CHAPTER ONE

Introduction to the Second Edition

SOME PERSONAL REFLECTIONS

This is a book about the philosophical ideas of a great thinker who transformed the study of jurisprudence in the English-speaking world and beyond. His impact was great in practice as well as in theory. By his arguments, writings, personal standing, and eminence, he contributed markedly to the liberalisation of law in the United Kingdom—and to the liberation of attitudes beyond these shores—in relation to human sexuality and aesthetic celebrations of it. He had a remarkable career, encompassing eight years of successful practice at the English chancery bar (during which he also discovered a taste for riding to hounds), the 1939–45 war years working as an official in British intelligence, the following eight years teaching philosophy in New College Oxford and becoming a significant figure in the Oxford 'philosophical revolution' of that period, then sixteen years from 1952 as Professor of Jurisprudence in Oxford University after his somewhat surprising appointment to the chair, matched by an equally surprising early retirement in 1968 that led into a period of editorial work on Jeremy Bentham's papers while also holding office as a Monopolies Commissioner, and finally the Principalship of Brasenose College Oxford from 1972 till 1978. He remained active in retirement and was the focus of much scholarly activity till shortly before his death in December 1992.

He was married throughout nearly all this period to the brilliant but wayward Jenifer Williams, a high-flying civil servant in the Home Office before and during the 1939–45 war and an Oxford don after the war. They had four children, the youngest of whom sadly had suffered brain damage at birth. The marriage was famously a somewhat tempestuous and open one, but it was a partnership that endured for life and sustained both the partners through many vicissitudes. Its last years became mired in controversy, even scandal. While Herbert Hart was in wartime intelligence, Jenifer Hart was a civil servant in the Home Office (after the war, she too moved to Oxford, to an academic post first in Nuffield College, subsequently

as a Fellow of St Anne's College). But during the thirties she had been a member of the Communist Party, like many other young people shocked by the rise of fascism and the apparent impotence of the democracies of the West.[1] By 1939, her membership had petered out, and she had ceased to have any contact with the party member who had been her contact in her early days in the Home Office. No attempt had been made to recruit her into spying. In the sixties, there was a series of revelations about spying in wartime, and Jenifer (like others who had had some engagement with communism in the thirties) was twice questioned in great detail by officials from the Security Service ('MI5') long before any public storm broke. She always maintained tenaciously that her early position as a potential 'sleeper' within the Home Office never came to anything but fizzled out along with her membership of and interest in the Communist Party during the period of the Molotov–Ribbentrop Pact, or shortly after. Break the storm did, however, in 1983. And it broke with a vengeance.

In 1983, Jenifer had given a (not uncharacteristically) indiscreet interview to a journalist at a time of public anxiety and speculation concerning spies at the heart of the British establishment. In the following furore, Herbert Hart became implicated as someone who allegedly might have passed secret intelligence information to his wife who in turn would have passed it on to her spymasters. As a respected figure in a pretty exalted position in the 'establishment', Hart was profoundly shocked to be faced with this innuendo or even accusation. It devalued in his own eyes the glowing record of the preceding years. And it was completely false. (So he robustly maintained throughout his ordeal of adverse publicity, and those who knew him considered him to be a person of rigid attachment to the truth.) He suffered a severe mental collapse, not cured until after a period of very unhappy hospitalisation culminating in electroconvulsive therapy.

The last public engagement at which I had the opportunity to meet him occurred some months after this unhappy episode. The occasion was a seminar in his honour held in Jerusalem in 1984 at the initiative of admirers of his in the senior ranks of the law faculty of the Hebrew University. He seemed to me to have recovered much of his sparkle, though still with an underlying sadness. He took a fairly low-key role at the seminar itself, while contributing a written response to a paper by Ronald Dworkin in the resulting volume edited by Ruth Gavison.[2] By that time, it was three years since the publication of the first edition of the present book, which Hart had largely welcomed while not fully agreeing with some parts of my reading of his work. We remained on very friendly terms since the time when I had worked

alongside of him in the Oxford law faculty, though I was never a member of his inner circle of close friends, nor one of his doctoral supervisees. My abiding memory of the Jerusalem visit is of his enthusiastically urging me to see the sights of the Old City. He wanted me to share his appreciation of the Islamic as well as the Jewish and Christian significance of the place and its wonderful gates and monuments, above all the Dome of the Rock and the Wailing Wall. It struck me how much more aesthetic experience mattered to him than religious observance, though his upbringing as an observant Jew was something he never belittled or disowned however far he moved into a stance of liberal agnosticism on religious questions.[3]

