Jurists: Profiles in Legal Theory

William Twining, General Editor

H.L.A. Hart, Second Edition

Neil MacCormick

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Preface

If this book has one particular message, it is a message about method in legal study. Law is an aspect of human society, and 'human society is a society of persons' (p. 184 below) whose activities and institutions are understandable only through interpretation of their meaning to those engaged in them. The method of understanding legal and other human institutions by reference to their meaning from an insider's or an 'internal' point of view is central to Herbert Hart's work. That method I argue to be the correct one. Where I criticize more detailed aspects of his theories about law, I do so mainly on the ground that he has not always taken his own method far enough. The corrections and extensions which I propose, as against other critics, involve pressing Hartian arguments further than Hart pressed them.

His work has fascinated me since I first read *The Concept of Law* and attended his lectures in Oxford in the years 1963–65 while adding legal studies to my prior studies at Glasgow in philosophy and literature. As a Fellow of Balliol College from 1967 till 1972, I got to know Hart as a senior Oxford colleague whom I had cause both to like and to admire. If as a result my judgment of his work is flawed by the bias of friendship, there may be some offsetting gain by way of insight into his line of thought.

He very kindly gave me advice about the biographical part of the first chapter. I then had the pleasure of giving him a copy not only of that chapter but of the whole typescript, but this was not done with a view to my seeking nor, from his point of view, to his giving any kind of *imprimatur*. The book stands or falls as its author's, not its subject's, view of a leading contribution to jurisprudence.

As well as to Herbert Hart, I have other large debts of gratitude. To William Twining as general editor; to Sarah Cohen and Helen Tuschling as publisher's editors; to Michael Machan, Robert Moles, David Nelken, and Jes Bjarup as acute critics and advisers; to Sheila Macmillan, Sheila Smith, Kim Chambers, Annette Stoddart, and Moira Seftor as clear typists of obscure manuscripts; and to my family as tolerant victims of neglect, I owe and give unstinted thanks.

Neil MacCormick
Edinburgh, February 1981

FURTHER WORDS ON THE SECOND EDITION

The reasons for producing a second edition are sufficiently stated in the Introduction (Chapter 1). It is now fifteen years since Herbert Hart's death, and one hundred since his birth. So it is a good time to attempt, even in a short introductory way, a comprehensive account and assessment of his work both as jurist and as moral critic of positive law. The passage of time has also given the opportunity to take a longer perspective on the subject matter of the book, acknowledging that I have come to characterise my own work as decidedly post-positivist, and my position much less closely aligned with that of Hart than in 1981. I thank Max Del Mar for help in preparing the text.

Neil MacCormick
Edinburgh, June 2007

List of Main Works by H.L.A. Hart

This is a chronological list of the works of H. L. A. Hart most frequently cited in this book. For convenience of citation, the abbreviations [in brackets] are used in the text. Number 12 is printed also as chapter 7 of *E.o.B.*; numbers 2, 5, 10, and 13 are printed also as chapters 1, 2, 9, and 11 (respectively) of *E.J.P.*

A full bibliography of Hart's publications (and of most of the significant commentaries on them) appears in N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford Univ. Press, Oxford, 2004), pp. 394–403.

1. "The Ascription of Responsibility and Rights." (1948/1949) 49 *Proceedings of the Aristotelian Society*, 171–94.

2. *Definition and Theory in Jurisprudence* (Inaugural lecture, Clarendon Press, Oxford, 1953). Also published in (1953) 70 *Law Quarterly Review*, 37. [*D.T.J.*; page references are to the Oxford edition.]

3. "Are There Any Natural Rights?" (1955) 64 *Philosophical Review*, 175–91. Also published in *Political Philosophy*, ed. A. Quinton (Oxford Univ. Press, Oxford, 1967), pp. 53–66. [*A.A.N.R.?*; page references are to the Quinton volume.]

4. "Analytic Jurisprudence in Mid-twentieth Century; a Reply to Professor Bodenheimer." (1957) 105 *Univ. of Pennsylvania Law Review*, 953–75. [*A.J.M.C.*]

5. "Positivism and the Separation of Law and Morals." (1958) 71 *Harvard Law Review*, 593–629. [*P.S.L.M.*]

6. *Causation in the Law*, jointly with A. M. Honoré (Clarendon Press, Oxford, 1959; 2nd ed., by Honoré, 1986). [*Causation*]

7. *The Concept of Law* (Clarendon Press, Oxford, 1961; 2nd ed., with Postscript, edited by P. P. Bulloch and J. Raz, 1994). [*C.L.*; page references are to the second edition. The Postscript is cited as *Postscript.*]

8. *Law, Liberty and Morality* (Oxford Univ. Press, London, 1963). [*L.L.M.*]
9. *The Morality of the Criminal Law* (Magnes Press, Hebrew Univ., Jerusalem; Oxford Univ. Press, London, 1965). [*M.C.L.*]
10. "Social Solidarity and the Enforcement of Morality." (1967/1968) 35 *Univ. of Chicago Law Review,* 1–13. [*S.S.E.M.*]
11. *Punishment and Responsibility: Essays in the Philosophy of Law.* (Clarendon Press, Oxford, 1968). [*P.R.*]
12. "Bentham on Legal Rights," *Oxford Essays in Jurisprudence, Second Series*, ed. A. W. B. Simpson (Clarendon Press, Oxford, 1973), pp. 171–91. [*B.L.R.*]
13. "Between Utility and Rights," *The Idea of Freedom,* ed. A. Ryan (Oxford Univ. Press, Oxford, 1979), pp.77–98. Also published in (1979) 79 *Columbia Law Review,* 827–46. [*B.U.R.*]
14. *Essays on Bentham: Jurisprudence and Political Theory.* (Clarendon Press, Oxford, 1982). [*E.o.B.*]
15. *Essays in Jurisprudence and Philosophy.* (Clarendon Press, Oxford, 1983). [*E.J.P.*]
16. "Comment," *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart,* ed. R. Gavison (Oxford Univ. Press, Oxford, 1987), pp. 35–42.

H.L.A. HART, SECOND EDITION

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 sociological 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 whatever 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.

CHAPTER TWO

Hart: Moral Critic and Analytical Jurist

INTRODUCTION: ON JURISPRUDENCE

Jurisprudence is the theoretical study of a practical subject. Its object is to achieve a systematic and general understanding of law. The business of law is the organization and ordering of human communities, the protection and regulation of human beings as members of communities. Theoretical study of this practical business can follow several lines. For example, it may overlap with and draw from moral and political philosophy in trying to establish principles of justice and of good law against which to criticize actual laws, legal practices, and modes of government. Or it may overlap with and draw from history, sociology, or descriptive political science in trying to depict the working of the legal system as one element within the entirety of social and political order. Or it may overlap with and draw from analytical philosophy in trying to analyse and elucidate the concepts and ideas through which the practical business of law articulates itself. Or it may overlap with and draw from logic and rhetoric in studying the modes and forms of argument used in the conduct of legal business. Or it may apply all or any of these lines of inquiry to more detailed case studies of particular institutions or branches of the law. None of these ways of theorising about law can be entirely independent of any other, and a complete view of law would in some form comprehend them all—and perhaps others besides. For Hart, however, jurisprudence was primarily a branch of philosophy, involving the application of philosophical ideas and methods both to the criticism of law and to the conceptual analysis of law, legal systems, and legal concepts. The strength of his commitment to the philosophical approach is easily comprehensible in view of the biographical details recounted in the preceding chapter.[1]

HART AS MORAL CRITIC OF LAW

During the fifteen years from 1955 to 1970, there was in the United Kingdom a substantial movement toward liberalization of the law. Obscene publications, abortion, and homosexual and heterosexual acts between adults in private were in part liberated from previous criminal restraints. The death penalty was abolished for murder. Divorce lost some of its quasi-penal implications and its moral stigma. Debate in Parliament and outside it became much concerned with methods to achieve greater humaneness in the penal system and the legal system generally.

