF RATIONALIST THOUGHT* (1966) (describing the Enlightenment origins of Universal Grammar).

136. See generally C.K. OGDEN, *BENTHAM’S THEORY OF FICTIONS* (1932). See also JEREMY BENTHAM, *Chrestomathia* (1843), reprinted in 8 *THE WORKS OF JEREMY BENTHAM* 1, 150–55, 185–91 (John Bowring ed., Thoemmes Press 1995) [hereinafter *WORKS*]; JEREMY BENTHAM, *A Fragment on Ontology*, reprinted in 8 *WORKS*, *supra*, at 193; JEREMY BENTHAM, *Essay on Language*, reprinted in 8 *WORKS*, *supra*, at 295; JEREMY BENTHAM, *Essay on Logic*, reprinted in 8 *WORKS*, *supra*, at 213; JEREMY BENTHAM, *Fragments on Universal Grammar*, reprinted in 8 *WORKS*, *supra*, at 339.

137. See, e.g., BENTHAM, *supra* note 67, at 6, 294–95; BENTHAM, *supra* note 68, at 418; BENTHAM, *supra* note 69, at 251. See James E. Crimmins, *Bentham’s Philosophical Politics*, 3 *HARV. REV. PHIL.* 18, 20 (1993) (noting that Bentham’s manuscripts on the fundamental elements of Universal Jurisprudence—some 614 pages—still await publication).

138. See generally OGDEN, *supra* note 136.

139. NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957). See also G.J. Warnock, *John Langshaw Austin, A Biographical Sketch*, in *SYMPOSIUM ON J.L. AUSTIN* 3, 14–15 (K.T. Fann ed., 1969) (observing that Austin taught *Syntactic Structures* in his last “Saturday mornings” seminar before his death).

140. See GILBERT RYLE, *Mowgli in Babel*, in *ON THINKING* 95 (1979) (reviewing ZENO VENDLER, *RES COGITANS: AN ESSAY IN RATIONALIST PSYCHOLOGY* (1972)).

141. See Peter F. Strawson, *Grammar and Philosophy*, in *SEMANTICS OF NATURAL LANGUAGE* 455 (Donald Davidson & Gilbert Harman eds., 1975).

4. What was Hart's attitude toward human rights? Did he welcome the adoption of the *Universal Declaration of Human Rights* in 1948?<sup>142</sup> If so, how did he reconcile it with his commitment to legal positivism? Did he embrace the *Declaration's* affirmation of economic, social, and cultural rights? How did Hart's reaction to the *Universal Declaration* influence the philosophical analysis of rights he developed in his publications of the late 1940s and 1950s?<sup>143</sup> How, if at all, did Hart's attitude toward human rights change over the course of his career?

Questions like these are hardly orthogonal to the intellectual and social worlds Hart inhabited, and they comprise a mere subset of those to which an intellectual biography of him would ideally provide answers. That Lacey does not engage any of them may be the most disappointing feature of her otherwise compelling narrative. In the remainder of this Essay, I attempt to answer some of these questions, drawing on various parts of Hart's corpus along with Lacey's own fruitful exploration of Hart's life and career. My central argument is that a genuinely puzzling aspect of Hart's legal theory is how detached it now seems from many of the most significant intellectual events of the past fifty years, including the modern revival of Universal Grammar, the cognitive revolution in the sciences of mind, brain, and behavior, and the human rights revolution in constitutional and international law, all of which would appear to have significant implications for the tradition of general and descriptive jurisprudence with which Hart was associated.<sup>144</sup> After providing some support for this claim in Part III, I offer a partial explanation of this state of affairs in Part IV.

### III.

The story of jurisprudence Lacey tells in *A Life of H.L.A. Hart* is a familiar one, which largely mirrors the one found in many student textbooks. The story centers around Hart's relationship to the philosophy of language. Lacey contends that Hart's "crucial philosophical innovation" was to combine the insights of legal positivism with the methods of "the new linguistic philosophy represented by the work of J.L. Austin, Frederick Waismann, and Ludwig Wittgenstein."<sup>145</sup> However, she neglects to explain what exactly those methods are, or to explore the fate of ordinary language philosophy since the 1950s. This leaves the impression that she has not thought critically about how such major events as the overthrow of logical positivism, the demise of behaviorism, and the rise

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142. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

143. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955); see also Hart, *supra* note 52; Hart, *The Ascription of Responsibility and Rights*, *supra* note 43.

144. See HART, *supra* note 77, at 239–40 (characterizing his own legal theory as one which is both "general in the sense that it is not tied to any particular legal system or legal culture" and "descriptive in that it is morally neutral and has no justificatory aims").

145. LACEY, *supra* note 2, at 4–5, 225.

of generative linguistics should inform our understanding of this aspect of Hart's legacy. Linguistics, psychology, and the philosophy of language and mind are much different today than they were in the 1940s and 1950s, and the philosopher Tyler Burge expresses a common view when he observes that ordinary language philosophy's "primary contribution to the philosophy of language, its focus on details of usage, yielded better results when it later allied itself with systematic theory."<sup>146</sup> Yet these developments make virtually no appearance in *A Life of H.L.A. Hart*, leading one to ponder the significance of their absence.

The central event in the study of language of the past fifty years, to which ordinary language philosophy has long since given way, is the so-called "Chomskyan Turn,"<sup>147</sup> which transformed the study of language and mind by showing that ordinary language is susceptible to precise formal analysis and by rooting knowledge of language in the human bioprogram. From this perspective, while philosophers like Austin and Wittgenstein were correct to criticize the neglect by logical positivists of the variety of uses (beyond the paradigm case of asserting) to which ordinary language can be put, and while they deserve credit for calling attention to many subtle nuances of ordinary usage, their approach was inherently incapable of providing an adequate theory of language because of its characteristically unsystematic orientation and its fundamentally flawed empiricist epistemology.<sup>148</sup> Today, researchers around the world investigate language within Chomsky's paradigm of Universal Grammar, and they have discovered that Chomsky was fundamentally correct to postulate that the grammars of individual languages throughout the world are variations on a single, universal pattern.<sup>149</sup> For example, in English the verb comes before the object (*pick fruit*) and the preposition comes before the noun phrase (*from the tree*). In Japanese, things are reversed: the object comes before the verb (*fruit pick*) and the noun phrase comes before the preposition, or rather, the postposition (*the tree from*).<sup>150</sup> However, as Steven Pinker explains,

it is a significant discovery that both languages have verbs, objects, and pre- or post-positions to start with, as opposed to countless other conceivable kinds of apparatus that could power a communication system. And it is even more significant that unrelated languages build their phrases by assembling a head

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146. Tyler Burge, *Philosophy of Language and Mind: 1950–1990*, 101 *PHIL. REV.* 3, 13 (1992).

147. *THE CHOMSKYAN TURN* (Asa Kasher ed., 1991).

148. See generally Burge, *supra* note 146; Noam Chomsky, *Some Empirical Assumptions in Modern Philosophy of Language*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 260 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969); Jerry A. Fodor & Jerrold J. Katz, *Introduction to THE STRUCTURE OF LANGUAGE: READINGS IN THE PHILOSOPHY OF LANGUAGE* 1 (Jerry A. Fodor & Jerrold J. Katz eds., 1964).

149. See generally MARK C. BAKER, *THE ATOMS OF LANGUAGE: THE MIND'S HIDDEN RULES OF GRAMMAR* (2001); RAY JACKENDOFF, *PATTERNS IN THE MIND: LANGUAGE AND HUMAN NATURE* (1994); STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* (1994).

150. STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 37 (2002).

(such as a verb or preposition) and a complement (such as a noun phrase) and assigning a consistent order to the two. In English the head comes first; in Japanese the head comes last. But everything else about the structure of phrases in the two languages is pretty much the same. And so it goes with phrase after phrase and language after language. The common kinds of heads and complements can be ordered in 128 logically possible ways, but 95 percent of the world's languages use one of two: either the English ordering or its mirror image the Japanese ordering. A simple way to capture this uniformity is to say that all languages have the same grammar except for a parameter or switch that can be flipped to either the "head-first" or "head-last" setting. The linguist Mark Baker has recently summarized about a dozen of these parameters, which succinctly capture most of the known variation among the languages of the world.<sup>151</sup>

Needless to say, these and related scientific developments in the study of language and cognition have profound implications for law and legal theory, which legal scholars have only recently begun to explore in earnest.<sup>152</sup> Perhaps the most important is their potential to transform our understanding of a cluster of interrelated topics, including the concept of universal jurisprudence, the origin of the law of nations, the idea of human rights, and—perhaps most fundamentally—the hypothesis of innate moral knowledge which lies at the heart of the perennial debate between natural law and legal positivism. Although this hypothesis has long been unfashionable, the fashion in moral psychology is now rapidly changing,<sup>153</sup> and the psychology and biology of human morality has become one of the liveliest topics in the cognitive and brain sciences, as a plethora of recent books attest: *The Ethical Brain*,<sup>154</sup> *The Moral*

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151. *Id.* at 37–38 (citing BAKER, *supra* note 149).

152. *See, e.g.*, MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 91–112 (2006) (drawing on linguistic theory to investigate the sense of justice); GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 5 (1998) (proposing a "universal grammar of the criminal law" analogous to universal grammar); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 57, 68–69 (1998) (drawing on Chomsky's theory of innate cognitive capacities to reply to historicist objections to the idea of human rights); LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993) (applying linguistic theory to problems of statutory interpretation and adjudication); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1279 (1995) (arguing that the "existence of universal grammar reinforces the discovery of universals in other language-based disciplines," including law); Stuart P. Green, *The Universal Grammar of Criminal Law*, 98 MICH. L. REV. 2104 (1998) (reviewing FLETCHER, *supra*); Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEX. L. REV. 877, 878 (2006) (arguing that "law and morality share a deep and pervasive structure—an analogue in the moral and legal domain of what Noam Chomsky has called the 'deep structure' or 'universal grammar' of language"); John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1088–98 (2002) (explaining the analogy between rules of justice and rules of grammar and criticizing Judge Posner's conception of morality and moral theory in light of it).

153. *See generally* Rebecca Saxe, *Do the Right Thing: Cognitive Science's Search for a Common Morality*, BOSTON REV., Sept.–Oct. 2005, at 33.

154. MICHAEL GAZZANIGA, *THE ETHICAL BRAIN* (2005).

*Sense*,<sup>155</sup> *The Moral Animal*,<sup>156</sup> *The Origins of Virtue*,<sup>157</sup> *Hardwired Behavior*,<sup>158</sup> *Good Natured*,<sup>159</sup> *Moral Minds*,<sup>160</sup> and other similar titles. Philosophers and scientists have begun to inquire whether the human genetic program includes a Universal Moral Grammar analogous to the linguist's notion of Universal Grammar, that is, an innate function or acquisition device that maps the child's early experience into the system of principles that constitutes the mature state of her moral faculty and generates her moral intuitions.<sup>161</sup> The psychology of moral development has become a particularly fruitful field of investigation, and developmental psychologists have begun to reveal that the intuitive jurisprudence of young children is complex and exhibits many characteristics of a well-developed legal code, including abstract theories of crime, tort, contract, and agency.<sup>162</sup> Recent work by comparative linguists suggests

155. JAMES Q. WILSON, *THE MORAL SENSE* (1993).

156. ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE, THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1996).

157. MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* (1996).

158. LAWRENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* (2005).

159. FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* (1996).

160. MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* (2006).

161. *See, e.g.*, GILBERT HARMAN, *Moral Philosophy and Linguistics*, in *EXPLAINING VALUE* 217 (2000); HAUSER, *supra* note 160; MATTHIAS MAHLMANN, *RATIONALISMUS IN DER PRAKTISCHEN THEORIE: NORMENTHEORIE UND PRAKTISCHE KOMPETENZ* (1999); Susan Dwyer, *Moral Competence*, in *PHILOSOPHY AND LINGUISTICS* 169 (Kumiko Murasugi & Robert Stainton eds., 1999); Joshua Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in *THE INNATE MIND: STRUCTURE AND CONTENTS* 338 (Peter Carruthers, Stephen Laurence & Stephen Stich eds., 2005); Joshua Knobe, *Theory of Mind and Moral Cognition: Exploring the Connections*, 9 *TRENDS COG. SCI.* 357 (2005); Matthias Mahlmann & John Mikhail, *Cognitive Science, Ethics, and Law*, in *EPISTEMOLOGY AND ONTOLOGY* 95 (Zenon Bankowski ed., 2005); Mikhail, *supra* note 152; John Mikhail, Cristina M. Sorrentino & Elizabeth S. Spelke, *Toward a Universal Moral Grammar*, in *PROCEEDINGS OF THE TWENTIETH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY* 1250 (Morton A. Gernsbacher & Sharon J. Derry eds., 1998); Shaun Nichols, *Innateness and Moral Psychology*, in *THE INNATE MIND*, *supra* at 353; John Mikhail, Rawls' Linguistic Analogy: A Study of the "Generative Grammar" Model of Moral Theory Described by John Rawls in "A Theory of Justice" (May 2000) (unpublished Ph.D. dissertation, Cornell University), <http://ssrn.com/abstract=766464>; Jennifer Nado, Daniel Kelly & Stephen Stich, *Moral Judgment*, in *ROUTLEDGE COMPANION TO THE PHILOSOPHY OF PSYCHOLOGY* (John Symons & Paco Calvo eds., forthcoming 2007).