We met once or twice after that at meetings of the British Academy and during working visits of mine to Oxford. In 1992, when he was becoming very frail, the Trustees of the Hart Lectures in Oxford invited me to give the 1993 Hart Lecture, hoping that a tribute from a former student and self-confessed follower of Hart might be a source of pleasure in the evening of his days. Alas, he died some weeks before the time set for the lecture, and my tribute became a posthumous one. Jenifer Hart spoke to me very kindly after it, and I called on her at her house in Manor Road, Oxford. She said that my lecture[4] had for the first time made *The Concept of Law* seem fully comprehensible to her, but perhaps on this one occasion her lifelong propensity for unvarnished truthfulness was overridden by the graciousness of a hostess. When her own autobiography *Ask Me No More*[5] was published, I eagerly bought and eagerly read it. My sense of Hart's eminence as a leader in the academic field in which I had also made a life's work remained undimmed. I was very specially gratified to receive in 1994 a copy, signed by Jenifer, of the newly published second edition of Hart's *Concept of Law*, which had been edited at her request by Joseph Raz and Penny Bulloch, assisted by Timothy Endicott.

Quite a few years later, I heard from another valued friend, Professor Nicola Lacey of the London School of Economics, that she was embarking on a biography of Hart and inquiring if I had any information that might be of interest to her. I was then embroiled in what turned out to be a single five-year mandate as a Member of the European Parliament for Scotland. So far as I could recall, I had nothing of interest to add to what was contained in this very book, *H.L.A. Hart*, in its first edition, and I reported so from my rather frantically busy office in Brussels. Anyway, I was somewhat surprised that Niki should divert herself from the main stream of legal scholarship to an essay in biography, perhaps rather vainly thinking that my own book had exhausted the market for sympathetic studies of Hart and his work.

How very wrong I was. Nicola Lacey's *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*[6] burst upon the world in 2004 and was a runaway success. It confirmed the greatness of Hart's work as educator, jurist, philosopher, and scholar and the value of his public contributions to significant debates during a time of change in public sensibilities. But it revealed an astonishing level of private self-doubt and spiritual turmoil, including an abiding ambiguity of sexual orientation with resulting tensions in conjugal relations and other tensions in the relations of the Harts to various of their friends. Many readers had thought, certainly I had thought, that Hart had written his very influential *Law, Liberty and Morality* from a stance of deep but essentially detached sympathy with those whose sexual predilections and activities popular morality pilloried and the law denounced as criminal. This was, after all, not the case. Behind the vigour of his writing there lay a personal sense of felt suffering as well as a cool rationalism concerning proper uses of the criminal law.

What I had not originally realised about Lacey's biographical activity was that she was working on Hart's life with the encouragement of Jenifer Hart, having been a close friend of both Herbert and Jenifer when they were all three working in Oxford, and that Jenifer had given her the free run of all Herbert Hart's hugely voluminous papers and diaries. There, all his inner turmoil was fully disclosed. Such turmoil contrasted sharply with the awareness most people had of the public person, with its sometimes aloof gravitas, its wise and rational stance on philosophical and practical issues, including issues of university governance, and its essentially benign view of fellow humans and their follies and foibles.

Lacey's biography has provoked controversy. Some consider that Jenifer betrayed Herbert in letting his papers be used in this way.[7] Some consider that Lacey has made too much of the private record in a way that besmirches the public memory. Many, and I for certain among them, take a strongly opposed view. Lacey's honest account of Hart's own honest self-doubt increases, not diminishes, my respect both for Herbert and for Jenifer and the deep affection in which I shall always hold the memory of each of them. Even the great have their points of vulnerability, perhaps especially the great. But we all have our private dragons to slay, and a biography like Lacey's of Hart can encourage any reader to believe that however fierce one's personal dragons may be, much that is of true worth can be accomplished while they are held at bay or even partially tamed.