No one who lived through those years would deny that during them the moral climate underwent great change. The value of enabling people to 'do their own thing' became more and more accepted and emphasized. Old restraints and taboos were questioned and overturned. The 1960s were celebrated as the 'swinging sixties' by the popularizers of the new morality. Nor were these changes peculiar to the United Kingdom. Equally obvious and in some ways farther reaching changes of a similar kind went ahead throughout the Western democracies, perhaps most notably in the United States and the small, predominantly Protestant countries of the north—the Netherlands, Denmark, Sweden, and Norway.

Such changes might well be ascribed to 'liberalism' in its classical sense. They involved the removal of restraints on individual freedom of action in matters where the individual or freely associating groups of individuals should be permitted to pursue what they see as good, not what other people define as good for them. Individuals and groups should be left free to do as they will, except for such acts as involve doing harm to others without their consent; and the mere fact that what I do goes against your moral standards is not admitted as an instance of harm done by me to you. So says classical liberalism, certainly in the form set out in John Stuart Mill's famous *Essay on Liberty*.

On the other hand, the postwar period up to and including the 1960s saw a vast extension in the powers of intervention of the state in previously private fields of activity. This stemmed from a commitment to maintaining full employment through economic management. This commitment was considered in some cases as requiring the state to take control of the 'commanding heights' of an industrial economy, instead of leaving the fate of individuals and the hope for economic growth to the free play of market forces. Closely parallel to this was a commitment to extending and improving health and welfare services on a universal rather than selective

basis, protecting public amenity through controls on private development of land, and extending and so far as possible equalizing opportunities for all through the public educational system.

The circumstances of economic growth of the times encouraged a substantial flow of brown and black British subjects and Commonwealth citizens from former colonies and imperial possessions into Britain. As a response to a growth in racial tensions and antagonisms, race relations legislation was introduced limiting freedom in private transactions by prohibiting various forms of discriminatory behaviour. At the same time, in a manner which some found contradictory, Parliament legislated to stem the flow of further brown and black immigrants into the country, performing remarkable legislative contortions with a view to wrapping up that purpose in a bundle of ostensibly nondiscriminatory provisions for the control of immigration. In due course, the protections against racial discrimination in housing, employment, and provision of services were extended to cover sexual discrimination and to strike a blow at the 'male chauvinism' ingrained in social mores that had been inherited from the Victorian patriarchs. A good deal later, this attack on discrimination was extended to protect sexual orientation as well as gender.

A similar sensitivity to problems of race and gender was no less marked in other democratic states. Nowhere was this more dramatically obvious than in the United States, where from 1954 onward the civil rights movement won important judicial and legislative changes in law and attitude on behalf of ethnic minorities, many of whose members descended from African slaves. There also, the women's movement built its case on top of the victories of the civil rights movement. By a curious inversion of previous usage, economic and social reforms or changes of this further kind are sometimes also ascribed to liberalism though in fact they involve restraints upon individual freedom of acting in order to maintain public standards of welfare and decency. To European ears it is perhaps more easy to speak of such reforms as social democratic than as liberal. But we need not too much trouble ourselves here with niceties of usage, for the important point to make is that according to a powerful body of modern thought, the liberalizing and the welfare equalizing trends of modern legislation and modern state practice are fully compatible each with another.

H.L.A. Hart provided a vocabulary to express that compatibility. He suggested a distinction between the *existence* of legal or constitutional liberty and its *value* to individuals, a distinction which John Rawls also took up to considerable effect.[2] A law securing freedom of the press, for example, may be so framed as to be absolutely universal in its terms and thus to confer an

identical and equal liberty on all citizens. But in fact this liberty will mean more and be worth more to those who have achieved literacy through education and who can afford to buy books and newspapers and have leisure to read them than to those who are lacking in all or any of these good fortunes. Those who own and control newspapers and publishing houses are, on the other hand, yet more favoured. The same general point can be made in respect of legal and constitutional liberties in all their manifestations, i.e., in all instances in which people are left free to do as they will without legal interference. Thus it can be argued that the original programme of classical liberalism needs to be revised by superimposing on it a social democratic strategy aimed at narrowing the grosser inequalities in the value of liberties. But the fundamental importance of liberties as propounded by classical liberalism remains a basic tenet of the social democrat.

This view is susceptible to attack from at least two sides. Some see a fundamental contradiction in programmes that seek to enhance the value of liberty through a diminution of the extent of liberty, especially economic liberty. Further, they see an attack on the inviolability of the human person or on the basic rights of human beings in schemes that force some people through taxation to transfer their resources and earnings to others. Additionally, it is argued that at the economic level it is both contradictory and self-defeating to pursue general welfare by restricting the only long-run effective system for securing economic growth (viz., a market economy).

On the other side, out-and-out socialists, especially Marxist-socialists, may well agree with market philosophers such as Hayek,[3] Nozick,[4] or Friedman[5] in their critique of the mistakes and contradictions allegedly intrinsic to the liberal/social democratic philosophy. They, however, ascribe these contradictions to capitalism itself both in its classical form and in the 'late capitalist' system of which social democracy is conceived to be the ideological reflection. Hence the proper path of progress is revolutionary change which will substitute full, positive, socialist liberty and equality for the merely formal and negative legal or constitutional liberty lauded by classical liberals and essential to the capitalist mode of production in all its manifestations.[6]

These controversies over the liberal/social democratic philosophy and its politico-legal practice require no more than brief allusion. But a reminder concerning them is essential to any proper appreciation of the thought and the writing of H.L.A. Hart. As thinker and as writer, Hart was one of the most important and influential contributors of the postwar period to the liberal/social democratic way of thought and action. He made powerful contributions to the philosophical arguments in favour of the liberalizations of

criminal law mentioned in the first paragraph of this section and in favour of a particular conception of humaneness in punishment. These contributions are to be found in his books *Law, Liberty and Morality*; *The Morality of the Criminal Law*; and *Punishment and Responsibility*. His essay "Are There Any Natural Rights?", which propounds the thesis that there is at least one natural right—the right to equal personal freedom of each individual—was disowned by Hart in his later writing on its main point but still contains elements of value that cannot be overlooked.

As advocate of these positions on the liberal front, Hart nevertheless held firm also to the social democratic political and economic philosophy, which was so powerful in the postwar period within the British Labour Party—in whose right wing a prominent role was taken by some of his closest friends and associates. In this context, one should particularly mention Hart's friendship since undergraduate days with the late Douglas Jay, a former member of Parliament and minister and leading contributor to the theory of social democracy.[7] As evidence of Hart's adherence to the social democratic rather than the classical variant of liberal thought, one may cite his critique of the American political philosopher Robert Nozick. In a book called *Anarchy, State and Utopia*, Nozick purports to establish a conclusive argument in favour of restoring the 'minimal state' favoured by classical liberalism. His argument is grounded in a reassertion of the fundamental character of each individual's rights to 'life, liberty, and estate' as John Locke set this forth three hundred years previously.[8]

Nozick holds, for example, that a system of compulsory income tax is equivalent to partial slavery. (In every five days, a man works three days for himself and two for the state, which compulsorily redistributes its two-fifths part to other men.) By contrast, Hart in "Between Utility and Rights" argued that this was, in effect, a reduction to absurdity of Nozick's own first principles. What is more, Nozick, he said, actually departs from Locke's own version of those first principles, since Locke's version includes the principle that every person has a right to the basic necessities of bodily survival. Hart accepts that the collectivist mode of utilitarian political theory subsumed within much social democratic thought is open to some criticism such as that of Nozick and (in a different vein) of Ronald Dworkin for ignoring the distinctness and individuality of each person. He himself argues that utilitarianism must be qualified and supplemented by independently established principles of justice, as is shown in chapter 12 of the present book. But he found the theories of individual rights advanced by these writers to be (in their different ways) even less convincing at key points than the utilitarianism that they reject. And he remained to the end

convinced that a case can be made for the view I have here called 'social democratic'.