162. For example, three- and four-year-old children use intent or purpose to distinguish two acts with the same result. *See, e.g.*, Sharon Nelson, *Factors Influencing Young Children's Use of Motives and Outcomes as Moral Criteria*, 51 *CHILD DEV.* 823 (1980). They also distinguish "genuine" moral violations (e.g., theft, battery) from violations of social conventions (e.g., wearing pajamas to school). *See, e.g.*, Judith G. Smetana, *Social Cognitive-Development: Domain Distinctions and Coordinations*, 3 *DEV. REV.* 131, 135 (1983). Four- and five-year-olds use a proportionality principle to determine the appropriate level of punishment for principals and accessories. *See, e.g.*, Norman J. Finkel, Marsha B. Liss & Virginia R. Moran, *Equal or Proportional Justice for Accessories? Children's Pearls of Proportionate Wisdom*, 18 *J. APPLIED DEVELOPMENTAL PSYCHOL.* 229, 240 (1997). Five- and six-year-olds use false factual beliefs but not false moral beliefs to exculpate. *See, e.g.*, Michael J. Chandler, Bryan W. Sokal & Cecilia Wainryb, *Beliefs About Truth and Beliefs About Rightness*, 71 *CHILD DEV.* 91,

that every natural language has words or devices to express the three basic deontic concepts—*may*, *must*, *must not*, or their equivalents;<sup>163</sup> while anthropologists and comparative lawyers have suggested that prohibitions of murder, rape, and other types of aggression are universal,<sup>164</sup> as are distinctions based on causation, intention, and voluntary behavior.<sup>165</sup> In a similar vein, George Fletcher has argued that a small set of basic distinctions captures the “deep structure” or “universal grammar” of all systems of criminal law.<sup>166</sup> Finally, recent functional imaging and clinical evidence suggests that a fairly consistent network of brain regions is involved in moral cognition, although this conclusion remains both preliminary and highly controversial.<sup>167</sup> In short, researchers from a variety of disciplines have begun to converge on a scientific theory of moral cognition which, at least in its broad contours, bears a striking resemblance to classical ideas of natural law and the foundation of the law of nations that reverberate throughout the ages.<sup>168</sup>

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93 (2000). See generally John Mikhail, *The Poverty of the Moral Stimulus*, in 1 MORAL PSYCHOLOGY: INNATENESS AND ADAPTATION (Walter Sinnott-Armstrong ed., forthcoming 2007).

163. See generally MODALITY IN GRAMMAR AND DISCOURSE (Joan Bybee & Suzanne Fleischman eds., 1995).

164. See, e.g., DONALD E. BROWN, HUMAN UNIVERSALS 138 (1991); see also PINKER, *supra* note 149, at 412–15 (citing BROWN).

165. See, e.g., FLETCHER, *supra* note 152.

166. See *id.*

167. See, e.g., Jorge Moll et al., *The Neural Basis of Human Moral Cognition*, 6 NATURE REVIEWS NEUROSCIENCE 799 (2005) (arguing that a fairly consistent network of brain regions is implicated in moral cognition, including the anterior prefrontal cortex, medial and lateral orbitofrontal cortex, dorsolateral and ventromedial prefrontal cortex, anterior temporal lobes, and superior temporal sulcus region). But see Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 523 (2002) (holding that “there is no specifically moral part of the brain” and that “if one attempts to ‘deconfound’ moral judgment with everything that is not specific to moral judgment . . . there will almost certainly be nothing left”).

168. Recall some of the most famous and important formulations, presented here in chronological order: (1) Cicero: Natural law is “something which is implanted in us, not by opinion, but by a kind of innate instinct.” CICERO, DE INVENTIONE, II, 65, cited in MICHAEL BERTRAM CROWE, THE CHANGING PROFILE OF THE NATURAL LAW 40 (1977); (2) Paul: “When the Gentiles, who have not the law, do by nature those things that are of the law . . . [they] show the work of the law written in their hearts. . . .” ROMANS 2:14–15, cited in CROWE, *supra*, at 52; (3) Gaius: “All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men . . . which natural reason has established among all human beings . . . and is called *jus gentium*, as being the law which all nations observe.” DIG. 1.1.9 (Gaius, Institutes 1) (Alan Watson trans.); (4) Ulpian: “Natural law is what nature has taught all animals.” DIG. 1.1.1.3 (Ulpian, Institutes 1), cited in CROWE, *supra*, at 45; (5) Isadore: Natural law is “what is common to all nations and is set up by natural instinct and not by any positive institution.” ISADORE, BOOK OF ETYMOLOGIES, V, 4, cited in CROWE, *supra*, at 69; (6) Gratian: “Natural law is common to all nations by reason of its universal origin in a natural instinct and not in any (positive) constitution.” GRATIAN, DECRETUM, D.I, 7, cited in CROWE, *supra*, at 75; (7) Aquinas: Natural law is “a natural disposition of the human mind . . . concerned with the basic principles of behavior.” THOMAS AQUINAS, DEBATED QUESTIONS ON TRUTH, 16.1, cited in TIMOTHY C. POTTS, CONSCIENCE IN MEDIEVAL PHILOSOPHY 124 (1980); (8) Suarez: Natural law is “that form of law which dwells within the human mind, in order that the righteous may be distinguished from the evil.” FRANCISCO SUAREZ, DE LEGIBUS AC DEO LEGISLATORE, I.3.9 (James Brown Scott ed., 1944) (1612); (9) Grotius: “Natural Law is the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational [and social] nature [of man], has in it a moral turpitude or a moral

Returning to Hart, one of the mysteries surrounding his intellectual biography, which Lacey's book does not illuminate, is his attitude toward this set of ideas, which were already beginning to swirl around him during the period in which he occupied the Oxford Chair. Surprisingly, Hart devoted very little attention to any of these topics, despite having many opportunities to do so. For example, although from the late 1950s onward many of Hart's colleagues were deeply engaged with Chomsky's ideas—Austin, for instance, taught *Syntactic Structures* in the last term before his death<sup>169</sup>—and by the early 1970s, scholars from a variety of disciplines were already describing Chomsky's influence in monumental terms,<sup>170</sup> Hart stood apart from these developments and displayed no discernible interest in the new linguistics. Why this happened is not entirely clear, but it meant that Hart continued to write about language and linguistic phenomena through the 1980s as if the “Chomskyan turn” in linguistics had never occurred.<sup>171</sup>

The mystery deepens when we consider the analogy between grammar and

necessity . . .” HUGO GROTIUS, 1 DE JURE BELLI ET PACIS [ON THE LAW OF WAR AND PEACE] I.1.10 (William Whewell trans., Cambridge Univ. Press 1853) (1625) (alteration in original); (10) Hume: “The final sentence . . . which pronounces characters and actions amiable or odious, praiseworthy or blamable . . . depends on some internal sense or feeling which nature has made universal in the whole species.” DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 6 (Charles W. Hendel ed., 1957) (1751); (11) James Wilson: “The moral sense is a distinct and original power of the human mind . . . Our knowledge of moral philosophy, of natural jurisprudence, of the law of nations, must ultimately depend, for its first principles, on the evidence and information of the moral sense.” JAMES WILSON, *Of the Nature and Philosophy of Evidence*, in 1 THE WORKS OF JAMES WILSON 369, 378–79 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804); (12) Thomas Jefferson: “Hobbes . . . [believes] that justice is founded in contract solely, and does not result from the construction of man. I believe, on the contrary, that it is instinct, and innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing.” Letter from Thomas Jefferson to John Adams (Oct. 14, 1816), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 490, 492 (Lester J. Cappon ed., 1959).

169. See Warnock, *supra* note 139.

170. See, e.g., John Searle, *Chomsky's Revolution in Linguistics*, in ON NOAM CHOMSKY: CRITICAL ESSAYS 2, 7 (Gilbert Harman ed., 1974) (“The extraordinary and traumatic impact of the publication of *Syntactic Structures* by Noam Chomsky in 1957 can hardly be appreciated by one who did not live through the upheaval.”) (quoting Howard Maclay, *Overview*, in SEMANTICS 163 (Danny D. Steinberg & Leon A. Jakobovits eds., 1971)); Gilbert Harman, *Introduction* to ON NOAM CHOMSKY, *supra*, at vii (“[N]othing has had a greater impact on contemporary philosophy than Chomsky's theory of language”); JOHN LYONS, NOAM CHOMSKY 9 (1970) (noting that *Syntactic Structures* “revolutionized the scientific study of language”).

171. See, e.g., ESSAYS, *supra* note 1, at 2–6, 3 (reflecting on how linguistic philosophers like Austin and Wittgenstein sought to analyze how “identical grammatical forms” conceal subtle differences of meaning without calling attention to Chomsky's subsequent work on deep structure); HART, ESSAYS ON BENTHAM, *supra* note 70, at 10 (explaining Bentham's view that “the relation of language and so of thought to the world is radically misunderstood if we conceive of sentences as compounded out of words which simply name or stand for elements of reality” without noting the parallel to Chomsky's internalist semantics); *id.* at 129–32 (discussing Bentham's paraphrastic analysis of terms like “right,” “duty,” and “obligation” without reference to the modern theory of linguistic transformations); H.L.A. Hart, Book Review, 94 MIND 153 (1985) (reviewing ROSS HARRISON, BENTHAM (1983)) (same); cf. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT, *supra* note 10, at 1, 5–6 (remarking that “the story . . . of Hart's forays into the philosophy of language” is “a sad one” in which “[v]ery little seems to have been gained”).

jurisprudence which bulks so large in the Western legal tradition Hart inherited. Although the link between these subjects traces at least as far back as Aristotle's observation in *The Politics* that the gift of speech and a sense of justice are what distinguish humans from other animals,<sup>172</sup> and although the comparison between rules of justice and rules of grammar was a popular one among Enlightenment philosophers and jurists, including Adam Smith, David Hume, Samuel Pufendorf, and Matthew Hale,<sup>173</sup> the modern positivist discussion of the topic begins in earnest with Bentham, in particular with Bentham's brief remarks on universal jurisprudence in *An Introduction to the Principles of Morals and Legislation*. Bentham introduced the term "universal jurisprudence" by an implicit analogy to Universal Grammar to denote the science of those notions that appear in "the laws of all nations," such as "power, right, obligation, liberty, and many others."<sup>174</sup> The basic idea was picked up and elaborated by Austin, who renamed the inquiry *general jurisprudence*, which he defined as "the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law."<sup>175</sup>

Austin's most significant follower, in turn, was Thomas E. Holland, whose *Elements of Jurisprudence* was the most widely used jurisprudence textbook in

172. See ARISTOTLE, *THE POLITICS*, Bk. 1, 1253a1-15 (Steven Everson ed., Cambridge Univ. Press 1988) ("[T]hat man is more of a political animal than bees or any other gregarious animals is evident. Nature . . . makes nothing in vain, and man is the only animal who has the gift of speech . . . . And it is [also] a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.").

173. See, e.g., Matthew Hale, *Preface to Rolle's Abridgment* (1668), reprinted in *READINGS IN JURISPRUDENCE* 341 (Jerome Hall ed., 1938) (comparing mastery of the common law with knowledge of grammar); DAVID HUME, *A Treatise of Human Nature* 490 (P.H. Nidditch ed., Oxford Univ. Press 1978) (1739-1740) (comparing the origin of justice to the establishment of human language); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 175 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759) (comparing the rules of justice to the rules of grammar); Samuel Pufendorf, *On the Duty of Man and Citizen* (1673), reprinted in *1 MORAL PHILOSOPHY FROM MONTAIGNE TO KANT: AN ANTHOLOGY* 158, 164 (J.B. Schneewind ed., Cambridge Univ. Press 1990) (explaining the meaning of "[t]he common saying that the law is known by nature" by observing that "[e]veryone has the same experience with his mother tongue").