Anyway, despite superficial appearances, Hart's life was not without its dramatic or even exotic aspects. The Lacey biography enables one to

understand these. But this is not the place to rake over the same ground. The mundane details of Hart's life matter perhaps more, or certainly matter as much, for the purposes of a book aimed at explaining his contribution to Jurisprudence. We shall attend to these now.

THE PUBLIC PERSON

Born in 1907 of Jewish parents, he was educated briefly at Cheltenham College (which he hated) and Bradford Grammar School (which he loved, and where his appetite for ideas was whetted). He then proceeded to New College Oxford, where he performed brilliantly in the study of classics and ancient history and philosophy, taking a first in 'Greats' in 1929. As for many others, success in Greats was for him a prelude to a legal career. He read for the Bar Examinations, and was called to the Bar in 1932. For the next eight years he practised as a Chancery barrister establishing a successful junior practice in such complicated matters as trusts, family settlements, and succession and related questions of taxation. His ambitions were for success in the law, and although during this period he was invited to return as a philosophy tutor to New College where he had been taught by H. W. B. Joseph, he chose to stay in the world of legal practice.

Upon the outbreak of war, he became a civil servant working in military intelligence. During this period, his never wholly dormant interest in philosophy was rekindled in a new form, partly through his working association with two Oxford philosophers in a connected department of intelligence, Gilbert Ryle and Stuart Hampshire. During intervals in their intelligence work, conversation among those three turned to philosophy.

After the war, New College renewed its invitation to him to return to Oxford as a Fellow and Tutor in philosophy, and this time he accepted the invitation. He then saw himself as giving up all legal interests in favour of the more profound intellectual challenge to be found in testing the new philosophical approaches against old philosophical fascinations of his own about perception, about the reconciliation of scientific and commonsense beliefs, and about Plato's work, in which H. W. B. Joseph's work had engaged his interest even through his years of legal practice. After sixteen years of intensely practical work in the law and then in war service, he returned to the academic life.

The Oxford to which he returned was in a state of philosophical effervescence, with claims in the air about the 'philosophical revolution'[8] that

was perceived both to be necessary and to be under way. Leading figures were Gilbert Ryle and J. L. Austin, but they were by no means the only important figures in the new Oxford philosophy of the postwar years. Others with whom Hart came into close contact on his return to Oxford and to philosophy after his sixteen years' absence were Friedrich Waissman and G. A. Paul, from the latter of whom he obtained his first sight of Wittgenstein's still unpublished 'Blue Book'.[9] These two were participants in regular Saturday morning philosophical discussions in Austin's rooms, as were also J. O. Urmson, A. D. Woozley, R. M. Hare, P. F. Strawson, Geoffrey and Mary Warnock, Philippa Foot, A. M. Honoré the jurist, and of course Hart himself. (Isaiah Berlin, the closest of Hart's philosophical friends and the one through whom he had been kept aware of newer philosophical developments during his years of legal practice, did not take part in these discussions.) In a work such as the present, no adequate account can be given of the range or quality of the work done by all the above named. Suffice it to say only that the galaxy of talent represented was a formidable one. Nevertheless, one should also acknowledge that in the perspective of a half-century later some of the claims of the 'revolution' (as so often with revolutions of all kinds) have proved to be somewhat overstated. The school of 'ordinary language philosophy' has dissolved into many different philosophical strands, some of which have involved rediscovering works that the revolutionaries treated with disdain.

However that may be, Hart's aims in returning to academia had nothing to do with applying philosophy to legal problems. Indeed, he saw himself as abandoning law in favour of philosophy. One can scarcely conceive of his having at that time accepted an appointment as a law tutor or even law professor, for that would have seemed a very low-grade alternative to legal practice. In those days, lawyers in practice, and especially those whose route to practice was through a university education in some subject other than law, regarded academic law with a certain disdain, as a very ancillary kind of activity in comparison to the real business of law. Such an attitude is by no means unfamiliar to this day. Philosophy in the universities was seen quite differently, clearly engaging the minds of brilliant people at the forefront of the world of ideas.[10]

As it turned out, however, Hart's legal experience in the Chancery barrister's manipulation of words to practical ends was particularly relevant to the current concerns of his fellow philosophers. The study of the uses of language in practical as well as theoretical ways had assumed a new urgency for them, as we shall see in due course. Hence Hart's legal experience

came to be drawn into his philosophical work, despite his exchange of the barrister's for the academic's gown. Yet the law in a way reclaimed him.