If Hart made no other claim on our attention, he would be a significant figure simply for his contribution to the ideology of liberal social democracy. As ideologist he contributed a particularly powerful statement of the liberal element in that way of thinking, exercising considerable influence on the thinking of his contemporaries and juniors, far beyond the normal influence exercised by professors and teachers.

Nobody who reads or thinks about Hart's work dares ignore the fact that he lived through the 1930s and the years of war from 1939 to 1945 and observed, as an intellectual of Jewish family origins, the growth and then the destruction of Fascism and Nazism and their British copies. During his time as a barrister, he lived in an intellectual milieu chiefly of persons committed to competing variants on the socialist theme as the desirable answer to Fascism, to tyranny, and to the injustice of man to man. The weight of his commitment to a certain conception of human liberty is to be seen against that background. His is comparable with the philosophy of Sir Isaiah Berlin,[9] his closest friend.

His commitment to that idea of liberty led him earlier than many of his own generation in the 1930s to a hostility toward the tyranny of Marxist regimes no less blunt than his hostility to Fascism and even to merely conservative moralism. Thus, unlike many contemporaries including Jenifer Williams, his friend and subsequently his wife, he was never even briefly persuaded of the virtues of the Communist party as an alternative to the Fabian or social democratic approach to politics. Apart, however, from work he did helping refugees from Nazi Germany during the 1930s and giving seminars on loopholes in the tax law to Labour Party groups organized by Douglas Jay, his political beliefs and commitments took no public form until after the war. Indeed, his main statements of position in these matters were not published until the early 1960s.

Their roots, however, lie deep in his experience of life, and their importance for an appreciation of his whole achievement as a jurist must not be underestimated. While much of his work aims to be descriptive or purely analytical (and thus requires a deliberate disengagement from issues of personal commitment in matters of morals and politics), that ought not to obscure the seriousness of the commitments he expresses in his other work. No one can be surprised about that seriousness once taking account of the experiences against which the commitments were formed. To be fully aware of this is essential as a prelude to considering the background and the nature of his analytical work.

ANALYTICAL JURISPRUDENCE AND LINGUISTIC PHILOSOPHY

Hart's position of preeminence among British jurists of the twentieth century rests even more on his analytical work than on his work as a philosophical critic of legal institutions and practices. Let us consider the intellectual context to which his analytical jurisprudence belongs and the end to which it is directed.

The aim of analytical jurisprudence is an improved understanding of law and legal ideas, both for its own sake and for the practical value of such understanding. It is natural that throughout the long history of juristic studies, much attention has always been given to terms and concepts. The reason is not far to seek. Law, the subject matter of jurisprudence, concerns human actions not simply as natural processes but as the social actions of thinking and speaking animals. Law is essentially and irreducibly, though not only, linguistic. Laws are formulated and promulgated in words. Legal acts and decisions involve articulate thought and public utterance—often also public argument. A complicated conceptual framework and indeed a large and partly specialized vocabulary are essential to the structuring of the wide range of practices and activities which constitute a legal order. Hence, the understanding of law requires elucidation and analysis of the complex conceptual framework involved. Not merely is jurisprudence an activity conducted linguistically through private thoughts as well as the written and spoken word; that which it studies is an activity that is also conceptual and linguistic in its very essence. So Hart's, like anyone else's, attempt to clarify the nature of legal order is inevitably, in part at least, linguistic in focus and concern.

It is, nevertheless, a special feature of Hart's work that it is linguistic in a stronger sense, for he was one of the leading proponents of what is sometimes called 'linguistic analysis' or 'ordinary language philosophy'. This makes it necessary to give a brief account of the philosophical school in which Hart developed his approach to analytical jurisprudence. Whereas 'reform' is the watchword of his critical morality, we have already noted that 'revolution' was the philosophical banner raised by Hart and his colleagues in postwar Oxford.[10] They claimed to be effecting a revolution in philosophy by rescuing it from a series of misunderstandings about language. Clear ideas needed clarification of speech, not elaborate constructions of philosophical systems.

A famous text illustrating this approach is Gilbert Ryle's *The Concept*

of Mind,[11] whose title Hart's own main book, *The Concept of Law*, was later to echo. Many of the questions central to the philosophy of western Europe since its beginnings in classical Greece have focused on the nature of the human mind and its relation to the physical universe. Since questions of philosophy have at their centre questions about what there really is and how we can know what there really is—how our minds can apprehend 'reality'—questions about the mind and its relationship to matter have an obvious importance. Equally, in moral and political philosophy, the question of how minds can control physical human bodies is vital. The issues of responsibility for acts and of freedom of the will seem fundamental to any view of human beings as moral agents whose acts really are *their* acts and are not merely elements in a physical process over which they have, at best, an illusion of being in control.

Ryle's thesis was that the way philosophers had traditionally gone at the question of the existence and working of the mind was itself the source of the problems they sought to resolve. The invention of and concentration on nouns like *soul, mind, intention, will*, and so forth conjured up a seemingly irresistible belief in the existence of a 'ghost in the machine' which in turn made it seem highly problematic how the ghost made the machine work. The answer was not to go on beavering away at constructing theories of the ghost but to start afresh with new questions. The new questions take us back to ordinary nonphilosophical speech. What do we mean when we say "Smith did that intentionally", "Jones did that of his own free will", "Macdonald has it in mind to take a holiday in France this year"? Do not ask what 'mental condition' is involved in 'being happy', 'being angry', 'being sad', or the like. The notion of a 'mental condition' is a philosophical invention by way of bogus explanation of these states of affairs, and it actually itself generates the problem of the ghost in the machine. Ask rather in what conditions we can truly say in ordinary English that someone 'is happy', 'is angry', 'is sad', or whatever. That is all that there is to be explained. There is no problem of the mind over and above a recognition of all the ways we ordinarily have as English (or German, or French) speakers for talking about people's acts, expressions of attitude, and so forth.

An even more influential colleague of Hart's was J. L. Austin, who (after war service as an army intelligence officer) returned to his prewar position as Fellow in philosophy at Magdalen College, becoming White's Professor of Moral Philosophy in Oxford University from 1952 until his early death in 1960. Much of his most important work was posthumously published in the next few years on the basis of lecture notes.[12] In his *Sense and Sensibilia*, Austin challenged the basis of much previous work on the theory of perception. Philosophical talk about 'sense data' and such simply misrepresented the way people talk about seeing and hearing things. Philosophers treat nouns like *reality* or *truth* as names calling for investigation of what 'lies behind' them—what is reality, what is truth? But they would do better to go back to adjectives. What distinctions do we draw when we call some things *real*, others *unreal*? What are we doubting if we ask whether this is a real duck? Are we concerned about its being an optical illusion or about its being a decoy duck? When can we say that some sentence is true or not true? What are the conditions for making such judgments? That is worth knowing by contrast with pursuing investigations into truth as such.

> What needs discussing . . . is the use, or certain uses, of the word 'true'. *In vino*, possibly, '*veritas*' but in a sober symposium '*verum*'.[13]

To one who takes seriously consideration of the conditions for the truth or falsity of what people say, a striking fact appears, namely that by no means everything that anyone says is either true or false. This is not just a matter of distinguishing expressive or emotive or poetic utterances from ordinary observations of fact. The point, as Austin put it in an influential paper,[14] is that many utterances are 'performative'. To *do* certain things you have to *say* certain words, for example, to make a promise ("I promise to meet you tonight"), to name a ship ("I name this ship *Titanic*"), to convict a person ("Guilty") or acquit him ("Not guilty"). The insight was one he shared with Hart.[15] These ways of using words are just as important and just as worthy of philosophical attention as statements, though *true* and *false* apply only to statements.