174. BENTHAM, *supra* note 67, at 295; see also *id.* at 6 (enumerating "obligation, right, power, possession, title, exemption, immunity, franchise, privilege, nullity, validity, and the like" as the "short list of terms, the exposition of which contains all that can be said with propriety to belong to the head of *universal jurisprudence*"). But cf. Crimmins, *supra* note 137.

175. John Austin, *The Uses of the Study of Jurisprudence*, in *THE PROVINCE OF JURISPRUDENCE DETERMINED* 365, 367 (H.L.A. Hart ed., 1954) (1832). Austin's list of common principles is more extensive than Bentham's and includes (1) "notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society"; (2) the distinction between written and unwritten law; (3) the distinction between rights *in rem* and rights *in personam*; (4) the distinction between property or dominion and "the variously restricted rights which are carved out of [them]"; (5) the division of obligations into those arising from contracts, those arising from injuries (i.e., *delicts*), and those arising "from incidents that are neither contracts nor injuries" (i.e., *obligations quasi ex contractu*); and (6) the division of injuries into civil and criminal, and the subordinate division of civil injuries into torts, breaches of contract, and breaches of *obligations quasi ex contractu*. *Id.* at 367-68. In line with his positivism, however, Austin's list does not include the *mala in se/mala prohibita* distinction, a point to which we return. See *infra* notes 193, 247-49 and accompanying text.

England for the next fifty years and exerted a significant impact on many leading British and American writers, including Pollock, Salmond, Gray, Hohfeld, Langdell, and Pound.<sup>176</sup> Holland defined jurisprudence as the formal science of law: “not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences.”<sup>177</sup> Explaining what he meant by a “formal science,” Holland drew an analogy to grammar, the abstract science of language under which “all the phenomena of any language find appropriate places.”<sup>178</sup> Just as grammar studies concepts and relationships appearing in all languages, so jurisprudence analyzes “those comparatively few and simple ideas which underlie the infinite variety of legal rules.”<sup>179</sup>

Holland’s linguistic analogy provoked a flurry of criticism from some of the era’s most prominent jurists. Frederick Pollock, for example, questioned whether the analogy was intelligible:

The parallel is felicitous, and only too felicitous. If it be just, it goes a little too far for the writer’s purpose. Abstract grammar, in the sense here specified, is evidently a conceivable science. But is it an actual science in the sense of being explicitly taught or learnt by any one? We have never heard of its professors or text-books. No such teachers or books, as far as I can learn, have been called forth by the development of modern philology.<sup>180</sup>

Likewise, John Chipman Gray argued that “Jurisprudence is, in truth, no more a formal science than Physiology.”<sup>181</sup> While conceding that language is “subject to rigorous rules which have operated controllingly without the conscious knowledge of those who have in fact obeyed them,” Gray objected that the type of legal science Holland envisioned, which seeks “to show what universal forces of human nature have caused the Jurisprudence of the globe to be what it is . . . does not yet exist.”<sup>182</sup>

Pollock and Gray did not live to witness the birth of a new scientific paradigm that transformed linguistics and psychology and helped make Chomsky one of the ten most-cited authors in all of the humanities (surpassing Hegel and Cicero, and trailing only Marx, Lenin, Shakespeare, the Bible, Aristotle,

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176. See THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* (13th ed. 1924). The book ran to thirteen editions, the last appearing in 1924. On Holland’s influence on subsequent British and American writers, see JAMES HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 84–93 (1990); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 25–33 (2000).

177. HOLLAND, *supra* note 176, at 9.

178. *Id.* at 6.

179. *Id.* at 1.

180. FREDERICK POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 3–4 (London, MacMillan & Co. 1882).

181. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 145 (2d ed. Peter Smith 1972) (1909).

182. *Id.* at 136–37.

Plato, and Freud).<sup>183</sup> But Hart did, and he was well-positioned to examine the modern revival of Universal Grammar and draw out its implications for jurisprudence and legal theory. Indeed, Hart was arguably uniquely qualified to do so for many reasons, including his background in linguistic philosophy,<sup>184</sup> his superb linguistic skills,<sup>185</sup> his interest in Bentham,<sup>186</sup> and his familiarity with the jurisprudential history we have been chronicling.<sup>187</sup> And yet Hart did not do so, for reasons that remain obscure.

Hart's attitude toward Rawls' linguistic analogy is especially puzzling. The centerpiece of the conception of moral theory Rawls articulates in *A Theory of Justice* is what we may call the *moral grammar hypothesis*: the assumption that each individual develops a moral sense or sense of justice under normal circumstances, whose essential properties the moral theorist must describe and explain, using concepts and models similar to those used in the study of language.<sup>188</sup> Although *A Theory of Justice* became highly influential, Rawls' linguistic analogy was not warmly received, and early reviews by R.M. Hare, Thomas Nagel, Ronald Dworkin, and Peter Singer sharply criticized or otherwise distanced themselves from Rawls' proposal, as did subsequent commentaries by Norman Daniels, Richard Brandt, Joseph Raz, and Bernard Williams.<sup>189</sup> Virtually alone among his peers, Hart refrained altogether from discussing the topic.<sup>190</sup> Likewise, although both Fuller and Williams address the linguistic

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183. See PINKER, *supra* note 149, at 23.

184. See, e.g., LACEY, *supra* note 2, at 4–6, 132–51. Interestingly, Hart used “linguistics” to describe the jurisprudence seminar he taught at Harvard Law School: “After the initial shock of my accent and my refusal to do sociology, and natural law, they seem to enjoy linguistics and comparisons of law with the rules of Baseball: They’ll be raging positivists before we’re ‘thru’ and then there’ll be a row.” *Id.* at 185.

185. See, e.g., *id.* at 20–21, 25, 292; cf. Sugarman, *supra* note 121, at 271 (“SUGARMAN: I wondered whether the barrister’s manipulation of words, that concern with language, might have possibly ‘connected’ with your passion for philosophy? HART: I’d always been passionately interested in language. As a schoolboy I tried to learn about a dozen languages. Words had always fascinated me.”).

186. See, e.g., LACEY, *supra* note 2, at 297–302. See generally HART, *ESSAYS ON BENTHAM*, *supra* note 70.

187. On Hart’s familiarity with Gray and Holland, see, for example, Hart, *supra* note 1, at 56 (quoting Gray); *id.* at 55 n.21 (citing Holland).

188. See RAWLS, *supra* note 95, at 45–53. See generally Mikhail, Rawls’ Linguistic Analogy, *supra* note 161. Note that as described here, the moral grammar hypothesis includes three distinct ideas: (1) each individual develops a moral sense or sense of justice under normal circumstances, (2) whose essential properties the moral theorist must describe and explain, (3) using concepts and models similar to those used in the study of language. In what follows, for ease of exposition, I sometimes use the phrase in a more restricted sense to refer to (1) and (2) only, or to (1) only, as circumstances warrant.

189. See RICHARD BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 16–23 (1979); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 93–99 (1985); Norman Daniels, *Some Methods of Ethics and Linguistics*, 37 *PHIL. STUD.* 21 (1980); DWORKIN, *supra* note 74, at 150–83; Hare, *supra* note 130; Thomas Nagel, *Rawls on Justice*, in Daniels, *supra* note 130, at 1–16; Joseph Raz, *The Claims of Reflective Equilibrium*, 25 *INQUIRY* 307 (1982); Peter Singer, *Sidgwick and Reflective Equilibrium*, 58 *MONIST* 490 (1974).

190. See Hart, *supra* note 95 (discussing Rawls without reference to the linguistic analogy).

analogy at some length,<sup>191</sup> Hart's critical reviews of *The Morality of Law* and *Ethics and the Limits of Philosophy* pass right over those comparisons.<sup>192</sup>

Turning more directly to the moral grammar hypothesis itself, Hart's neglect of this topic throughout his career is also quite mysterious. In 1954, Hart edited and wrote an introduction to a new edition of John Austin's *The Province of Jurisprudence Determined*, but he noticeably refrained from commenting there on Austin's vigorous attack on the moral grammar hypothesis in Lecture IV or his use of that attack to undermine the traditional distinctions between *jus gentium/jus civile* and *mala in se/mala prohibita* in Lectures IV and V.<sup>193</sup> In *Positivism and the Separation of Law and Morals*, and again in *The Concept of Law*, Hart distinguished five main doctrines associated with legal positivism: (1) laws are the commands of human beings; (2) there is no necessary connection between law and morals; (3) the analysis of legal concepts is worth pursuing and should be distinguished from historical, sociological, and critical inquiries; (4) a legal system is a "closed logical system" in which correct decisions can be deduced from pre-existing legal rules without reference to social aims, policies, or moral standards; and (5) ethical noncognitivism (the claim that moral judgments cannot be established or defended by methods of rational inquiry as statements of fact can).<sup>194</sup> Significantly, Hart neglected to mention a sixth doctrine, which as an historical matter unites Bentham and Austin as much any other—that the moral grammar hypothesis is false.<sup>195</sup> Hart's characterizations of natural law are notoriously inadequate, but in addi-

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191. See FULLER, *supra* note 131; WILLIAMS, *supra* note 189.

192. See H.L.A. Hart, *Lon L. Fuller: The Morality of Law*, 78 HARV. L. REV. 1281 (1965) (book review), reprinted in ESSAYS, *supra* note 1, at 343–64; H.L.A. Hart, *Who Can Tell Right from Wrong?*, 33 N.Y. REV. BOOKS, Jul. 17, 1986, at 49 (reviewing BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985)).

193. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 81–93, 114–25, 157–63 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

194. See Hart, *supra* note 1, at 601 n.25; see also HART, *supra* note 5, at 253 (adding the further comment that "'positivism' is often used [in continental literature] for the general repudiation of the claim that some principles or rules of human conduct are discoverable by reason alone"). Hart identifies the same five doctrines in his *Encyclopedia of Philosophy* article on Legal Positivism. See H.L.A. Hart, *Legal Positivism*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 418 (Paul Edwards ed., 1967). Note that in contemporary legal theory, legal positivism is often defined more narrowly, to include only the second doctrine and a Hartian alternative to the first doctrine. See, e.g., Jules L. Coleman & Brian Leiter, *Legal Positivism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 241, 241 (Dennis Patterson ed., 1996) ("All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention ('the social thesis'); second, that there is no necessary connection between law and morality ('the separability thesis')."); see also Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1140–44 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)) (explaining that legal positivism is a theory of law, not a theory of adjudication, which consists of the social thesis and the separability thesis); accord Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 677–79 (1998). Because of the wide scope of this Essay, unless otherwise indicated I use the term more broadly than this, to encompass additional doctrines historically associated with legal positivism, including Bentham's and Austin's rejection of the moral grammar hypothesis.

195. See, e.g., AUSTIN, *supra* note 193, at 81–93; BENTHAM, *supra* note 67, at 25–28.

tion to the criticisms John Finnis,<sup>196</sup> Norman Kretzmann,<sup>197</sup> Mark Murphy,<sup>198</sup> and other writers have made, one must add the further objection that Hart simply ignores many of the classic questions of moral epistemology which occupied the majority of natural law theorists from Plato onward.

Finally, there is the issue of human rights. It is difficult to imagine a more direct repudiation of legal positivism than that which is contained in Article 1 of the *Universal Declaration of Human Rights*: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>199</sup> Here, one might think, is humanity’s considered response to *Anarchical Fallacies* and *The Province of Jurisprudence Determined*, the sharpest conceivable provocation to any jurist seeking to build on the positivist legacy of Bentham and Austin. And yet, surprisingly, Hart hardly seemed to notice or care. None of his rights-related essays of the 1940s and 1950s—the 1949 paper on rights and responsibilities,<sup>200</sup> 1953 inaugural lecture,<sup>201</sup> 1955 paper on natural rights,<sup>202</sup> and 1958 paper on legal and moral obligation<sup>203</sup>—gives the *Universal Declaration* so much as a passing reference.<sup>204</sup> Meanwhile, the topic of human rights is

196. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 29 (1980) (“H.L.A. Hart has said that ‘natural law theory in all its protean guises attempts to assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival.’ For my part, I know of no one who has ever asserted this.”); *id.* at 52–53 (“Hart’s account of ‘the teleological view of nature’ is a little extravagant—of what serious writer was it ever true that ‘the questions whether [events] *do* occur regularly and whether they *should* occur or whether it is *good* that they occur [were] not regarded as separate questions?’”) (alteration in original); *id.* at 364–65 (“The central tradition of natural law theorizing . . . has not chosen to use the slogans attributed to it by [Hart], for example that ‘*what is utterly immoral cannot be law*’, or that ‘*certain rules cannot be law because of their moral iniquity*’, or that ‘*these evil things are not law*’, or that ‘*nothing iniquitous can anywhere have the status of law*’, or that ‘*morally iniquitous demands . . . [are] in no sense law*’ . . . . On the contrary, the tradition, even in its most blunt formulations, has affirmed that unjust LAWS are not law. Does not this . . . make clear, beyond reasonable question, that the tradition is not indulging in ‘a refusal, made *once and for all*, to recognize evil laws as valid *for any purpose*?’”) (alteration in original).