In 1952 A. L. Goodhart resigned from the Chair of Jurisprudence in Oxford. Although Hart had not yet published extensively, he was a respected member of the new school of postwar Oxford philosophers. Alone among them, he was a man of law as well as of philosophy. He was elected to the vacant Chair, but undertook his tasks very much in the style of a philosopher among lawyers, not as a lawyer with philosophical interests. His inaugural lecture on "Definition and Theory in Jurisprudence" put him at once in controversy when he announced the relevance of the new philosophy to long-standing juristic controversies over the nature of legal concepts. Instead of building theories on the backs of definitions, he argued, jurists must work at analysing the use of legal language in the practical workings of the law. From the United States, he was denounced by Professor Edgar Bodenheimer for reducing jurisprudence to the repetition of lawyers' talk and for diverting juristic attention from more urgent sociological inquiries. Hart rejoined[11] that the sociologists themselves could do with applying more rigorous conceptual analysis in their own work and that at least the starting point for juristic study ought to be the careful study by lawyers and law students of the linguistic fabric of their own enterprise.

Hart's analysis of law and legal concepts has sometimes been criticized for the rather detached, value-neutral approach it exhibits with regard to the law. This can plausibly be linked to the fact that, as we have seen, he had made a quite deliberate decision to break with the law and go over to philosophy. That break survived in his stance as one who inquires about law from the outside, not as one committed to finding practical solutions to current problems within it. It may be doubted whether this is really the stance of one who seeks to stand right outside the ordinary world and to find an 'Archimedean point' from which to cast doubt on all that lies below.[12] It implies a choice of standpoint or of method of study, and one that is certainly understandable in the light of Hart's own life-course. In the final chapter, the appropriateness of this methodological choice will be considered more closely.

The fruits of Hart's way of working did not become available to a wider public (beyond his well-attended Oxford lectures, which alternately stimulated and puzzled the law students present) until the publication in 1959 of *Causation in the Law*. This was a joint work with A. M. Honoré, which had been prefigured in a series of *Law Quarterly Review* articles.[13] Questions of causation have wide-ranging importance in law where questions of civil

or criminal liability are at stake. (Did Smith's act cause damage to Jones's property? Did it cause Macdonald's death?) They are also of philosophical and scientific concern. And they bulk large in the affairs of ordinary life and in commonsense speech. *Causation* was a masterly and detailed elucidation of the legal uses of a concept with its roots in everyday thought and speech, and it certainly vindicated Hart's—and Honoré's—jurisprudence from any plausible charge of triviality.

It was soon followed, in 1961, with the publication of Hart's central work, *The Concept of Law*, which offers an analysis of the concepts of law and of legal system through a discussion of the way in which rules of human conduct are used as social standards of behaviour. These are sometimes combined together into complex systematic wholes within which the concepts of legal discourse make sense and become applicable in appropriate social contexts. *The Concept of Law* can keep company even with the massively erudite and acutely perceptive works of the great Austrian jurist Hans Kelsen, among the great works of twentieth-century jurisprudence. It is a work of international eminence, and even its strongest critics have acknowledged it as a masterpiece worth at least the compliment of careful refutation.

Although such a work aims at universality of application, being supposedly as relevant to quite alien legal traditions as to the author's own, every jurist is apt to bear the marks of his own historical and geographical locality. Hart's work, though it is not directed particularly at British institutions and though he claimed that it applied to legal systems quite generally, is nevertheless clearly recognizable as the work of an English lawyer of the twentieth century.

Perhaps everywhere there is a line that can be drawn between 'law' and 'politics', but one of the more obvious facts of cross-cultural comparisons is that it gets drawn differently in different places. The British parliamentary tradition right up till the end of the twentieth century was one in which questions of fundamental rights and of justice fell primarily and permanently in the political sphere. It belonged primarily to the political nation—citizens, journalists, parties, politicians, parliamentarians, and statesmen—to settle and secure the rights of the people and to determine the framework of social justice. Under the constitution, whatever the political nation determined through proper parliamentary process issued forth as binding law. It was not then for judges and lawyers as such to pass a judgment of superior wisdom upon the decisions of the political nation. Their proper role was wise and faithful application of the law as it issued from those political decisions. They needed to have criteria for what

counted as law, but in interpreting and applying whatever counted as law by these criteria, they were not themselves to be bothered with issues of political theory in the grand manner.