To begin with, Austin presented this as a distinction between performative and non-performative utterances. Later however (in the posthumously published lectures *How to Do Things with Words*), he improved and extended the doctrine. He drew attention to the fact that to utter *any* words is to perform an act—the act of making a statement, or of promising, or of recording a verdict, or of conferring a name; his name for such an act was a 'speech act'. The study of these types of acts required reflection on and clarification of the social rules or conventions that make possible the performance of any such acts when a person utters certain articulate sounds. Hence such philosophizing is not a merely trivial matter of verbal questions and disputes. It is the discovering and making plain of the social context that give words their sense. It is a matter of attending to words in order to find out about the world.

Austin's approach parallels the work pursued at more or less the same time in Cambridge by Ludwig Wittgenstein and his circle, work which became known to the world at large with the publication of *Philosophical Investigations*[16] in 1953. This book represented Wittgenstein's reaction against his own earlier work (in association with Bertrand Russell). In this, he had adopted the notion of the world as a vast aggregation of 'atomic facts' that could be grasped only by the construction of a logically perfect language, which would faithfully depict every fact and nothing else. Dissatisfied with this 'picture' theory of language, Wittgenstein directed his later attention to the real uses of everyday speech and philosophical speech. Speaking a language, he concluded, is not a matter of setting out to produce a series of verbal pictures of 'facts'. There might indeed be a kind of 'language-game' that could be constructed with a view to doing simply that; but it would be a special game with rules of its own, and it would coexist with a whole range of other already existing 'language-games' each with rules of their own. His talk of 'games' was not a wilful trivialization of his subject matter. Rather, it was a way of getting at the point that every language expresses a 'form of life', a collaboration of individuals made possible by their sharing in a common way of life structured by partly explicit and partly inexplicit but commonly understood conventions. Hence the analogy of games.

So there was a convergence in ideas between Wittgenstein and his Cambridge followers and the proponents of 'linguistic analysis' in the Oxford mode. They shared the view that philosophers must be alert to the way in which language, and particularly the technical jargon employed in traditional approaches to philosophy, can itself be the very source of philosophers' problems about the nature of the world. Words do not always and necessarily 'stand for' things, so before we dash into inquiries about the supposed things for which they stand, we must carefully work out the ways in which and the conditions under which words are used meaningfully in the languages we speak. A chief task for philosophy is therefore that of working toward an interpretive understanding of normal human discourse in its normal social settings.

For present purposes, enough has been said to fill out a point mentioned earlier, concerning the way in which the new philosophical movement that Hart joined was one to which his practising experience of law had an important relevance. Although the interests quickened by his wartime reading of works of G. E. Moore, L. S. Stebbing, Schlick, Isaiah Berlin, and A. J. Ayer had seemed to lead him clean away from any sort of legal concerns, he was soon enough led back to them. It is easy to explain why this came about.

Among the questions raised by Ryle's *Concept of Mind* are questions about the nature of 'mental states', and the new school of thought interpreted these questions as requiring reflection on the proper use of such terms as *intention, motive*, and the like. But to understand the use of such terms, it is necessary to reflect on the contexts in which they are characteristically used. A famous illustration of this is the "Plea for Excuses",[17] which J. L. Austin made in his Presidential Address to the Aristotelian Society in 1956 (the argument in the paper having been developed earlier in a seminar jointly run by Hart and Austin at Oxford during the 1950s).

Austin's thesis was that concern over whether someone has or had a certain intention is characteristically raised in a context where moral blame or legal punishment is in issue. The context is one in which an untoward occurrence has come about, and we want to know who, if anyone, was to blame. Did some act of this or that person cause the accident? If it did, the person concerned is apt to be held responsible and blameworthy—but not if he had a justification or a good excuse. A possible good excuse is that he did the deed in question *unintentionally*. To generalize, the primary point of references to intention or the lack of it is by way of rebutting or (as the case may be) establishing excuses for ostensibly blameworthy acts. So the proper inquiry for someone who wants to understand about 'intention' is an inquiry into the range of excusing conditions that are accepted as eliding or mitigating responsibility for one's acts. The same would go for concepts like that of 'will', as related to the notice that some acts are 'wilful', others not—again in the context of decisions about responsibility and blameworthiness.

To take this line is necessarily to treat lawyers' practices as highly significant for philosophy. The very terms like *intent* or *intention* in which the criminal law is framed by legislators and applied by judges and lawyers are key terms for philosophers. These terms are used in the context of a social practice that gives them sense and that is publicly available for scrutiny and analysis. No doubt lawyers' theoretical analyses of *intention, will*, and such like terms might have defects akin to—even inherited from—those of traditional mental philosophy. But a study of the practical legal use of the terms, as distinct from lawyers' abstract theorizings about them, must be a key to a new understanding of the meaning of *mind*. Likewise, from the point of view of an interest in how people 'do things with words', an interest in such legal activities as conveyancing, contracting, or legislative drafting—all ways of making words 'operative', as Hart has put it—is unavoidable.

It is therefore not at all surprising to find that an early fruit of Hart's return to philosophy was the presentation in 1949 of his seminal, but subse-

quently disowned, essay on 'The Ascription of Responsibility and Rights'.[18] His point here was that *responsibility* or *rights* are not *descriptive* features of human beings, but are *ascribed* to them in contexts determined by legal or other social rules. Hence the character of such ascription has to be considered, and upon consideration it is found both to be dependent upon rules and yet to have a *defeasible* character. There is a range of settled grounds for ascribing to persons responsibility for some act or state of affairs and for ascribing to them rights over something or other. But one can defeat such ascriptions by showing that some exceptional circumstances exist, and in practice it appears that the list of exceptional circumstances is not necessarily a closed one. Rules for ascription are hence open-ended, since the ascription holds good only if nothing has vitiated it, and the conditions of such defeasance need not be—perhaps cannot be—exhaustively listed in advance of the particular cases that come up for decisions.

Interesting though this essay was as an example of the new style of philosophy and of its natural concern with legal questions, it was not of itself a work of such evident preeminence as to make its author the obvious candidate for the vacant Chair of Jurisprudence in 1952. To those outside the particular circle of younger philosophers and jurists who knew him and his work, Hart's appointment must at the time have seemed a surprising one. Yet, as I have already said, it did not take long for his work to stir up interest and controversy.

In the inaugural lecture that provoked so strong a response from Professor Bodenheimer, Hart set about showing the relevance of the new philosophy to long-standing problems in jurisprudence. In the case of concepts like *right* and *corporation*, lawyers no less than philosophers had gone head-on at questioning what such things are as if definitions could solve the difficulties to which such terms give rise. This had resulted in 'the growth of theory on the back of definition'. The aim of such work was a laudable 'effort to define notions actually involved in the practice of a legal system'. Unhappily the result was one of failure 'to throw light on the precise work they do there'. A fresh and more fruitful approach would be to elucidate the conditions in which true statements are made in legal contexts about rights, corporations, etc. and the point that such statements have in these practical contexts. Here was an obvious case for applying the linguistic philosophers' programme of studying the use of words in context rather than the pursuit of mysterious essences or the construction of theories to justify definitions.

The same approach was carried on in the joint work with A. M. Honoré on *Causation in the Law*.[19] There again we find a two-handed attack both on

arid formalism, the elaboration of high-level conceptual constructs inept for practical application, and on any excessive so-called realism that seeks to portray every legal ascription of cause to effect as nothing other than a mere act of judicial policy making tailored to a judge's hunch or prejudice about the fair outcome of a case. *Causation* deserves recognition both for its exhaustive scholarly scrutiny of a huge range of civil and criminal case law drawn from many English-speaking jurisdictions and for the contribution its authors made to improving and refining a necessary conceptual tool for lawyers. It also represents the partial fulfilment of Hart's hope to reconcile scientific and commonsense modes of thought. It has perhaps been unduly overshadowed by the success of *The Concept of Law*, in which Hart's analytical jurisprudence was finally brought to the point of a general analysis of the nature of law itself.