197. See Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99, 101 n.5 (1988) (explaining that Hart mischaracterizes Augustine and Aquinas).

198. See Mark Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 243–44 (2003) (arguing that the “dominant contemporary understanding of natural law theory,” which is “not drawn from any reading of natural law theorists themselves, but from Hart,” is deficient in several respects).

199. G.A. Res. 217A (III), *supra* note 142, art. 1.

200. Hart, *The Ascription of Responsibility and Rights*, *supra* note 43.

201. Hart, *supra* note 52.

202. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955).

203. H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82 (A.I. Melden ed., 1958).

204. Hart later declined to republish three of these essays, although not for this reason. See HART, *supra* note 7, at v (explaining that the main claims of *The Ascription of Responsibility and Rights* “no longer seem to me defensible”); cf. LACEY, *supra* note 2, at 146. See also *ESSAYS*, *supra* note 1, at 17 (explaining that the main argument of *Are There Any Natural Rights?* “seems to me to be mistaken and my errors not sufficiently illuminating to justify re-printing now”); cf. LACEY, *supra* note 2, at 169.

completely absent from *The Concept of Law*.<sup>205</sup> In fact, it is not until the late 1970s—three decades after the *Universal Declaration* was adopted—that the phrase “human rights” first appears in Hart’s writings.<sup>206</sup> We are therefore left with the following paradox: human rights is “the idea of our time,”<sup>207</sup> and yet the twentieth century’s leading English-language legal philosopher had virtually nothing to say about them.<sup>208</sup>

Disappointingly, Lacey does not shed much light on any of these issues. Although she does a terrific job situating Hart’s intellectual development in the context of the ordinary language philosophy of the 1940s and early 1950s, her account of the cross-fertilization that occurred in Hart’s mind between the philosophy of language and the philosophy of law does not progress much beyond this point. The contrast Lacey draws between Austin and Wittgenstein—in particular her suggestion that Hart would have benefited from taking “a broader, Wittgensteinian approach”<sup>209</sup> to problems of language and meaning—has proven controversial, with Thomas Nagel holding that “[t]he idea that Wittgenstein’s method encourages a more empirical approach than Austin’s is [false],”<sup>210</sup> and John Gardner arguing that Lacey is mistaken to assume that Austin’s influence on Hart was more dominant than Wittgenstein’s.<sup>211</sup> However, this debate leaves untouched the more interesting and fertile question of Hart’s attitude toward Universal Grammar, next to which the writings of Austin and Wittgenstein for all their genuine insight seem more like the dead end of a river than a source of continued inspiration.<sup>212</sup>

Likewise, Lacey’s account of the debate between natural law and legal

Apparently, Hart also declined to republish *Legal and Moral Obligation*; however, I am unaware of the reason for this decision, and Lacey does not address the issue.

205. As far as I can tell, neither “human rights” nor “natural rights” appears in *The Concept of Law*. Arguably, Hart does tacitly invoke human rights when discussing the tendency of some natural law theorists to equate law and morality. See HART, *supra* note 5, at 7 (explaining that “law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights”). However, none of the book’s further references to rights appear to refer to human rights. See *id.* at 53–54, 57–58, 85.

206. See, e.g., H.L.A. Hart, *Utilitarianism and Natural Rights*, 53 TUL. L. REV. 663, 670–71, 678–80 (1979).

207. LOUIS HENKIN, *THE AGE OF RIGHTS*, at ix (1990).

208. See also *infra* notes 217–19 and accompanying text. In his book on Hart, MacCormick remarks that “Hart has written very extensively about rights.” MACCORMICK, *supra* note 10, at 88. However, as MacCormick’s subsequent discussion makes clear, Hart’s efforts in this regard were directed mainly toward legal rights. *Id.* at 88–91. Furthermore, as MacCormick points out, Hart’s analysis of the truth-conditions of “X has a right” in his 1953 inaugural lecture seems to preclude standard uses of “right” in ordinary moral discourse. *Id.* at 88–89.

209. LACEY, *supra* note 2, at 218.

210. Nagel, *supra* note 15, at 13.

211. Gardner, *supra* note 2, at 332 (describing Hart’s work as “impeccably late-Wittgensteinian”).

212. Cf. GILBERT RYLE, *Review of ‘Symposium on J.L. Austin,’* in 1 COLLECTED PAPERS 272, 273 (1971) (observing that Austin was a “stamp-collector of idioms” who “thought of his own, almost botanical classifications of locution-types much less as contributions to philosophy than as elements for a future *Principia Grammatica*”); Chomsky, *supra* note 148, at 280 (observing that “[t]here is a curious frustration in the attempt to explore Wittgenstein’s thought. His examples and remarks, often brilliant

positivism is also less than edifying. Both of these schools are described as competing answers to a single question—what is the source of law’s authority?—their main difference being that one answer (natural law) is inherently religious or metaphysical, while the other (legal positivism) conceives of law as “essentially human.”<sup>213</sup> While this may accurately capture how some legal writers, such as Justice Holmes,<sup>214</sup> have sought to distinguish these schools, such a description seems little more than a misleading caricature. On any historically accurate account, what is central to the traditional debate between natural law and legal positivism is an empirical proposition about the essential properties of the human mind, which virtually all of the classical natural lawyers affirmed, but which Bentham and Austin vigorously denied.<sup>215</sup> Regrettably, Lacey simply ignores this issue.

Finally, the information one is able to glean from Lacey’s book on Hart’s attitude toward human rights is also meager and unsatisfying. We learn that Hart regularly lectured on rights and duties from 1953 to 1966, but little is said of the substance of those lectures. Lacey merely observes that they “not only encompassed the close analysis of legal concepts but also demonstrated his continued identification as a philosopher, his persisting interest in moral and political philosophy, and his belief in the relationship between analytic and normative, prescriptive strands in philosophy.”<sup>216</sup> Lacey does briefly discuss the thesis of Hart’s 1955 paper, *Are There Any Natural Rights?*—the conditional argument “that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free”<sup>217</sup>—which she generously describes as “distinctly more radical in 1955 than it would [look] today,”<sup>218</sup> but surely this is a lapse into hagiography. It was not radical, but timid, for Hart to

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and perceptive, lead right to the border of the deepest problems, at which point he stops short and insists that the philosopher can go no further”).

213. See LACEY, *supra* note 2, at 224 (“Rejecting the ‘natural law’ idea that law derives its authority from God, or from some metaphysical conception of nature or reason, Bentham and Austin argued that law is essentially human: it is a command issued by a political superior or sovereign, to whom the populace is in a habit of obedience.”); see also *id.* at 4.

214. See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”). Cf. O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457, 461 (1897) (“When we study law we are not studying a mystery but a well known profession . . . The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law.”).

215. See generally *supra* notes 168 and 195; see also *infra* notes 238–39 and accompanying text.

216. See LACEY, *supra* note 2, at 168–69. According to Honoré,

Hart was never willing to publish his lectures on rights. While he rejected the view of Austin and Bentham that only law could create rights, he was not satisfied with Mill’s attempt to put moral rights on a utilitarian foundation and did not see how to provide an alternative. So, while dismissive of Dworkin’s free-wheeling use of the notion of moral right, he was uncertain what to substitute.

Honoré, *supra* note 45, at 303.

217. Hart, *supra* note 202, at 175.

218. See LACEY, *supra* note 2, at 169.

defend this thesis in 1955, seven years after the adoption of the *Universal Declaration*, with its notably concrete and expansive list of fundamental human rights, including freedom from torture or cruel, inhuman or degrading treatment (Article 5); freedom from arbitrary arrest, detention, or exile (Article 9); the right to a fair, public, and impartial trial (Article 10); the presumption of innocence and immunity from retroactive punishment (Article 11); the right to marry and to found a family (Article 16); freedom of thought, conscience, and religion (Article 18); freedom of opinion and expression (Article 19); freedom of peaceful assembly and association (Article 20); the right to just and favorable working conditions, including a living wage, unemployment benefits, and equal pay for equal work (Article 23); the right to a standard of living adequate to the health and well-being of oneself and one's family (Article 25); the right to education (Article 26); and the right to participate in the cultural and scientific life of one's community (Article 27).<sup>219</sup> In light of all this, one is left wondering whether in spite of, or perhaps even because of, instruments like the *Universal Declaration*, with its unmistakable natural law overtones, Hart was simply skeptical of human rights at the time, as both his early papers and his overall commitment to legal positivism would seem to imply.

#### IV.

What explains the puzzle we have uncovered? Why did Hart devote so little attention to the modern revival of Universal Grammar and the cognitive revolution it helped inspire? Why did he write so little on the analogy between grammar and jurisprudence, the moral grammar hypothesis, or the foundation of human rights? Questions like these are too complex to resolve adequately here,<sup>220</sup> but the following partial and provisional explanation seems plausible. I offer it here as a tentative hypothesis, with the hope and expectation that others will modify and improve on it.

Hart's rise to prominence at Oxford initiated a new phase of legal theory that shifted the focus of Anglo-American jurisprudence away from historical, doctrinal, and empirical inquiries toward analytic philosophy. Although Hart described this process as "sell[ing] just a little philosophy to the lawyers,"<sup>221</sup> one of Lacey's many achievements is to reveal that the converse is also true, that one of Hart's primary accomplishments was selling law to the philosophers,

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219. Cf. Hart, *supra* note 202, at 176 (observing that the thesis of his paper "is not as ambitious as the traditional theories of natural rights" and may appear "meager" in many respects).

220. For example, it is impossible to determine here whether Hart's unpublished writings might call into question one or more arguments of this Essay, certainly a distinct possibility that should be kept in mind. See LACEY, *supra* note 2, at 145 ("Throughout his career, Herbert wrote vastly more than he published: he would only release for publication work which satisfied his exceptionally high standards of rigour, insight, and clarity."); see also Honoré, *supra* note 216.

221. See generally LACEY, *supra* note 2, at 151, 155–78.

thereby transforming the discipline of analytic philosophy itself.<sup>222</sup> The context in which Hart did so was ordinary language philosophy, a highly insular movement which was “crying out for someone with insight into the social practices within which linguistic usage develops.”<sup>223</sup> Drawing on his background as a lawyer, Hart imported a much-needed practical sensibility into this movement at a time that it risked becoming stale and complacent. He also exerted a powerful influence on his students and colleagues, including Austin, which has not always been fully appreciated.<sup>224</sup>

Hart’s early efforts at applying the techniques of analytic philosophy to jurisprudence were somewhat shaky, but he hit his stride by the late 1950s. The books and articles he published during his most productive period, roughly 1957–1964, comprise a truly remarkable body of work, including what may be the best book on causation and the best short introduction to legal philosophy ever written. During this period, Hart also became a justly admired public intellectual, championing gay rights (among other liberal causes) at a time when such rights were not yet a significant part of public consciousness. His forceful response to Devlin’s facile attempt to equate the legal suppression of homosexuality with that of treason not only became “the nearest thing to a manifesto for the homosexual law reform movement,”<sup>225</sup> but also constituted a major event in the development of a liberal democratic culture in Great Britain, Canada, the United States, and elsewhere.<sup>226</sup> It is probably no exaggeration to suggest that a direct line can be drawn from Hart’s vigorous defense of sexual freedom in *Immorality and Treason* and *Law, Liberty, and Morality*, the latter a true landmark of political liberalism which grew out of the Hart-Devlin debate, to cases such as *Lawrence v. Texas*, which struck down laws criminalizing intimate homosexual conduct because, *inter alia*, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a

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222. See, e.g., LACEY, *supra* note 2, at 144–45; accord MACCORMICK, *supra* note 10, at 16 (Hart recognized “lawyers’ practices as highly significant for philosophy”); Honoré, *supra* note 45, at 300 (Hart “introduced to philosophers the legal notion of defeasibility”); Nagel, *supra* note 15, at 12 (“Hart was the founder of jurisprudence as a field for analytic philosophy in the second half of the twentieth century.”); Schauer, *supra* note 19, at 858 (“Anglo-American analytic philosophy before Hart was not particularly concerned about law”).