The criteria in question were of course 'constitutional' in nature. But in a system that entrusted so much to the wisdom of the political nation, there seemed scarcely any room for grand notions of fundamental law, 'basic norms' which cement together the whole legal and political edifice, founts of all rightful authority. How different had to be the assumptions built into different traditions. Jurists in the European continental tradition have in their background in modern times constitutions and basic laws which are, as it were, the legally uncaused cause of all legal effects. In this context, the greatest of modern European jurists, Hans Kelsen, postulated the idea of a 'basic norm' or '*Grundnorm*' as a presupposition of all legal and juristic thinking, under which the actual historical act of determining a constitution is transformed into a source of *normative* authority determining what *ought* to be done, as distinct from what merely *is* done.

Jurists in the tradition of the United States work against a background of constitutionally guaranteed rights so general in their initial statement that theories of just relations between government and people are essential to implementing them. What, for example, is to be understood by a guarantee of "equal protection of the laws" for all citizens? Does this or that state or federal enactment infringe "equal protection"? What is "due process of law"? When is a punishment "cruel or unusual"? Such questions fall to be contested before and determined by courts of law, and ultimately the Supreme Court. Their determination leads judges inexorably into framing and acting upon political theories as an intrinsic element of constitutional law. Jurists and jurisprudence must then have something to say about theories of just government since they are intrinsic to the administration of such a system of law.

Yet from a British standpoint, the same matters seemed in Hart's day to be issues of political morality *v* questions of law. Deciding such issues was a matter for the political nation. The outcome of the decision was an act of lawmaking. But the law, once made, was binding law, which the courts had to apply even if they thought the political theories that justified it to be wild nonsense.

Great changes have come over the legal traditions of the United Kingdom since the time of Hart's flourishing. Entry in 1973 into the European Economic Community (itself, since 1992, one 'pillar' of the European Union) has wrought deep changes, yet changes that were little noticed in

the jurisprudence of the following decade. The unitary United Kingdom has been made quasi-federal with the devolution of power to a reestablished Scottish Parliament, a National Assembly for Wales, a new power-sharing Northern Ireland Assembly, and an elected Greater London Authority. (Plans for devolving power to regional assemblies in other parts of England have, however, been abandoned through lack of public demand for them). The European Convention for the Protection of Human Rights and Fundamental Freedoms has been largely made justiciable before British courts under the Human Rights Act 1998, though in a way that does preserve the last-resort supremacy of Parliament in relation to upholding the Convention rights. The development of public law has led to a far greater degree of judicial scrutiny of executive action than was ever practised before.

At the time of Hart's death in 1992, nearly all of this lay in the future, or at any rate had not yet impinged deeply on ideas about legal theory. Beyond doubt or denial, Hart's theory of law bears some of the marks of the previously prevailing unspoken assumptions of the English lawyer (to some extent shared also by Scots lawyers) as to the line that fell between the legal and the moral-cum-political. In turn, certain criticisms of his theories may indicate the concerns which seem more salient to legal thinkers grounded in other traditions. A German critic,[14] for example, has characterized Hart's and other similar works as '*Rechtstheorie ohne Recht*'—a rightless theory of the legally right, as one might falteringly translate the play on the German word *Recht*. In a partly similar way, American critics have attacked the absence from Hart's jurisprudence of any elucidation of the 'inner morality' which one of them, Lon L. Fuller, considered an intrinsic element of anything we can recognize as law. A landmark of Anglo–American juristic debate in the late 1950s was the publication in the *Harvard Law Review* of a controversy[15] between Fuller and Hart upon the question whether law is or is not essentially moral in its inner nature. Neither convinced the other, and each subsequently extended his argument in a powerfully argued book. Somewhat later, Ronald Dworkin, also of course an American, found in Hart's jurisprudence a failure to 'take rights seriously'[16] since it fails to build up any theory of the way in which basic principles of right come to be bodied forth in the 'black letter law' of statutes and judicial precedents.