Of the philosophical context to which Hart responded and contributed, enough has been said. Of the legal, there is, perhaps, less to be said. Hart's view of law was primarily formed by experience in practice, not in the academic world. This is no doubt reflected in the way he tried to build a bridge directly from linguistic philosophy to practical law in his inaugural lecture and in the criticisms he offered of prior legal theory in the same lecture (though even in that he was already paying tribute to the analytical insights he found in Bentham's early writings). Yet others ahead of him—as he readily acknowledged in a review article[20] of the same period—had stepped out upon juristic paths similar to his own, none more noticeably than Professor Glanville Williams in a series of articles on 'Language and the Law'.[21]

In the main, however, jurisprudence, as the general study of law and legal ideas by contrast with the particular scholarly study of major areas of positive law, was in the doldrums in Britain in 1952. Two great movements in nineteenth-century thought had gone stale. On the one hand there was a tradition of analytical jurisprudence, Benthamite in intellectual inspiration but based immediately on John Austin's *Province of Jurisprudence Determined* and *Lectures on Jurisprudence*. On the other hand there was the school of historical jurisprudence stemming from Sir Henry Maine's *Ancient Law*, itself in part a reaction against Austinian theory. The former tended to pre-dominate in academic teaching and writing but in a way that cut it adrift from its philosophical roots. Lawyers had stopped being interested in philosophy, philosophers in law. Jurisprudence in the universities had become a routine reading and rereading of a canon of texts and textbooks. Excepting a handful of brilliant exceptions, the subject was moribund.

Hart certainly succeeded in regenerating excitement and interest in

jurisprudence. He did so not by abandoning traditional areas of conceptual study, as the American realists did in the law schools of the United States in the 1930s, but by redefining and reexamining the traditional questions in the style and spirit of the new philosophy. Thereby he excited the legal imagination to reconsideration of the philosophical significance of legal problems, while at the same time forcefully recalling philosophers to an awareness of legal problems as vital ones both for analytical philosophy and for moral and political philosophy. The reexamination of the traditional questions involved a reexamination of the traditional texts, above all Austin's *Province of Jurisprudence Determined*. It is not at all surprising to find that Hart's *Concept of Law* spends three initial chapters teasing out difficulties about Austin's jurisprudence before announcing a fresh start. The fresh start was made from a station in which the locomotive of British jurisprudence seemed to have broken down. Naturally and rightly, the man who did most to get things moving again became for English-speaking jurists the focal figure of the succeeding fifty years.

Some subsequent work has in different ways explored and refined the insights of Hartian positivism. Some work has sought to restate more traditional natural law theory in a way that takes account of Hart's work. Some work has aimed at the pursuit of 'law in context', some, such as my own, at a kind of post-positivist legal institutionalism. Reaction to the claim in the preface of *C.L.* that it is in part a work of 'descriptive sociology' of law has involved a ferment of essentially anti-Hartian sociology of law, paralleled in a way by the Critical Legal Studies Movement. As noted earlier, Ronald Dworkin's 'interpretive' account of law and legal thought emerged from a critique of Hartian positivism. Legal theory (jurisprudence, philosophy of law, sociology of law, socio-legal studies, law, and economics) presents a hugely changed intellectual landscape from that of 1952. Hart is, of course, not entitled to credit for all of that, but it is difficult not to give him credit for having had a huge catalytic effect, and for having made a major contribution, some of whose elements will endure for many years yet.

CHAPTER THREE

Hart's Conception of Law

The task of this book is to give a constructive critique of Hart's jurisprudence, so there will have to be close scrutiny of its elements. As a preliminary to that, it seems desirable to present in this chapter a concise description of Hart's main positions unencumbered for the present with any critical comment on these. A résumé in plain terms of the whole will provide at least a sketch-map against which to check the succeeding critical investigation of its parts.

A RÉSUMÉ OF HART'S JURISPRUDENCE

The main text for consideration as presenting Hart's general legal theory is, of course, *The Concept of Law*. The theory there presented is of a legal system as a system of social rules, social in a double sense: both in that they govern the conduct of human beings in societies and in that they owe their origin and existence exclusively to human social practices. As social rules, they belong to a general class to which also belong such diverse other types of rule as rules of morality, of manners and etiquette, of games, of speech, etc. Two features differentiate them from this general class. The first is that, like moral rules, they are concerned with 'obligations' or 'duties', that is, they make certain conduct 'obligatory' or 'binding'. As such, they amount to a kind of 'peremptory' reason for action. The second is that, unlike moral rules, they have a systemic quality depending on the interrelationship of two kinds of rules, 'primary rules' and 'secondary rules' as Hart calls them.

The primary rules are those that establish obligations and duties and proscribe the forms of wrongdoing that we call *crimes, offences, torts*, or *delicts*. Rules of the other kind are 'secondary' in that they do not themselves constitute binding standards of obligatory conduct. Rather, these other rules relate in various ways to the primary ones, and in this special kind of relationship lies the *systemic* quality of law. For example, there are

rules that confer competence on certain people to pass judgment on cases of alleged wrongs (i.e., breaches or infractions of primary rules). This power to adjudicate can be, and in modern states is, coupled with a further power either to order the performance of some remedial action by wrongdoers (e.g., payment of damages) or to impose punishments on them. These might take the form of an order to another competent person or persons to take away their liberty or even life or to punish them physically in some other way. Such rules involving the competence of officials do not impose duties but confer powers, powers of judging and of law enforcement. Compendiously, Hart calls these rules about judging and law enforcement 'rules of adjudication'.

In modern law, both the primary rules of obligation and the secondary rules of adjudication (like almost all other legal rules) are susceptible to deliberate change by legislative amendment and repeal, by the enactment of new rules, and possibly also by judicial decisions or even social customs. This process of change is itself rule regulated, in the sense that there are rules, secondary rules again, which confer on individually or generically identified persons or groups (such as parliaments, presidents, ministers) power to enact legislation by specified and more or less complex procedures.

These 'secondary rules of change' have a parallel in lower order secondary rules that empower ordinary individuals to make various changes in the legal position or legal relationships of themselves and others. To do so, they must have the requisite legally defined characteristics in the way of legal status and legal capacity. One may undertake duties by making contracts; one may alter the incidence of the laws prohibiting theft by exercising a power to give or to sell a certain piece of property to another. One may impose obligations on others (trustees) by giving them property subject to certain trusts, or on yet others (executors) by making a will which they are duty bound to implement. One may get married or form a partnership or a limited company. The possibility of all such exercises of private power depends on the existence of relevant power-conferring secondary rules, whose existence may itself derive from the exercise by a legislator of the public power of legislative change.

In addition to primary rules of obligation and secondary rules of adjudication and change, every legal system includes a further secondary rule essential to its distinct existence as a legal system. This is what Hart calls a 'rule of recognition'. The rule of recognition lays down the criteria that determine the validity of all the other rules of a particular legal system. Whereas the secondary rules of adjudication and change are power-conferring, the rule of recognition lays down duties binding on those who exercise public and official power, especially the power to adjudicate. If those who have power to act as judges are also duty bound as judges to apply all and only those rules that satisfy certain more or less clearly specified criteria of validity, then the whole body of rules which those judges have power to administer has a relatively determinate or determinable content.

That relatively determinate group of rules is the one these judges must apply to all those over whom they have jurisdiction (i.e., power to adjudicate). For that population and within a certain territorial area, there is then a 'legal system'. It is the system made up of the rule of recognition and all those other rules of adjudication and change (public and private) and of obligation or duty that are valid by reference to the criteria of validity contained in the rule of recognition. For example, a certain group of judges having jurisdiction over everyone in territory T is held to be duty bound to apply all unrepealed rules enacted by a certain legislature L, all judicial precedents of those judges and their predecessors except the ones that conflict with rules enacted by L, and all customary rules observed in T except the ones that conflict either with rules enacted by L or with binding judicial precedents. All rules that satisfy any of these three criteria then belong to the legal system of T, and the legal system comprises that rule of recognition (here, the rule that judges must apply every rule satisfying the three criteria) and all those other rules.