223. LACEY, *supra* note 2, at 145.

224. See *id.* (discussing Hart’s influence on Austin’s *A Plea for Excuses*); MACCORMICK, *supra* note 10, at 16 (same); Gardner, *supra* note 2, at 332 (suggesting that “Austin’s ‘theory of speech-acts owed more to Hart than Hart owed to him’”) (quoting Honoré); cf. H.L.A. Hart, *John Langshaw Austin*, in *DICTIONARY OF NATIONAL BIOGRAPHY 1951–1960*, at 46, 47 (E.T. Williams & Helen M. Palmer eds., 1971) (describing Austin as “the most powerful single influence on the development of philosophy in Oxford” from 1946 to 1960). Note that Gardner is mistaken to imply that Hart was one of Austin’s “younger” colleagues, Gardner, *supra* note 2, at 332, since Austin was born in 1911 and Hart in 1907. By contrast, Ryle was born in 1900, making him 45 years old when Hart returned to Oxford in 1945 at the age of 38, while Austin was only 34 at the time.

225. LACEY, *supra* note 2, at 2, 221.

226. *Id.*; see also MACCORMICK, *supra* note 10, at 8–10.

sufficient reason for upholding a law prohibiting the practice.”<sup>227</sup> As some notably repressive post-*Lawrence* decisions illustrate, Hart’s spirited defense of liberalism remains pertinent even today.<sup>228</sup>

By the time Hart accomplished all of this, however, the bulk of his creative energies had been spent. As Lacey observes, one “cannot disguise a certain deceleration in Herbert’s intellectual creativity in the second half of the 1960s.”<sup>229</sup> This of course is just when Chomsky’s ideas began to attract widespread attention and the new field of cognitive science began to take hold. By then Hart was almost sixty years old, and although he remained active for the next several decades, it seems clear in retrospect that a sustained engagement with a new paradigm was more effort than Hart could muster. Additionally, there are those features of Hart’s biography which Lacey brings to our attention: Hart’s training was classical rather than scientific;<sup>230</sup> he was a late returner to philosophy who was notably insecure about his ability to handle the more technical aspects of the philosophy of language;<sup>231</sup> he came of age intellectually in a highly insular and homogenous environment, characterized by disdain for the history of philosophy and the almost cult-like dominance of a few intimidating personalities;<sup>232</sup> and finally, throughout his career Hart strongly resisted the idea that philosophy might become empirical or test its basic assertions about language and thought experimentally.<sup>233</sup> All of these factors help to explain Hart’s failure to engage productively with the best linguistics and cognitive science of his day.

Hart’s attitude toward the moral grammar hypothesis is more complex, but many of the same factors seem to be involved. To begin with, Hart’s familiarity

227. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting); cf. *Bowers*, 478 U.S. at 212 (Blackmun, J., dissenting) (“Reasonable people may differ about whether particular sexual acts are moral or immoral, but ‘we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law.’”) (quoting Hart, *Immorality and Treason*, reprinted in *THE PHILOSOPHY OF LAW*, *supra* note 55, at 86).

228. See, e.g., *Lofton v. Sec’y of Fla. Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (denial of reh’g en banc) (upholding FLA. STAT. § 63.042(3) (2002), which provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual”); see also *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (upholding an Alabama statute prohibiting the commercial distribution of any device primarily used for the stimulation of human genitals). *But see Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting) (arguing that Florida’s ban on homosexual adoption is unconstitutional because, *inter alia*, it “condition[s] access to the statutory privilege of adoption on surrender of the right to engage in private intimate sexual conduct protected by *Lawrence*”); *Williams*, 378 F.3d at 1250 (Barkett, J., dissenting) (“The majority’s decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity.”).

229. LACEY, *supra* note 2, at 281, 283, 297, 326.

230. *Id.* at 136–37.

231. *Id.* at 115, 143.

232. See *id.* at 132–36, 138–44.

233. *Id.* at 260–62.

with the history of philosophy appears to have been rather limited.<sup>234</sup> Most of the authors he appears to have studied extensively were British empiricists,<sup>235</sup> who rejected appeals to innate moral knowledge, often on rather dubious epistemological grounds.<sup>236</sup> Additionally, throughout his career Hart was surrounded by an intellectual culture that was deeply skeptical of appeals to conscience, the moral sense, the sense of justice, and other allegedly mysterious entities. Indeed, largely due to their commitment to empiricism, behaviorism, historicism, or other theoretical doctrines predicated on denying the existence of innate mental structures, many of the authors Hart read or was influenced by sought to delegitimize these concepts, or simply rejected them out of hand.<sup>237</sup>

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234. See, e.g., *id.* at 141–42; see also FINNIS, *supra* note 196; Kretzmann, *supra* note 197; Cristobal Orrego, *H.L.A. Hart's Understanding of Classical Natural Law Theory*, 24 OXFORD J. LEG. STUD. 287, 287 (“Hart misunderstood classical natural law theory in such a way that it warranted the suspicion that he did not have a first hand acquaintance with that theory”); Twining, *supra* note 49, at 579 (“Hart has never claimed to be primarily an historian of ideas.”); cf. H.L.A. Hart, Book Review, 77 LAW Q. REV. 123, 125 (1961) (reviewing DENNIS LLOYD, INTRODUCTION TO JURISPRUDENCE: WITH SELECTED TEXTS (1959)) (expressing surprise “at the amount and difficulty of the philosophy which Professor Lloyd expects his students to absorb”) and explaining “I have never dared to do more overt philosophy than expound Aristotle on justice, Hobbes and Hume on the nastiness of life without law, and parts of Aquinas on natural law”).

235. Cf. LACEY, *supra* note 2, at 141–42 (noting that Oxford linguistic philosophy was characterized by a process of “casting off the historical, political, and metaphysical baggage of continental traditions . . . and constructing an indigenous, English, no-nonsense, post-war philosophy . . . [T]here was a feeling that much of what had gone before in philosophy was ‘nonsense’: ‘they had won the war, got rid of the evil people, and didn’t need to learn anything from earlier traditions.’”); *id.* at 142 (“Only the so-called English Empiricists—Locke, Berkeley, Hobbes, Hume, and Mill (as well as, to some extent, Kant)—appear to have engaged the enthusiasm of the linguistic philosophers”).

236. See, e.g., THOMAS HOBBS, LEVIATHAN 188 (C.B. MacPherson ed., Viking Penguin 1985) (1651) (“Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not Solitude.”); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 65–84 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689) (rejecting the existence of innate practical principles because, *inter alia*, there are no moral principles which command universal assent, many people violate basic principles without remorse, and no such principles are available to introspection); JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 136–45 (W. von Leyden ed., Oxford Univ. Press 1954) (1660) (same); cf. AUSTIN, *supra* note 193, at 81–90 (attacking the hypothesis of a moral sense on these and similar grounds).

237. See, e.g., KURT BAIER, THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS 22–23 (1958) (“The moral sense theory . . . claim[s] that we have a special moral sense . . . which enables us to see the rightness or wrongness of certain sorts of action. The absolutely fatal objection to this view is that there is no such moral sense . . . . There is no part of a man’s body whose removal or injury would specifically affect his knowledge of the rightness or wrongness of certain types or courses of action . . . .”); R.M. HARE, THE LANGUAGE OF MORALS 77 (Galaxy Book 1964) (1952) (explaining that “our consciences are the product of the principles which our early training has indelibly planted in us” and therefore an unreliable basis from which to make ethical decisions); MACKIE, *supra* note 98, at 38–42 (rejecting the existence of a “faculty of moral perception or intuition” because it would be at odds with empiricist theories of knowledge acquisition, hence epistemologically “queer”); RYLE, *supra* note 123, at 315–16 (describing “moral knowledge” as a “strained phrase” and the idea of an innate moral sense or conscience as a “nursery myth”); JULIUS STONE, HUMAN LAW AND HUMAN JUSTICE 213–16 (1965) (distancing himself from the sense of justice with scare quotes and arguing that its usefulness as a guide to moral problems is limited); see also A.J. AYER, LANGUAGE, TRUTH, AND LOGIC 104–09, 108 (1946) (supplying the classical logical positivist articulation of noncognitivism by holding that “sentences

Moreover, for most of his life, Hart clung firmly to the belief that legal positivism and utilitarianism were morally progressive doctrines and that natural law and common morality were inherently conservative. Indeed, it seems likely that Hart was inclined to follow Bentham and Austin in assuming that any appeal to the conscience or moral sense of the community in the context of a legal or policy dispute was likely to be a mask for ignorance or prejudice. Austin put the matter thus:

And as for the moral sense, innate practical principles, conscience they are merely convenient cloaks for ignorance or sinister interest: they mean either that I hate the law to which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommodious to avow.<sup>238</sup>

This merely distilled Bentham's memorable footnote in the second chapter of *An Introduction to the Principles of Morals and Legislation*, in which Bentham collected all of the "contrivances" previous British writers had used to reaffirm the moral grammar hypothesis after Hobbes' influential attack on it and held that "[t]he mischief common to all these ways of thinking and arguing (which, in truth . . . are but one and the same method, couched in different forms of words) is their serving as a cloak, and pretence, and aliment, to despotism."<sup>239</sup>

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which simply express moral judgments do not say anything. They are pure expressions of feeling and as such do not come under the category of truth and falsehood"); SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 51–70 (Joan Riviere trans., Dover Publications 1994) (1930) (explaining conscience as the function of a super-ego which originates in the internalization of instinctual aggression); cf. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 67 (Univ. of Notre Dame Press 1981) (arguing that human rights are "fictions" and "belief in them is one with belief in witches and in unicorns"); WILLIAMS, *supra* note 189, at 94 (arguing that the hypothesis of a faculty of moral intuition "has been demolished by a succession of critics, and the ruins of it that remain above ground are not impressive enough to invite much history of what happened to it"); Richard Rorty, *The Priority of Democracy to Philosophy*, in *PROSPECTS FOR A COMMON MORALITY* 254, 255 (Gene Outka & John P. Reeder, Jr. eds., 1993) ("Contemporary intellectuals have given up the Enlightenment assumption that religion, myth, and tradition can be opposed to something ahistorical, something common to all human beings qua human. . . . The result is to erase the picture of the self common to Greek metaphysics, Christian theology, and Enlightenment rationalism: the picture of an ahistorical natural center, the locus of human dignity, surrounded by an adventitious and inessential periphery."). Rawls was a notable exception to this pattern. See, e.g., RAWLS, *supra* note 95, at 45–52; John Rawls, *The Sense of Justice*, 72 *PHIL. REV.* 281 (1963). Hence it is perhaps not surprising that his proposals to organize moral theory around describing the sense of justice met with such strong resistance.

238. AUSTIN, *supra* note 193, at 159.

239. BENTHAM, *supra* note 67, at 28 n.d. Bentham wrote:

It is curious enough to observe the variety of inventions men have hit upon, and the variety of phrases they have brought forward, in order to conceal from the world, and, if possible, from themselves, this very general and therefore very pardonable self-sufficiency.

1. One man (Lord Shaftesbury, Hutchinson, Hume, etc.) says, he has a thing made on purpose to tell him what is right and what is wrong; and that it is called a *moral sense*: and then he goes to work at his ease, and says, such a thing is right, and such a thing is wrong—why? 'because my moral sense tells me it is'.

2. Another man (Dr. Beattie) comes and alters the phrase: leaving out *moral*, and putting in

Furthermore, Hart had at least two additional reasons for being skeptical of hortatory appeals to conscience and common morality. First, the Holocaust: where was conscience when the most vicious mass murder machine in history was unleashed on defenseless Jews? Second, his debate with Devlin: why embrace a “common morality” which apparently lends itself so easily to the legal enforcement of homophobia?<sup>240</sup> Both of these arguments still resonate

*common* . . . . He then tells you, that his common sense teaches him what is right and wrong, as surely as the other’s moral sense did: meaning by common sense, a sense of some kind or other, which, he says, is possessed by all mankind: the sense of those, whose sense is not the same as the author’s, being struck out of the account as not worth taking. This contrivance does better than the other; for a moral sense, being a new thing, a man may feel about him a good while without being able to find it out: but common sense is as old as the creation; and there is no man but would be ashamed to be thought not to have as much of it as his neighbours . . . .