These criticisms are perhaps not unrelated to some of the criticisms which some sociologists of law and sociologically minded jurists, including 'Critical Legal Scholars', have in their turn directed against Hart's way of elucidating the concept of law and related concepts.[17] The gravamen of the sociolog-

ical complaint is that analytical work upon legal ideas takes for granted the ideological scheme within which lawyers in general and, *a fortiori*, lawyers within a particular national tradition do their work. The task of understanding law is a task of seeing it as a manifestation of ideology located within a larger politico-economic framework of which it is but a part. This cannot be achieved within the four corners of an 'analytical jurisprudence' which elucidates lawyers' concepts from inside the taken-for-granted assumptions either of legal systems at large or of a single legal system.

Again, there may in any event be a gap between the concepts and rules that lawyers, judges, and administrators of law manipulate in their debates and arguments, and the way in which they actually conduct the business they are authorized to do. Understanding a legal system requires us, as 'American realists' and their sociologically minded successors in jurisprudence have insisted, to look behind the linguistic and conceptual smoke screen and find out what really goes on in the name of 'law'.[18]

Great though Hart's distinction as a jurist is, greater than that of any other twentieth-century British jurist, one cannot claim for his work that it is flawless or that it presents an entire and complete view of law. Like all great work it has gaps and defects, like all great work it bears the marks of place and time, and like all great work it is eminently open to criticism and owes some at least of its importance to the criticisms it has provoked.

Hart's work has another side to it, beyond the contribution it makes to analytical jurisprudence. His way of drawing the line between issues of law—moral-cum-political questions about the law and its conformity to ideas of freedom and justice—undoubtedly reveals some of the characteristically British assumptions of his own times concerning where that line falls. But he did not restrict himself to one side only of the line. He made powerful contributions to debate upon justice and good law as well as to descriptive analytical jurisprudence. He characterized these contributions as works of "critical morality", aimed at expounding principles for the just and proper uses of law in a civilized society. In this field he concentrated mainly on matters of criminal law and punishment, on which his position was set out in works published subsequently to *The Concept of Law*, namely *Law, Liberty and Morality* (1963), *The Morality of the Criminal Law* (1965), and *Punishment and Responsibility* (1968).

Both in his analytical and in his critical work, Hart drew heavily on the British tradition of liberal utilitarianism and legal positivism. (Legal positivism can for the moment be sufficiently defined as the theory that all laws owe their origin and existence to human practice and decisions

concerned with the government of a society and that they have no necessary correlation with the precepts of an ideal morality.) The utilitarian/positivist line of thought starts with the work of philosophers such as Thomas Hobbes and David Hume, but the more direct influence on Hart came from Jeremy Bentham (1748–1832) and John Austin (1790–1859) and their disciple John Stuart Mill (1806–73). As will be seen, Hart's critical moral theory restates liberal ideas about liberty under law, though at the same time adapting them to a social democratic political philosophy. On the other hand, his analytical work is founded on a critique of Bentham's and Austin's theories of law as always deriving from a sovereign's will. His interest in their work is manifested not only in many scholarly articles,[19] but also in acting as editor of their work. In 1954 he published an introduction to an edition of John Austin's *Province of Jurisprudence Determined*, and later in his professional career he was instrumental in putting in train the vast project of editing the huge mass of (partly unpublished) papers left by Bentham. For his part in this project, he acted as editor together with J. H. Burns of Bentham's *An Introduction to the Principles of Morals and Legislation* and *Comment on the Commentaries and Fragment on Government* and as sole editor of Bentham's *Of Laws in General*.

Such was the burden of this editorial work, coupled with the duties he had undertaken as a member of the (UK) Monopolies Commission, that in 1968 he resigned from the Oxford Chair of Jurisprudence, being in due course succeeded as professor by Ronald Dworkin. For the next four years he held a Senior Research Fellowship at University College Oxford, then in 1972 he was elected Principal of Brasenose College, an office which he held until his retirement in 1978. During a period of student unrest in the 1960s, Hart had acted as chairman of a committee appointed by Oxford University to look into relations between junior and senior members of the university. The committee's report recommended a series of liberalizing reforms in university discipline and related matters, reforms mostly enacted by the university's legislative forum in the late 1960s. So he was by no means a stranger to the problems of academic government when he took up the Principalship of Brasenose in the somewhat quieter days of the 1970s. Even after his retirement, he remained active in scholarship and writing and in the formal and informal supervision and assistance of younger scholars. The 'Oxford spy' scandal, his breakdown, and his hospital treatment affected him quite badly and probably diminished his vigour and appetite for controversy. Anyway, for what-

ever reason, he never completed the *Postscript* to *The Concept of Law* in the form that he had hoped it would take.