But the legal system in question 'exists' as the legal system of T only if it is effectively in force. For this it is a necessary condition that the bulk of the inhabitants of T do, most of the time, comply with the primary rules requiring them to do certain things and to omit others. Some may do so willingly because they regard the rules as 'binding law'; others may do so only reluctantly and for fear of sanctions (criminal punishments and civil remedies) enforced by officials having both legal powers of adjudication and that collective force which organized groups of people can deploy. Almost the whole population could even be in this state of passive and coerced obedience.

The officials themselves, however, must have a somewhat different view. For, as we saw, the 'legal system' requires by definition a rule of recognition, a rule prescribing official duties to apply certain rules as 'law'. But for that rule itself to exist, it is necessary that the officials at least observe it as a binding social rule. They must accept it and observe it 'from the internal point of view'. This is a key phrase of Hart's, as we shall see.

That entails, of course, that they do, as a matter of duty, apply more or less faithfully all those other rules which are 'valid' precisely because they

satisfy the relevant criteria of recognition. The rule of recognition, if it is to exist at all, exists only as a shared social rule *accepted as a binding common standard of behaviour* by those whose official power as a 'legal power' is dependent ultimately upon that very rule. It is possible, but not necessary, for citizens at large (few, some, many, or even, in a limiting case, all) to share in the attitude of support for the ultimate rule of recognition. But it is sufficient that only governors and officials so accept it, provided that by some means they can procure obedience and conformity in large measure to the other rules that it validates.

A system of rules that is, in this sense, effectively in force in a territory is, according to Hart, the central case of a legal system. But although it is the central case falling within the concept of law, there are other cases. There are instances of primitive forms of human social community whose members acknowledge a common set of primary rules of obligation, without having yet developed any power-conferring rules setting up some of their number as adjudicators of alleged breaches of duty, far less any power-conferring rules enabling anyone by any process to procure deliberate legislative change in the basic rules by which the community lives. An almost parallel case is presented by modern international law, which lacks any central adjudicative organ with compulsory powers and lacks any method other than the cumbersome one of multilateral treaties for procuring changes in the rules of law to meet perceived changes in the circumstances of interaction among states. There may be, or may have been, many cases intermediate between such rudimentary modes of social coexistence and the complex and highly integrated form of legal system found within modern states, comprising a 'union of primary and secondary rules' effectively in force among a population within a territory. All are in some sense instances of law.

There are, however, important differences of form and structure between primitive forms of law and developed legal systems. These differences exhibit themselves, for example, in the inapplicability in primitive law of terms and concepts essential in the description of modern states and daily current in everyman's speech, terms such as *power, right, official, judge, penalty, corporation, trust, legislature*, and indeed *state* itself. A self-proclaimed virtue of Hart's analysis is that it provides an analytical framework for the elucidation of such 'legal concepts' with which generations of legal and political thinkers had more or less ineffectually wrestled.

Despite these differences of form and structure there are essential similarities of *content* and *function* as between the primitive and the developed

cases. These similarities make it natural to think of the concept *law* as including *primitive law* and *international law* alongside the more central instance of the developed legal system of a territorial state. As to content, all such social orderings contain among their primary rules certain basic prohibitions on interpersonal violence, deception, free taking and use of valued things, dishonesty, breaches of promise, and such like. The explanation for this is in terms of social function. Human beings, having the physical and emotional makeup they have and living in the kind of terrestrial environment they inhabit, need to coexist in social groups if they are to survive as most of them most of the time wish to do. But individual and group survival of such beings so circumstanced depends on common observance of common rules covering at least the matters mentioned. What is more, in most but not all forms of society, successful maintenance of that rule observance depends on some organized practice of enforcing conformity to the rules by imposing sanctions on miscreants in order that those who are prepared to cooperate voluntarily do not fall victim to those who would exploit their complaisance.

In this statement of the basic point of legal order in all its manifestations, Hart sees a germ of truth in what have come to be known as theories of 'natural law'. There are natural features of human existence which make it necessary for human beings (those who have a drive for survival) to participate in social orderings. This provides the basis for a minimum content of natural law essential to collective survival.

Just because such rules are important to human beings, they also feature as elements in any code of conduct that might be considered a moral code. The basic legal rules are also, from almost any point of view, basic moral rules. To that extent, there is an inevitable overlap between *law* and *morality*. What is more, since moral values represent profound commitments for individuals who hold them, those who exercise legal powers of adjudication and change in developed societies may see reason to secure that the law expresses sound morality according to their view of it. In a perhaps conflicting way, they will surely see reason also to avoid affronting the moral commitments of any sizeable group among the citizenry. Otherwise the system's efficacy may be put seriously at risk. So even where law and morality have become differentiated as a result of the evolution of a legal system, there is always some overlap in the content of legal and moral orders and considerable reciprocal influence between them.

True as all that is, it does *not* mean that law is in any sense *derived* from moral principles as a preexisting higher order of normative system govern-

ing humanity. Nor is it the case that there is some necessary *conceptual* link between the legal and the moral. There are many and various contingent links dependent on functional similarity. There is even the possibility that (as in the legal systems within the United States since 1787 and the Federal Republic of Germany since 1949) the rule of recognition of some states may explicitly include certain moral principles as governing principles for that legal order.

Because of his insistence on the absence of any necessary conceptual link between law and morality, Hart holds himself to be a legal 'positivist'. Positivists deny that law as such is essentially moral and affirm that the existence of a law is always a conceptually distinct question from that of its moral merit or demerit. Hart, like all positivists, rejects the tenets of 'natural law' theorizing as propounded by thinkers as diverse as Aristotle, Aquinas, Grotius, Locke, Kant, Stammler, L. L. Fuller and, most recently, John Finnis.

In adopting the positivist position on this point, Hart deliberately follows the line of the two greatest English jurisprudents of the past, Jeremy Bentham and John Austin. Just as they do, Hart affirms that natural lawyers' moralization of the concept of law tends either toward a form of extreme conservatism (whatever is law must be moral, therefore all law is morally binding) or toward revolutionary anarchism (since whatever is law must be moral, governments must be disobeyed or even overthrown if what they propound as law is not morally justified). The proper attitude to law is, as against that, one which acknowledges that the existence of law depends on complex social facts and which therefore holds that all laws are always open to moral criticism. For there is no *conceptual* ground for supposing that the law which *is* and the law which *ought to be* coincide.

Indeed, as Hart frankly acknowledges towards the end of his book (*C.L.* ch. 9 pp. 209–10), one basis for adhering to the positivist thesis of the conceptual differentiation of law and morals is itself a moral reason. The point is to make sure that it is always open to the theorist and the ordinary person to retain a critical moral stance in face of the law that actually exists. It might be very bad law indeed, and history is full of examples of cruelly oppressive uses of law. The positivist thesis makes it morally incumbent upon everyone to reject the assumption that the existence of any law can ever itself settle the question what is the morally right way to act.

For that reason it is proper to stress that Hart's analytical description of legal systems is powerfully complemented by his critical moral philosophy. His work as an exponent of the principles of liberal social democracy is his response to the moral demands of his positivist position according to

which the law as it is must always be held open to criticism and reform. In the moral criticism of the positive law and in promoting what, by his moral principles, have been highly desirable reforms, Hart played his full part.

Whereas he took the Benthamite-cum-Austinian stance on the absence of a conceptual link between law and morality, and while indeed his critical moral philosophy drew heavily on the utilitarian liberalism of Bentham and John Stuart Mill, Hart departed sharply from their view of what law is. He agreed with them that for any law there are 'social sources' (his term, not theirs). But he disagrees about the nature of those sources. Hart's theory of law as a system of social rules, a 'union of primary and secondary rules', is radically different from Bentham's and Austin's accounts of law and laws.[1] For them, the rules of a legal system are (in the main) 'commands' issued by political superiors to subjects within political societies. 'Political superiors' are those whom others, for any reason whatsoever, *habitually* obey. And those superiors who do not themselves habitually obey any higher superior are sovereigns. Laws are commands issued directly or indirectly by sovereigns to subjects. The point about 'commands' is that (as distinct from requests, invitations, etc.) they imply the threat of a sanction to be enforced against those who do not comply.