3. Another man (Dr. Price) comes, and says, that as to a moral sense indeed, he cannot find that he has any such thing: that however he has an *understanding*, which will do quite as well. This understanding, he says, is the standard of right and wrong: it tells him so and so. All good and wise men understand as he does: if other men’s understandings differ in any point from his, so much the worse for them: it is a sure sign they are either defective or corrupt.

4. Another man says, that there is an eternal and immutable Rule of Right: that that rule of right dictates so and so: and then he begins giving you his sentiments upon anything that comes uppermost: and these sentiments (you are to take for granted) are so many branches of the eternal rule of right.

5. Another man (Dr. Clark), or perhaps the same man (it’s no matter) says, that there are certain practices conformable, and others repugnant, to the Fitness of Things; and then he tells you, at his leisure, what practices are conformable and what repugnant: just as he happens to like a practice or dislike it.

6. A great multitude of people are continually talking about the Law of Nature; and then they go on giving you their sentiments about what is right and what is wrong: and these sentiments, you are to understand, are so many chapters and sections of the Law of Nature.

7. Instead of the phrase, Law of Nature, you have sometimes, Law of Reason, Right Reason, Natural Justice, Natural Equity, Good Order. Any of them will do equally well.

. . . .

The mischief common to all these ways of thinking and arguing (which, in truth, as we have seen, are but one and the same method, couched in different forms of words) is their serving as a cloak, and pretence, and alimnt, to despotism: if not a despotism in practice, a despotism however in disposition: which is but too apt, when pretence and power offer, to show itself in practice.

*Id.* at 26 n.d (footnotes omitted).

240. *See, e.g.*, DEVLIN, *supra* note 55, at 10 (“[S]ociety is not something that is kept together physically; it is held by the invisible bonds of common thought . . . . A common morality is part of the bondage.”); *id.* at 13 (“There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions.”); *id.* at 15 (equating law with a “‘practical morality’, which is based . . . ‘in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense’”). Recall Hart’s trenchant reply:

For [Devlin] a practice is immoral if the thought of it makes the man on the Clapham omnibus sick. So be it. Still, why should we not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence, and insist that before general moral feeling is turned into criminal law it is submitted to scrutiny of a different kind from Sir Patrick’s? Surely the legislator should ask whether the general morality is based on ignorance, supersti-

today, and it is perhaps considerations like these more than anything else that explains Hart's decision to align himself with legal positivism just as the seeds of a global, anti-positivist human rights revolution were being sown. Surely this is understandable at some level: after the nightmare of the Holocaust, in the face of so much ongoing racism, sexism, militarism, and homophobia, who is really prepared to confidently answer Freud's question: "*Homo homini lupus*;"<sup>241</sup> who has the courage to dispute it in the face of all the evidence in his own life and in history?"<sup>242</sup> Dworkin is probably correct, therefore, that Hart simply despaired of finding any great truth about human nature that could generate concrete theories of justice or human rights.<sup>243</sup>

Hart's conviction that utilitarianism and legal positivism were morally progressive doctrines and his related discomfort with natural law were clearly major factors in his approach to *The Concept of Law*. On this point, a key text which has not yet received adequate attention (and which Lacey inexplicably ignores) is Goodhart's slim but stimulating volume, *English Law and the Moral Law*.<sup>244</sup> Here in a nutshell one finds many of the same ideas for which Hart later became famous, including the critique of Austin, the variety of laws, the distinction between being obliged and being obligated, the rule of recognition, the gunman situation, and others.<sup>245</sup> Although one cannot be certain, Hart's primary objec-

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tion, or misunderstanding . . . . To any theory which, like this one, asserts that the criminal law may be used on the vague ground that the preservation of morality is essential to society and yet omits to stress the need for critical scrutiny, our reply should be: "Morality, what crimes may be committed in thy name!"

Hart, *Immorality and Treason*, *supra* note 55, at 87.

241. "Man is to man a wolf." FREUD, *supra* note 237, at 40.

242. *Id.*

243. See Ronald Dworkin, Speech at the Memorial Ceremony for Herbert Hart (Feb. 6, 1993), *excerpted in* HART, ASK ME NO MORE, *supra* note 39, at 213, 214.

244. ARTHUR L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* (Fred B. Rothman & Co. 1988) (1953).

245. See, e.g., *id.* at 12 ("The attraction of the command theory lies in the fact that it is a not inaccurate description of the typical English statute. A statute appears to be a command by a superior, the Queen-in-Parliament, to inferiors, the Queen's subjects, which will be enforced by a sanction if they fail to obey it. Even this is true only of penal law where there may be said to be a direct command to the subject. It is difficult to find a command and a sanction in ordinary civil law. Thus there is no command addressed to a testator requiring him to make a will in a particular form because he is free to make a will or not as he chooses."); *id.* at 13 ("[T]he moment we go beyond the ordinary civil law we can see the total inadequacy of this interpretation of law. It leaves out the most important part of State law, i.e., constitutional law. It is obvious that the corner-stone of the English legal system is the obedience that is paid to the Queen-in-Parliament, but this cannot have been commanded by anyone. The structure and the authority of Parliament are based on a collection of ancient and modern rules which, taken together, constitute the constitution, but they are based on recognition and not on a non-existent command."); *id.* ("The American constitution, which is the most important single legal document in the history of the world, clearly was not commanded . . . , and it continues to exist not by force, but by general recognition."); *id.* at 19 ("Austin found the key to the science of jurisprudence in the word *command*: I suggest that a more correct view is to find it in the word *obligation*. I should therefore define law as any rule of human conduct which is recognized as being obligatory. It is distinguished from a purely voluntary rule of human conduct which is followed for its own sake: thus if a man always puts on an overcoat in the winter to avoid the cold he is not following this course of

tive in writing *The Concept of Law* was probably to produce an accessible student text which conceded the main criticisms of positivism Goodhart had made but which denied the conclusions he drew about the dependence of legal obligation on “an objective moral law.”<sup>246</sup> However, while Hart succeeded brilliantly in this endeavor, his success came at a heavy cost because the emphasis he placed on the separation of law and morals led him to simplify and distort the natural law tradition in ways that now seem painfully obvious. It also led him to evade some difficult conceptual barriers to reconciling legal positivism with the idea of human rights, such as what to do with the *mala in se/mala prohibita* distinction. Human rights and inherent wrongs are opposite sides of a coin; each implies the other. Yet legal positivists were unwavering in their rejection of the *mala in se/mala prohibita* distinction,<sup>247</sup> while conservative jurists like Devlin were quite prepared to draw upon the distinction to support or at least tolerate the legal regulation of homosexuality and other allegedly

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conduct because of any sense of obligation.”); *id.* at 19–20 (“It is essential to draw a clear distinction between obedience to an order or a rule and recognition that the order or rule is obligatory, i.e., that the order or rule *ought* to be obeyed. We may obey an order solely because we fear that if we do not do so we shall incur an evil. In such a case we are reacting to naked force, and we shall seek to avoid obedience if that is possible. We have no conative feeling: no sense that we are under a duty of any nature. On the other hand, if we recognize that a rule is obligatory our reaction will be entirely different. It is true that we may refuse to perform our obligation . . . , but nevertheless the feeling of *oughtness* will remain.”); *id.* at 20 (“Let me give you one illustration to make my point. A gangster enters a bank, and orders, at the point of his gun, all the persons there to raise their hands. A police constable, who is present, calls on them, as he is entitled to do under the common law, to assist him in arresting the gangster. Why do we regard the gangster’s order as an arbitrary command and the police constable’s order as a legal one? The answer obviously does not depend on any sanction, because the sanction behind the gangster’s order is far more powerful than is any which the law can apply.”).

246. *Id.* at 30; *see, e.g.*, Sugarman, *supra* note 121, at 281 (“SUGARMAN: What were the origins of *The Concept of Law*? HART: “The essential doctrine is contained in my Harvard lecture. . . . All of a sudden I felt tremendously antipathetic to rather, as it seemed to me, sentimental views of the connection between law and morality. Goodhart had it, all sorts of people have it, and it could be given a natural law basis. And I’ve possibly gone over the deep end too much. I said ‘no separation; they’re conceptually distinct’, except at various points, which I mention.”) (alteration in original); Hart, *supra* note 203, at 89 (linking Goodhart with the view that “at the root of every legal system is a general recognition of a moral obligation to obey the law so that there is a necessary or analytic connection and not merely an empirical one between the statement that a legal system exists and the statement that most of the population recognizes a moral obligation to obey the law” and citing GOODHART, *supra* note 244, at 18, 28); *cf.* Morton J. Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD. 551, 581 (1997) (suggesting that the appeal of positivism for secular Jews like Hart and Kelsen was its serving “as a counterweight to religiously grounded legal systems derived from natural law”); *id.* at 582 (“It was precisely his fear of the incorporation of religious norms into positive law that led Hart to wish to separate law and morality.”).

247. *See, e.g.*, HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 52–53 (Anders Weberg trans., Harvard Univ. Press 1945) (1925) (“There are no *mala in se*, there are only *mala prohibita*, for a behavior is *malum* only if it is *prohibitum* . . . . These principles are the expression of legal positivism in the field of criminal law . . . .”); *see also* AUSTIN, *supra* note 193, at 92; 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 264 (Burt Franklin 1970) (1861); BENTHAM, *supra* note 68, at 28–33, 63–68, 79–89, 374–89; 1 JEREMY BENTHAM, *The Influence of Time and Place in Matters of Legislation*, in *WORKS*, *supra* note 136, at 171, 192–93; *cf.* *Morissette v. United States*, 342 U.S. 246, 260 (1952) (drawing on the *mala in se/mala prohibita* distinction to read a specific intent element into a federal statute prohibiting the conversion of government property).

“immoral” conduct.<sup>248</sup> This is the dilemma which, in retrospect, one can see Hart wrestling with at various times throughout his career, beginning in the mid-1950s, yet which he arguably never squarely resolved.<sup>249</sup> Finally, Hart’s emphasis on the separation thesis led him to neglect and sometimes distort the historical record of legal positivism itself, thereby making his jurisprudence vulnerable to the charge of being unhistorical.<sup>250</sup> There are many telling illustrations of this point, such as the fact that Hart never wrote anything about *Erie* and its progeny, surely a surprising characteristic of one of the century’s leading positivists.<sup>251</sup> However, nowhere is the unhistorical and politically detached character of Hart’s jurisprudence more apparent than in his unfortunate tendency to overlook or minimize some rather significant distinctions between Bentham and Austin.

Bentham was an atheist and a political radical.<sup>252</sup> He condemned the corruption and chicanery of the English bar; waged ceaseless war on irrational privileges based on sex, wealth, race, and creed; and lit the fire that resulted in the historic Reform Bill of 1832.<sup>253</sup> He was a fierce opponent of slavery,<sup>254</sup> a harsh critic of colonialism,<sup>255</sup> and an outspoken if belated proponent of universal suffrage.<sup>256</sup> He conceived of the principle of utility as a rational, secular measure of right and wrong, and his prodigious philosophical energies were

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248. See, e.g., DEVLIN, *supra* note 55, at 16–18; cf. *Lawrence v. Texas*, 539 U.S. 558, 589 (Scalia, J., dissenting) (“Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (“Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ i.e., immoral.”).

249. See, e.g., H.L.A. Hart, *Blackstone’s Use of the Law of Nature*, 3 BUTTERWORTHS S. AFR. L. REV. 169 (1956) (examining Blackstone’s use of the *mala in se/mala prohibita* distinction); Hart, *Are There Any Natural Rights?*, *supra* note 202; Hart, *Legal and Moral Obligation*, *supra* note 203, at 83–84 (suggesting that while “duties and obligations are really at home” in the law, the same vocabulary may be unsuitable in morals); see also HART, *supra* note 6 (examining the relation between law and morals); HART, *supra* note 5, at 181–207 (same); H.L.A. Hart, *Duty*, in 4 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 320 (David L. Sills ed., 1968) (explaining the concept of duty without reference to natural duties); Hart, *Rawls on Liberty and Its Priority*, *supra* note 95, at 231–32, 240–41 (expressing concern over the implications of Rawls’ account of natural duties for sexual freedom and other liberties); Hart, *Social Solidarity and the Enforcement of Morality*, *supra* note 55, at 5–13 (analyzing the legal enforcement of morality in the light of Durkheim’s notion of a “collective conscience”).