WHY A NEW EDITION?

The first edition of this book appeared in 1981, to a generally rather favourable reception, and it seems quite largely to have stood the test of time. At least Nicola Lacey has been kind to it in referring to it as one useful source for her far more massive work. But much has happened in the intervening years, and the present second edition of *H.L.A. Hart* must take due account of things that have changed. This edition follows its predecessor after a lapse of twenty-six years, and fifteen years after Hart's death. The corpus of Hart's work is complete, and there have been some years for reflection upon it. The first edition was written as a friendly/critical introductory account of a great jurist's work, aimed at sympathetic reconstruction of Hart's main ideas in a way that would be easily accessible to readers unfamiliar with jurisprudence in general and Hart's work in particular. I undertook it in the hope that, notwithstanding its relative modesty of aim, it could also make a significant contribution in its own way to shedding light on the very important topics it necessarily covers. The new edition remains faithful to the original conception.

Since 1981, however, there have been developments that any book about H.L.A. Hart's contribution to jurisprudence has to take into account. Hart himself added significant thoughts about his theoretical position as a whole in the context of the two volumes of collected papers (*Essays on Bentham*, *Essays in Jurisprudence and Philosophy*) that he produced in 1982 and 1983.[20] The former was a blue book, the latter a brown, perhaps in a deliberate graphic echo of the celebrated blue and brown books of Ludwig Wittgenstein.[21] Each contained a substantial reflective introduction that discussed the content of the papers included and expressed a new, or a somewhat adjusted, orientation to the themes he had addressed over the years. He took part in the previously mentioned Jerusalem seminar about his work, making responses in the published proceedings to some of the critical comments on his work. He also attempted in his later years to survey the huge volume of comment his work had called forth and to respond to it. He did, however, once remark to me that there was simply too much of it for him to cope with it. He had mountains of volumes and offprinted

articles sent to him by admirers and by critics, and he did try to read these and come to some sort of position in relation to them; however, taking a synoptic view was out of the question.

After his death, the fruits of some of his later labours came to the surface in the form of a draft *Postscript* to his magnum opus, *The Concept of Law*. His great friend and former student Joseph Raz, together with Penny Bulloch, as requested by Jenifer Hart, edited this for publication as the concluding part of a new, posthumous edition of *C.L.* The editors record that the *Postscript* was incomplete relative to its author's own intention, for he had only completed the first part of what he hoped to achieve and even that was still in draft form, requiring sympathetic editorial intervention to work it up for publication. This first part, in six sections, consisted of a fairly detailed response to Ronald Dworkin's criticisms of Hart's jurisprudence coupled, naturally, with a critique by Hart of what he considered defects in Dworkin's own work. A hoped-for second section dealing with, and in some cases accepting, comments and criticisms from other scholars lay quite unfinished in merely skeletal note form. So it remains a matter for speculation what Hart would have said about other scholars (and perhaps even about this book's first edition) had he been able to fulfil his own intention.

Certainly though, the *Postscript*, even in its never-completed form, reveals how much his attempt to come to terms with and respond to the ideas and the critical observations of his Oxford successor had absorbed his intellectual energy in his last years. The *Postscript* is not a broad reflection on legal philosophy in the light of the huge and multifarious response generated by his work. It is a response to Dworkin, with a few subsidiary references to one or two other significant figures.

Nicola Lacey's biography also shows from the private papers to what an extent Hart's intellectual and personal relationship with Dworkin came to dominate his thought in his last years. In 1968, Hart had been unusually active, contrary to the normal convention, in seeking to influence the appointment of his successor after he retired (early) from the Oxford Jurisprudence Chair. Though still relatively little known in the United Kingdom or even in the United States, Ronald Dworkin was his preferred candidate, and in due course Dworkin was indeed appointed. Yet after the most mutually cordial of beginnings, the atmosphere between them became, over time, one of mutual noncomprehension, and their early friendship cooled considerably. This was a matter of particular regret to Dworkin, whose intellectual disagreements with Hart never disrupted personal regard and indeed respect for the man and the thinker.