Hart's theory of social rules is constructed on the basis of a critique of these notions. In particular, it turns on the inadequacy of the notion of 'habit', which relates to *external* regularities of behaviour, to capture the *internal* attitude essential to the full and proper elucidation of the idea of a rule. Thus, while agreeing that law always and necessarily derives from 'social sources', Hart disagrees profoundly with Bentham and Austin as to the proper characterization of those sources. His doctrine here also differentiates him from the greatest of the other legal positivists among his own near contemporaries, Hans Kelsen.[2] For Kelsen, as for Hart, law is intrinsically *normative*; that is, it determines what ought to be done relative to a certain form of social order, not what actually *is* done. As a follower of Kant, Kelsen takes this to mean that there is a separate category of human thought, the category of the *ought*, which is radically distinct from the *is* and from that principle of causality, which is presupposed in all our thought about natural processes. Hart disagrees. To understand the normativity of legal, moral, or other social rules, we need only reflect on human *attitudes* to human action. This we shall see in chapter 4.

Kelsen's 'Pure Theory of Law' aims to establish what makes possible knowledge of the law as an objective normative order. His answer is that whoever interprets law normatively as a jurist necessarily presupposes a non-positive 'basic norm', according to which the human act of creating

the historically first constitution of a given legal order is valid and ought to be obeyed. Such a presupposition has a rational foundation if the legal norms that the constitution itself validates are effectively in force in the territory to which the constitution belongs. He thus considers that the task of the jurist is concerned with 'pure' legal cognition, having no concern with descriptive sociology, psychology, politics, economics, or ethics. The juristic task is to produce a rationally structured representation of all the norms of law that are valid according to the presupposed basic norm. Kelsen's theory in effect sets out the framework for such a rationally structured representation of a legal order. This has to take into account also his further assumption that an identifying characteristic of law is the way in which it authorizes particular legal 'organs' to apply coercive sanctions to persons in the event of their acting in certain ways. Hart several times acknowledged his debt to Kelsen's analysis of legal order as he established it on the above premises. His own hermeneutic concerns, however, led him to give an account of rules, duties, and authority that relates these concepts both to particular social contexts and to individual or group attitudes. In doing so, he rejected Kelsen's programme for a 'pure' theory of law; his own debt here being, ultimately, to Hume, while Kelsen's is to Kant.

A final and necessary point to make about Hart's legal positivism concerns the relative indeterminacy of social rules and thus also of legal rules. As against the 'rule-scepticism' of leading twentieth-century American proponents of 'realistic' jurisprudence, Hart does indeed affirm that law essentially comprises *rules*. He further affirms that a great part of legal business consists in the straightforward and uncontroversial application, observance, and enforcement of rules. But he accepts, in partial agreement with the realists, that rules cannot settle everything. Being framed in language, rules are 'open-textured' and often vague. What they prescribe or prohibit or enable can be totally unclear in problem cases. Yet decisions must be reached, and by the hypothesis, the rules can be no more than one inconclusive factor in making and justifying the decision.

So Hart concludes that within the framework of rules whose meaning is clear enough for some purposes, there is and must be a considerable range of *discretion* left open to judges and other officials. And in exercising this discretion, they necessarily and properly have regard to *nonlegal* factors such as moral and political opinion, expediency, and *raison d'état*, as well as reflecting on the general background of legal rules and principles for such guidance as they can give. 'The law' is not an entire, complete, and closed normative system that can, even in principle, determine for all purposes

everyone's rights. A suitable metaphor might compare law in action to a musical performance that is only partly covered by the musical score. The performers have to do a certain amount of improvisation, and while they should try to follow the general spirit of the melody as gathered from the incomplete score—a matter in which some performers show greater virtuosity than others—it is a delusion to suppose that there is just one way of filling in the gaps so as to achieve a uniquely proper fit with the parts that the score does completely state.

In thus trying to meet the realist critique of the formalism that may appear to be implicit in any theory that says law is a system of rules, Hart has laid himself open to attack on the opposite flank from those who deny his doctrine of judicial discretion. Most prominent in this line of attack is Ronald Dworkin, his successor as Professor of Jurisprudence at Oxford. In its mature forms, says Dworkin, the law completely determines everyone's rights.[3] The judges have no business to do other than render to every person his or her rights. This is not, in the Hartian sense, a discretionary task, though it is a difficult and inescapably controversial question *what* rights exactly the law does grant in what contexts to what persons. That question calls for an anxious exercise of the adjudicator's best judgement, and this can be said to involve discretion in a 'weak sense'; but it is weak precisely because it is only an interpretative discretion. There is just one improvisation on the scored melody which is uniquely right and fitting, can we but find it.

The grounding of Dworkin's thesis lies in what we might call 'social rule scepticism'. Law is not just a social practice which spawns social rules. The legal order stems from a background morality some of whose principles are embodied in political institutions. That background morality is the morality of the political community to which the law belongs. The rules made by institutional office holders are a partial and incomplete embodying of the principles of the community's morality, understood as the set of principles that best justifies the historical record of the institutional decisions accumulated over time. The rights of legal persons are founded in these institutional principles and are only partly concretized via explicit rules. Hence silence or ambiguity in the rules merely obliges us to have direct recourse to the principles that are the true and ultimate ground of legal rights, anyway.

Not merely does Hart's theory significantly fail to embark on any substantial discussion of principles to parallel his discussion of rules. Thereby it is also seen to fall into such error as always befalls theories which mistake

the part for the whole. Hence Dworkin's critique of the Hartian positivist doctrine of discretion leads him back to a radical critique of the doctrine of the social sources of law in Hart's version. In his final contribution, the *Postscript* to *The Concept of Law*, Hart doggedly reaffirmed his positivist position, though acknowledging that he ought to have attended more closely to the elements of legal reasoning in problem cases. He acknowledged the importance of argument from principles in such cases but denied that there was any basis on which to contend that these can always, or even often, point to a single correct answer such that the judge exercises only weak discretion in finding it. A later chapter will discuss whether the Hartian theory of social rules can indeed be extended to give a fully coherent theory of principles and other practical standards of conduct and of their role in legal reasoning.

At this point, one can deem complete the preliminary sketch of Hart's analytical philosophy of law. This sketch highlights three main points: (i) the social sources of law and the theory of legal rules as a special kind of social rules; (ii) the absence of a necessary conceptual link between morality and positive law, despite the manifest overlap of content and function between these; and (iii) the necessary incompleteness or open-ended quality of positive law, implying the existence of judicial discretion. The second of these, as was noted, may itself express a moral commitment. The moral commitment is to the freedom and responsibility of every individual, and especially of the analytical theorist, to remain open to moral criticism of positive law. Whatever is, is not necessarily right. In every advanced society there are existing legal rules and dominant moral opinions, these naturally intertwining and overlapping. What it is really right to do remains a question for the sovereign individual who dares not surrender her judgment to that of the lawful government or of the moral majority. She must indeed have regard to the actual law and the positive morality of her community as relevant to what is right; but only relevant to it, not determinant of the issue.

This claim for the sovereignty of individual conscience belongs to the heart of the liberal tradition and bridges the gulf between classical market liberalism and the liberal and social democratic philosophy, of which Hart's work as critical moralist presents an important instance. It is not clear whether socialists or Marxists can adhere to it without loss of self-consistency at the more fundamental points, though some believe that they can. If indeed they can, Hart's jurisprudential analysis has that ideological neutrality across the three main ideological positions of his times, which

analytical work, by its nature, claims for itself (whether or not it is also *correct*). Otherwise, it is indeed a legal theory open for acceptance, if otherwise convincing, only to one or the other variety of liberal. That might itself be a ground for opposing ideological positions that are incompatible with the analytical approach.