250. See generally Horwitz, *supra* note 246; see also Twining, *supra* note 176, at 47–49.

251. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (drawing on a positivist conception of law to deny the existence of federal general common law). But see Goldsmith and Walt, *supra* note 194 (challenging the conventional wisdom that *Erie* relies on a commitment to legal positivism).

252. See generally Elie Halevy, *The Growth of Philosophical Radicalism* (1955); James E. Crimmins, *Bentham on Religion: Atheism and the Secular Society*, 47 J. HIST. IDEAS 95 (1986).

253. On Bentham’s life and influence, see generally Halevy, *supra* note 252; Mary P. Mack, *Jeremy Bentham: An Odyssey of Ideas, 1748–1792* (1962); John Stuart Mill, *Bentham* (1838), reprinted in *Mill on Bentham and Coleridge* 39 (F.R. Leavis ed., 1983). On Bentham’s jurisprudence, see generally Gerald J. Postema, *Bentham and the Common Law Tradition* (1986).

254. See, e.g., Hart, *Essays on Bentham*, *supra* note 70, at 72–73.

255. See, e.g., Jeremy Bentham, *Emancipate Your Colonies!*, in 4 *Works*, *supra* note 136, at 408.

256. See, e.g., Hart, *Essays on Bentham*, *supra* note 70, at 70.

undoubtedly directed toward the genuine improvement of human welfare. For example, when Bentham wrote of those “whose care it has been to pluck the mask of Mystery from the face of Jurisprudence,”<sup>257</sup> he was not referring to something abstruse or theoretical, but simple and practical: parliamentary reforms requiring courts of law to record their proceedings in English rather than Law-Latin, so that the public, whose liberties were at stake, could actually understand them.<sup>258</sup>

By contrast, Austin was a religious and political conservative whose opposition to liberalism earned him a reputation as “a retrograde or backsliding

257. BENTHAM, *supra* note 68, at 410.

258. *Id.* In one of his many trenchant criticisms of Blackstone, Bentham wrote:

It is from the decisions of Courts of Justice that those rules of Law are framed, on the knowledge of which depend the life, the fortune, the liberty of every man in the nation. Of these decisions the Records are, according to our Author [i.e., Blackstone] (I Comm. 71) the most authentic histories. These Records were, till within these five-and-forty years, in Law-Latin: a language which, upon a high computation, about one man in a thousand used to fancy himself to understand. In this Law-Latin it is that our Author is satisfied they should have been continued . . . . He gives us to understand that, taking it altogether, there could be no room to complain of it, seeing it was not more unintelligible than the jargon of the schoolmen, some passages of which he instances; and then he goes on, “This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell; when, among many other innovations on the body of the Law, some for the better and some for the worse, the language of our Records was altered and turned into English. But at the Restoration of King Charles, this *novelty* was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the Proceedings at Law should be *done* into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26.

“This was done (continues our Author) in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am *apt to suspect* that the people are now, after many years’ experience, *altogether* as ignorant in matters of law as before.”

In this scornful passage the words *novelty*—*done* into English—*apt to suspect*—*altogether* as ignorant—sufficiently speak the affection of the mind that dictated it. It is thus that our Author chuckles over the supposed defeat of the Legislature with a fond exultation which all his discretion could not persuade him to suppress.

The case is this. A large portion of the body of the Law was, by the bigotry or the artifice of Lawyers, locked up in an illegible character, and in a foreign tongue. The statute he mentions obliged them to give up their hieroglyphics, and to restore the native language to its rights.

This was doing much; but it was not doing every thing. Fiction, tautology, technicality, circuitry, irregularity, inconsistency remain. But above all the pestilential breath of Fiction poisons the sense of every instrument it comes near.

The consequence is, that the Law, and especially that part of it which comes under the topic of Procedure, *still* wants much of being generally intelligible. The fault then of the Legislature is their not having done *enough*. His quarrel with them is for having done any thing at all. In doing what they did, they set up a light, which, obscured by remaining clouds, is still but too apt to prove an *ignis fatuus*: our Author, instead of calling for those clouds to be removed, deprecates all light, and pleads for total darkness.

*Id.* at 410–11 n.r (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES \*322).

Benthamite.”<sup>259</sup> He did not think the principle of utility was the basis of a secular morality, but rather “the index to God’s commands.”<sup>260</sup> He was lukewarm on the abolition of slavery,<sup>261</sup> an apologist for British colonialism,<sup>262</sup> and an opponent of universal suffrage on the grounds that “the bulk of the working people are not yet ready for political power.”<sup>263</sup> While Austin supported some progressive reforms in his youth, by 1859 he stated publicly what he had told his friends in private many years earlier: that democracy was not only unnecessary, but also undesirable, because the natural opinions of most working people were essentially socialist.<sup>264</sup>

When Hart, therefore, described Bentham and Austin as “the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws”<sup>265</sup> and praised them for standing firmly “for all the principles of liberalism in law and government”;<sup>266</sup> when he credited them with “the most enlightened liberal attitudes”<sup>267</sup> and claimed that their emphasis on the separation of law and morality was motivated mainly by “the problem posed by the existence of morally evil laws”;<sup>268</sup> and when he insisted that the “the great battle-cries of legal positivism”<sup>269</sup> were therefore directed toward *empowering* rather than weakening the ability of individuals to criticize and resist the abuse of official power; his statements were largely accurate with respect to Bentham but quite dubious with respect to Austin. (Considering what Austin actually *does* in connection with the separation thesis in *The Province of Jurisprudence Determined*, among his main objectives was to delegitimize the law of nations, hardly a progressive doctrine either in his day

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259. W.L. MORRISON, JOHN AUSTIN 42 (1982).

260. AUSTIN, *supra* note 193, at 69; *see also id.* at 41 (describing “the principle of general utility” as “our only index or guide to [God’s] unrevealed law”).

261. *See* MORRISON, *supra* note 259, at 122.

262. *See* WILFRID E. RUMBLE, THE THOUGHT OF JOHN AUSTIN 51 (1985).

263. JOHN AUSTIN, A PLEA FOR THE CONSTITUTION, at vi (London, John Murray 1859).

264. MORRISON, *supra* note 259, at 123. Austin wrote:

No man, looking attentively at the realities around him, can doubt that a great majority of the working classes are imbued with principles essentially socialist: that their very natural opinions on political and economic subjects are partial applications of the premises which are the groundwork of the socialist theories. They believe, for example, very generally, that the rate of wages depends on the will of the employers; that the prices of provisions and other articles of general consumption, depend upon the will of the sellers; that the wealth of the richer classes is somehow subtracted from their own; and that capital is not an adminicle, but an antagonist of labour. We might, therefore, expect from a House of Commons representing the prejudices of the non-proprietary class, a *minimum* rate of wages, a *maximum* price of provisions and other necessities of life, with numberless other restrictions on the actual freedom of contracting.

AUSTIN, *supra* note 263, at 19.

265. Hart, *supra* note 1, at 52.

266. *Id.* at 51.

267. *Id.* at 74.

268. *Id.* at 73.

269. HART, *supra* note 5, at 203.

or ours.) Likewise, when Lacey credits the positivism on which Hart built with “the development of a conception of law appropriate to modern, secular democracies,”<sup>270</sup> her contention merits careful scrutiny. There is little question that modern secular democracies are predicated on the fundamental moral equality and dignity of all individuals; on popular sovereignty; on the rule of law (“the government of law and not of men”); and, above all, on the concept of human rights. How, if at all, ideas like these can be brought together in one coherent scheme is of course controversial, but as an historical matter, they unquestionably owe more to the philosophy of natural law than to legal positivism.<sup>271</sup> By contrast, the legal positivism Hart inherited and sought to revitalize included (along with many attractive features) the following elements: no acts are wrong in themselves; conscience and human rights are mere fictions; international law is not really law; all law emanates from a determinate sovereign, whose power is incapable of legal limitation. Hart chipped away at many of these notions,<sup>272</sup> but he never subjected the epistemological foundations of positivism to wholesale critical scrutiny, even after the cognitive and human rights revolutions provided him with powerful reasons to do so. Nor, as far as one can tell, did he seriously question whether the same philosophical doctrines which for Bentham had been a key to progressive social reform had become in his own day, under different circumstances, a legal theory for judicial conservatives.<sup>273</sup>

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270. LACEY, *supra* note 2, at 4, 224.

271. *Cf.* GOODHART, *supra* note 244, at 10–28 (arguing that Austin’s positivism is incompatible with the rule of law); HENRY SUMNER MAINE, ANCIENT LAW 88–92 (Raymond Firth ed., Beacon Press 1963) (1861) (discussing the natural law origins of modern democratic ideas); FREDERICK POLLOCK, ESSAYS IN THE LAW 31–79, 32 (1922) (tracing the “essentially rationalist and progressive” history of natural law doctrines from Aristotle onward, including their impact on English legal norms of reasonableness, justice, and equity); *see also* Dyzenhaus, *supra* note 31, at 119–20 (arguing that “in the last sixty years both international and domestic law have been shaped more by Professor’s Radbruch’s intuitions than by Professor Hart’s”); Schauer, *supra* note 19, at 865 (noting that lawyers refer to the rule of law in ways that owe far more to Fuller than to Hart).

272. *See, e.g.*, HART, *supra* note 5, at 64–69 (criticizing the positivist concept of a legally unlimited sovereign); *id.* at 189–95 (rejecting the positivist thesis that “law may have any content” in favor of “a minimum content of natural law”); *id.* at 208–31 (affirming the obligatory character of international law).

273. For some illuminating discussion of this topic, see generally ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998) (tracing the association of positivism and conservatism in post-war American jurisprudence); Horwitz, *supra* note 246 (describing the shifting political significance of legal positivism in English jurisprudence from Bentham to Hart); *see also* Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1677–78 (2002) (noting that while jurists like Bentham, Holmes, Hand, and Brandeis appealed to positivism to support progressive economic and social legislation, after World War II positivism “was associated no longer with democratic progress, but with conservative majoritarianism”). Dworkin claims that positivism “is no longer an important force either in legal practice or in legal education,” *id.* at 1677, but among other things this contention seems at odds with the Supreme Court’s recent habeas corpus, qualified immunity, and law of nations jurisprudence. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1746–53, 1758–64 (1991) (analyzing the positivist underpinnings of *Teague v. Lane*, 489 U.S. 288 (1989) (habeas corpus), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity)); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–38 (2004) (relying on a positivist conception of law to limit the jurisdictional reach of the Alien Tort Statute, 28

Near the end of his career, Hart's attitudes began to shift, and he began to voice greater misgivings about Bentham's philosophical doctrines and to devote more attention to the foundation of human rights. In one of his last essays, he wrote movingly of the growth of a global human rights culture and of the importance of finding sound philosophical arguments in support of it. Surveying the efforts of Rawls, Nozick, and Dworkin to construct such a theory, Hart found them to be "in spite of much brilliance still unconvincing,"<sup>274</sup> and he called for a "more radical and detailed consideration"<sup>275</sup> of the basis of human rights and their relation to other values. Hart wrote:

[I]t is plain that a theory of rights is urgently called for. During the last half century man's inhumanity to man has been such that the most basic and elementary freedoms and protections have been denied to innumerable men and women guilty, if of anything, only of claiming such freedoms and protections for themselves and others, and sometimes these have been denied to them on the specious pretence that they are demanded by the general welfare of society. So the protection of a doctrine of basic human rights limiting what a state may do to its citizens seems to be precisely what the political problems of our own age most urgently require . . . . And in fact the philosophical developments which I have sketched have been accompanied by a growth, recently accelerated, of an international human rights movement. Since 1946 when the signatories of the United Nations Charter affirmed their faith in fundamental human rights and the dignity and worth of the human person, no state can claim that the denial of such rights to its own citizens is solely its own business . . . . [T]he conception of basic human rights has deeply affected the style of diplomacy, the morality and the political ideology of our time, even though thousands of innocent persons still imprisoned or oppressed have not yet felt its benefits. The doctrine of human rights has at least temporarily replaced the doctrine of maximising Utilitarianism as the prime philosophical inspiration of political and social reform. It remains to be seen whether it will have as much success as Utilitarianism once had in changing the practices of governments for human good.<sup>276</sup>

Hart's eloquent remarks in this passage serve as an important reminder of

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U.S.C. § 1350); *id.* at 745–46 (Scalia, J., concurring) (arguing that "a new federal common law of international human rights" should be completely foreclosed because "the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century"). Of course, none of these observations should be taken to imply that positivism is *inherently* conservative, for depending on how it is defined, positivism may have few if any political implications. See generally Hart, *supra* note 1; *cf. supra* note 194. Nor do they imply that natural law doctrines are "essentially rationalist and progressive." POLLOCK, *supra* note 271 (emphasis added). "Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature." H.L.A. Hart, *Scandinavian Realism*, in *ESSAYS*, *supra* note 1, at 163 (quoting ALF ROSS, *ON LAW AND JUSTICE* (1958)).