Beyond doubt, the intellectual gulf between them was a deep one. Hart believed it possible to give a philosophical analysis of law that was straightforwardly descriptive of a significant social institution to be found in varying forms in many different states or societies. This account acknowledged that participants in the institution had necessarily a value-laden engagement with it and that relevant values might therefore be highly relevant to any rich description of it. They were not, however, the values of, nor need they be values shared by, the descriptive theorist. They were simply the (observed and described) values of active participants in the system. Hart's insistence on the possibility and intellectual desirability of a detached, descriptive, and positivistic jurisprudence was more sharply stated in his *Postscript* than ever before. This approach necessarily discountenanced certain readings of Hart's work that stressed his own basis in values. Such accounts suggested that the best argument for Hart's positivistic approach was one that appealed to moral values. The first edition of the present book stated (and the present edition repeats) a rather vigorous case in favour of such a reading. It is therefore one among the readings of his work on which a shadow was cast by Hart in his own concluding thoughts.

For his part, in his Hart Lecture of 2001,[22] Dworkin confessed himself simply unable to grasp what there is for this supposedly descriptive theory to describe. In his view, all political and social theorising, legal theory included, has to express some 'value-commitment' made by the theorist, since all attempts to grasp any social practices or institutions must be interpretative of them. The best interpretation of a practice is the one that makes the best sense of it, and this means constructing the most evaluatively attractive version that is faithful to the pre-interpretive materials brought into view in the process of constructing the meaning of the practice as a whole.

The relative merits of the two sides of this argument will be taken up later in this book. For the moment, the point is only to confess that Hart's later work effectively, though not explicitly, rejected one part of the interpretation of his work offered in the first edition of the present book. William Twining, general editor of the series to which the present book belongs, recalls a conversation on the train between Oxford and London. In response to a question by Twining about his reaction to the first edition of this book, Hart "indicated general approval, but said emphatically that he considered himself to be more of a hardened positivist than MacCormick had depicted".[23] The *Postscript* certainly underlines this self-conception of Hart's, and indeed Hart once remarked to me that I made him out to be more of a natural lawyer than he wanted to be.

This has an inevitable bearing on the task here undertaken of producing a new edition. All useful interpretation of an author's work is indeed a kind of 'constructive' interpretation[24] that reads the text and tries to construct or construe the ideas discerned in it in the most attractive and persuasive way possible. Yet a living author always has the right to reject someone else's interpretation and offer her or his preferred counterinterpretation. In turn, the interpretative commentator must revise the originally offered interpretation to encompass the new self-interpretation offered by the target author.

This second edition mainly sustains the arguments and interpretations offered in the first edition. Yet adjustments have been made that allow for Hart's subsequent disowning of works on which the first edition relied, and others have been made in response to criticisms of the first edition where these seemed just. At some points, the reading that is here offered of the texts remains apparently less 'positivistic' than their author would have thought appropriate. At such points, a warning note is entered to that effect. A new final chapter, the Epilogue, has been added to take up some of the specific issues of positivistic methodology raised by Hart's later writings and to take a little account of subsequent writing about him.

There have been many major contributions to Hart scholarship in the quarter century between 1981 and 2007 and also two other full-length critical studies of his whole body of work, both carried through in greater depth and detail than is appropriate to this book.[25] Responses to the *Postscript* have produced a major collection of important and wide-ranging essays.[26] There is such a mountain of material to be considered that one can barely encompass it in thought. To do it anything like full justice in what remains by design a short and relatively simple introduction to a great philosophical contribution is simply impossible. In other recent works, I have discussed much of it, more than is possible or desirable in this book. These are works that have taken up themes originally sketched in this book's first edition and developed them in ways that reveal an intellectual inheritance from Hart while nevertheless reaching conclusions divergent from his on many important points.[27] They add up to an 'institutional theory of law' of a markedly post-positivist kind. The most recent of them, *Institutions of Law*, includes at full strength an alternative view to that of Hart's on many of the issues covered in this book, acknowledging nevertheless a huge debt to Hart's work and influence.