274. Hart, *supra* note 206, at 679.

275. *Id.*

276. *Id.* at 679–80.

difficult political and legal challenges which have not yet been met. Yet they also remind us of some crucial limitations of Hart's own approach to human rights, which he never managed to transcend over the course of his illustrious career. Here and elsewhere, Hart's philosophy of human rights is restricted to the activities of a state concerning the civil and political rights of its citizens. Significantly, Hart never broadened this conception to encompass human rights abuses committed by private actors, such as corporations; the full status of social, economic, and cultural rights, such as those rights enumerated in Articles 22–27 of the *Universal Declaration*; or the human rights of persons generally, including aliens, refugees, indigenous peoples, and individuals living under military occupation. Today, these categories comprise many of the world's most pressing human rights challenges. Moreover, it seems clear on reflection that even after Rawls had called for a return to “the conception of [moral philosophy] adopted by most classical British writers through Sidgwick,”<sup>277</sup> Hart never seriously entertained the possibility that the foundation of human rights could be found where most classical British as well as American writers said it could be found: in a moral sense or conscience “which nature has made universal in the whole species.”<sup>278</sup> Instead, even in his later essays, Hart continued to approach the topic of human rights almost entirely in the shadow of Bentham's epistemological empiricism<sup>279</sup>—even as he perceptively criticized Nozick and

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277. RAWLS, *supra* note 95, at 51.

278. HUME, *supra* note 168, at 6; *see also id.* at 5 (locating the seat of moral judgment in “the original fabric and formation of the human mind”); JOSEPH BUTLER, *A Dissertation on the Nature of Virtue*, in FIVE SERMONS 69, 69 (Stephen L. Darwall ed., 1983) (recognizing a universal moral faculty in “our natural sense of gratitude . . . [the] distinction every one makes between injury and mere harm . . . and [the distinction] between injury and just punishment, a distinction plainly natural, prior to the consideration of human laws,” and remarking that a “great part of common language, and of common behavior over the world, is formed upon supposition of such a moral faculty”); FRANCIS HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY (1747), *reprinted in* PHILOSOPHICAL WRITINGS 155, 161 (R.S. Downie ed., 1994) (observing that the “several rights of mankind” derive “from that *moral sense* of right and wrong, natural to us previous to any consideration of law or command”); SMITH, *supra* note 173, at 318 (explaining that in order to refute the “odious” doctrine of Hobbes, “it was necessary to prove, that antecedent to all law or positive institution, the mind was naturally endowed with a faculty, by which it distinguished in certain actions and affections, the qualities of right, laudable, and virtuous, and in others those of wrong, blamable, and vicious”); MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (1792), *reprinted in* A VINDICATION OF THE RIGHTS OF MEN AND A VINDICATION OF THE RIGHTS OF WOMAN 65, 75, 69 (Sylvana Tomaselli ed., 1995) (observing that women must be viewed “in the grand light of human creatures, who, in common with men, are placed on this earth to unfold their faculties,” and demanding “a participation of the natural rights of mankind” on this basis); *cf.* JEFFERSON, *supra* note 168; WILSON, *supra* note 168.

279. *See* Etienne Dumont, *Introduction to Principles of the Civil Code*, *reprinted in* 1 WORKS, *supra* note 136, at 299, 300 (“The first ray of light which broke in upon Mr. Bentham in his legal studies was, that the law of Nature—the original Compact—the moral Sense—the notions of Right and Wrong, which had been employed for the explanation of the laws, were only at bottom those innate ideas whose falsehood had been so ably demonstrated by Mr. Locke.”). Compare John Stuart Mill:

Man is conceived by Bentham as being susceptible of pleasures and pains, and governed in all his conduct partly by the different modifications of self-interest, and the passions commonly classed as selfish, partly by sympathies, or occasionally antipathies, towards other beings. And here Bentham's conception of human nature stops . . . Man is never recognized by him as a

Dworkin of operating too much in the shadow of utilitarianism.<sup>280</sup>

Finally, as scholars continue to debate Hart's legacy and to contemplate new forms of jurisprudence in an era increasingly characterized by naturalism and globalization,<sup>281</sup> it seems important to ask whether Hart ever considered that the proper philosophical standpoint from which to interpret Bentham's theory of fictions, of which his critique of natural rights was in some sense merely an application, is the computational and internalist theory of language and mind pioneered by Chomsky and other linguists and philosophers in the 1960s and 1970s and now widely utilized in the cognitive and brain sciences.<sup>282</sup> From this naturalistic perspective, human rights are indeed "fictions" in more or less Bentham's sense—mental constructs which are indispensable for human thought and discourse, but which have no immediate referent in the mind-independent, external world, as described by the natural sciences—but are surely no worse off for that; for the same may be said of many if not most concepts of folk psychology and ordinary discourse, and the principles which generate these rights are, or at least can be, as much a part of a scientific theory of human nature as other principles of cognitive science are. Furthermore, while the existence and character of these principles is, or least can be, a problem of ordinary science, the discipline which studies them may justly be called "jurisprudence" as much as anything else. For it is a matter of no small importance to recognize that for centuries before positivism sought to redefine its subject matter, the science of jurisprudence was directed toward elucidating "the com-

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being capable of pursuing spiritual perfection as an end; of desiring, for its own sake, the conformity of his own character to his standard of excellence, without the hope of good or fear of evil from other source than his own inward consciousness. Even in the more limited form of Conscience, this great fact of human nature escapes him. Nothing is more curious than the absence of recognition in any of his writings of the existence of conscience, as a thing distinct from philanthropy, from affection for God or man, and from self-interest in this world or the next. There is a studied abstinence from any of the phrases which, in the mouths of others, import the acknowledgment of such a fact.

MILL *supra* note 253, at 66–67; *cf.* BENTHAM, *supra* note 67.

280. *See, e.g.*, H.L.A. HART, *The United States of America*, in *ESSAYS ON BENTHAM*, *supra* note 70, at 53 (examining the doctrine of natural rights from the perspective of Bentham's criticisms of it); H.L.A. HART, *Natural Rights: Bentham and John Stuart Mill*, in *ESSAYS ON BENTHAM*, *supra* note 70, at 79 (same); Hart, *1776–1976*, *supra* note 96 (same); Hart, *Utilitarianism and Natural Rights*, *supra* note 206 (same); Hart, *Between Utility and Rights*, *supra* note 90 (same); *cf. id.* at 222 (suggesting that "a satisfactory foundation for a theory of rights will [not] be found as long as the search is conducted in the shadow of utilitarianism, as both Nozick's and Dworkin's in their different ways are").

281. *See generally* BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001); TWING, *supra* note 250; William Twining, *General Jurisprudence*, in *LAW AND JUSTICE IN A GLOBAL SOCIETY* 609 (M. Escamilla & M. Saavedra eds., 2005).

282. *See generally* NOAM CHOMSKY, *LANGUAGE AND THOUGHT* (1993); NOAM CHOMSKY, *NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND* (2000); JERRY A. FODOR, *THE LANGUAGE OF THOUGHT* (1975); GARDNER, *supra* note 33; JACKENDOFF, *supra* note 149; RAY JACKENDOFF, *LANGUAGES OF THE MIND: ESSAYS ON MENTAL REPRESENTATION* (1992); STEVEN PINKER, *HOW THE MIND WORKS* (1997).

nonsense morality of the human race”<sup>283</sup> with the aid of a technical legal vocabulary, in roughly the manner many philosophers and cognitive scientists now do: by identifying a class of considered judgments in which “our moral capacities are most likely to be displayed without distortion”<sup>284</sup> and a set of rules and principles from which they can be derived. The historical evidence for this proposition is hardly unequivocal, but nonetheless it seems reasonably clear.<sup>285</sup> Hence a careful study of classical accounts of jurisprudence from a contemporary scientific perspective may prove to be a highly profitable enterprise for philosophers, legal theorists, and cognitive scientists alike. With the dramatic success of Universal Grammar in the past fifty years, it is perhaps not too much to hope that a revitalized conception of Universal Jurisprudence, conceived along similar lines, may also make significant progress in the years that lie ahead, thereby supplying an increasingly globalized yet fractured world with a deeper and more durable understanding of universal human rights.

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283. J.B. Schneewind, *Hugo Grotius*, in 1 MORAL PHILOSOPHY FROM MONTAIGNE TO KANT: AN ANTHOLOGY, *supra* note 173, at 88, 88.

284. RAWLS, *supra* note 95, at 47.

285. *See, e.g.*, RAWLS, *supra* note 95, at 50–51, 51 n.26 (characterizing a theory of justice as “a theory of the moral sentiments . . . setting out the principles governing our moral powers, or, more specifically, our sense of justice” and equating this endeavor with both “the conception of [moral philosophy] adopted by most classical British writers through Sidgwick” and “Aristotle’s procedure in the *Nicomachean Ethics*”); *id.* at 51 (stating that under this conception of moral philosophy “[t]here is a definite if limited class of facts against which conjectured principles can be checked, namely, our considered judgments in reflective equilibrium”); HENRY SIDGWICK, *OUTLINES OF THE HISTORY OF ETHICS* 160–61 (Hackett Publ’g 5th ed. 1988) (1902) (observing an “absence of distinction between the provinces of Ethics and Jurisprudence” in the history of moral philosophy prior to Grotius, which Grotius only partially abandoned); HENRY SIDGWICK, *THE METHODS OF ETHICS* 373–74 (Hackett Publ’g 1981) (1874) (characterizing the history of moral philosophy as a series of attempts to formulate principles “by the scientific application of which the common moral thought of mankind may be at once systematized and corrected”). *See generally* POTTS, *supra* note 168 (discussing medieval theories of conscience); J.B. SCHNEEWIND, *SIDGWICK’S ETHICS AND VICTORIAN MORAL PHILOSOPHY* (tracing the history of British moral philosophy from Thomas Reid to Henry Sidgwick, F.H. Bradley, and T.H. Green); J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* (1998) (tracing the history of modern moral philosophy from Montaigne to Kant); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625* (William B. Eerdmans Publ’g 2001) (1997) (examining rights in the context of medieval and early modern jurisprudence); RICHARD TUCK, *NATURAL RIGHTS THEORIES* (1979) (same). *Cf.* J. INST. 1.1.1 (J.B. Moyle ed., 1928) (defining jurisprudence to include “the science of the just and the unjust”); HENRY DE BRACON, 2 *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* [ON THE LAWS AND CUSTOMS OF ENGLAND] 25 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1268) (same); GROTIUS, *supra* note 168, *Prolegomena*, at 30 (noting that the proper study of jurisprudence is natural law and observing: “Many, in preceding times, have designed to invest [jurisprudence] with the form of an Art or Science; but no one has done this. Nor can it be done, except care be taken in that point which has never yet been properly attended to;—to separate Instituted Law from Natural Law.”); ADAM SMITH, *LECTURES ON JURISPRUDENCE* 397 (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1766) (“Jurisprudence is that science which inquires into the general principles which ought to be the foundation of the laws of all nations.”). *But see* AUSTIN, *supra* note 193, at 18 (“The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.”).

## CONCLUSION

*A Life of H.L.A. Hart* is a compelling story of an admirable man who had a profound impact on twentieth century philosophy of law. With style and grace, Nicola Lacey unmasks the man behind the initials, weaving a complex and engaging narrative which illuminates many aspects of Hart's life and career by locating them in their original social and philosophical context. The result is a truly impressive biography that is sure to become a standard reference for many years to come.

As Frederick Schauer observes, one of the many virtues of Lacey's book is that it "tracks what actually interested Hart,"<sup>286</sup> thereby enabling scholars to take a fresh look at elements of his legal philosophy that have become hidden or obscured as a result of the massive literature it has spawned. Further, by paying Hart's work the ultimate compliment of unflinching criticism, Lacey encourages the rest of us to ask some hard questions of our own. This Essay seeks to build on these foundations by drawing attention to some notable gaps in Hart's jurisprudence and Lacey's interpretation of it that have not yet received adequate attention. It is to be hoped that these efforts will encourage others to improve on them.

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286. Schauer, *supra* note 19, at 869.