ELEMENTS FOR CLOSER SCRUTINY

The foregoing résumé was offered as a sketch-map of Hart's jurisprudence. It may be helpful now to present an account of the areas to be investigated further and the order of proceeding. The first task is a discussion of Hart's theory of social rules (which will be presented as incomplete but improvable in its own terms) and the 'hermeneutic method' he brings to their elucidation (chapter 4). The questions there raised about standards of conduct, which are not rules, lead at once into consideration of his moral theory in chapter 5, and there one can find the germs of a theory of principles and values as standards. This facilitates a discussion in chapter 6 of 'obligation' and related ideas that fall within, but extend considerably beyond, Hart's notion of a primary rule. Following that comes a review of the notion of 'legal power', tied up as it is with Hart's conception of secondary rules (chapter 7)—the eighth chapter being no more that a brief note on Hart's analysis of the concept of a 'right'.

Throughout these chapters, the argument is that the Hartian *method* of analysis is a good one and that its more rigorous application removes certain difficulties in the conclusions he himself drew. The same goes for chapters 9 and 10, which review the primary elements of law and the 'union of primary and secondary rules', which as Hart presented it in *The Concept of Law* seemed to lead into a logical circle. Chapter 11 is devoted to the judicial role and judicial discretion, covering Dworkin's criticisms. Chapter 12 relates Hart's analysis of sanctions to his philosophy of punishment, and chapter 13 appraises Hart's critical moral philosophy as the background to his legal positivism. Chapter 14 is an epilogue that surveys Hart's latest methodological concerns, especially as he developed these in his own *Postscript*.

CHAPTER FOUR

Social Rules

PRELIMINARY

The sketch of Hart's legal theory offered in the preceding chapter shows it to be a theory of legal order as an order of rules. These rules are a particular variety of social rules. As such they derive from social sources and exist in virtue of social practices. They do not exist in some ideal order or extra-terrestrial universe independent of what men and women living together socially do, say, and think. They are, on the contrary, an element in the doings, sayings, and thinkings of the men and women who live together in human social groupings. As will be seen, Hart represents them as dependent on, or expressions of, the attitudes of human beings toward their own and other humans' conduct and their ways of acting and interacting with each other as conscious agents.

It will be argued that the most distinctive and valuable element in Hart's work as a jurist lies in the way in which he addressed the explanation of laws as social rules and the explanation of social rules. He rejected the idea that rules are some kind of command or imperative. He rejected the ideas that they can be represented as simple behavioural generalizations about outwardly observable regularities in human behaviour and that description of social 'habits' can yield conclusions about social rules. He rejected the related idea that they are only predictive propositions or grounds for predicting how people will act in certain circumstances. He rejected the idea that they are merely expressions of human emotion or feeling.

He maps out a new route to the explanation of social rules dependent on what may be called a 'hermeneutic'[1] approach. This approach owes much to his appreciation and use of the linguistic analysis practised by his friend and contemporary, J. L. Austin,[2] and to themes advanced in Peter Winch's *Idea of a Social Science*.[3] Through Winch's work, Hart connects with the 'linguistic' philosophy put forward by Ludwig Wittgenstein[4] in his later years and also with Max Weber's insistence as a sociologist on the need for interpretive understanding (*verstehen*) as well as outward behavioural description of social actions and social institutions.[5]

There has been some speculation as to the extent to which Hart himself paid close attention to the work of Max Weber. Nicola Lacey draws attention to the fact that John Finnis found in Hart's library an annotated copy of *Max Weber on Law in Economy and Society*.[6] I can perhaps shed a little light on this. In the spring of 1968 when I was a recently elected fellow of Balliol College, Hart visited me at lunch to welcome me as one of the jurisprudence group in the Law Faculty of Oxford University. He was at that time full of enthusiasm for Weber's work, which he was currently reading and thought would be more accessible to law undergraduates than some more philosophical writings. My impression was that up till that time his acquaintance with Weber had been somewhat superficial and even indirect. When Hart ascribes to sociologists the job of *external* description of legal orders, he is presumably referring to Weber's view that the sociologist is not directly concerned with a normative interpretation of law, but with the probability that people in society will respond in certain ways to *their own* normative interpretation of the law. In relation to Weber's attempts to produce a typology of different forms of legal domination and different modes of legal thought or 'rationality' and to relate these to historical developments and changes in society at large, Hart has nothing to say. Indeed, as chapter 10 of the present work indicates, Hart's own account is deficient in its lack of any historical perspective on the development of the modern type of legal institutions covered by his 'secondary rules'. In this respect, his view resembles Kelsen's in so far as he holds that the task of analytical jurisprudence (compare 'the pure theory of law') is to analyse legal concepts for what they are, leaving to sociology the task of establishing the social content of *law* thus elucidated.[7]

However that may be, there is, one way or another, no doubt that Hart owes considerable intellectual debts to various predecessors. Nevertheless, as will be argued in this and following chapters, his practice theory of social rules—and thus of legal rules as a special type of social rules—makes a distinctive, original, and extremely fruitful contribution to jurisprudence.

SOCIAL RULES IN GENERAL

> [I]f a social rule is to exist, some [members of the social grouping in question] at least must look on the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an 'internal' aspect in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record. (C.L. p. 56)

That quotation puts squarely before us Hart's basic idea about *rules*. By contrast with those who stress the importance of 'habits', he is denying the possibility of explaining *rules* solely by reference to external regularities of behaviour.[8] To draw on an example of his: observation of the movements of motor vehicles at certain crossroads may reveal a significant statistical regularity whereby an extremely high proportion of the vehicles is observed to stop when a red light shines in their direction. But no such observed or described regularity is or entails a statement of the existence of a *social rule* about vehicle driving. To observe or to state that the pattern 'vehicles stopping when facing a red light' occurs in 99 percent of cases is neither to see nor to say that there is a rule. The same would hold if it were observed that 99 percent of drivers play car radios when stopped at traffic lights.

As the quotation says, however, externally observable regularity or patterning of behaviour is necessary to the explanation of a rule—necessary, but not sufficient. The further necessary element is an element of *attitude* among members of a group whose behaviour does reveal such patterning. 'Drivers stop their vehicles when facing a red traffic light' is (statistically) a descriptive truth about patterns in behaviour. If it is also true that among some members of some group we find 'a critical reflective attitude to [that] pattern of behaviour as a common standard' (*C.L.* p. 57), then the addition of that 'internal' attitude to the 'external' regularity of behaviour is sufficient for the existence of a rule. The rule can be stated in such terms as: 'Drivers ought to stop their vehicles when facing a red traffic light'. Given that *attitude*, the group in question has more than merely a shared 'habit' of stopping when facing a red traffic light, as perhaps its members have a 'habit' of playing car radios when stopped at traffic lights; it has a *rule*.

As points of distinction between 'habit' and *rule*, Hart mentions also two other matters. First, in the case of a *rule* about doing something, deviation from the normal pattern of behaviour is treated as a fault or lapse open to criticism; but failing to act in the way in which there is a general habit of acting 'need not be a matter for any form of criticism'. To carry on our example: people do get criticized for 'jumping the lights', quite apart from any legal enforcement or sanctioning procedures; they don't get criticized for not playing their radios when stopped at the lights. It is quite possible both that there *is* a general habit of playing car radios then and that *no one* gets criticized for not doing so.

Second, in the case of a *rule*, the criticism made when people do deviate from the pattern is regarded as justified or legitimate—their deviating constitutes of itself a good reason for criticism by others, or indeed for self-criticism. This means that those who criticize another's action—jumping the lights, say—are not in turn open to justified criticism for criticizing the original actor. That other himself, or at least other members of the social group, hold such criticism to be proper.

Both of these points Hart makes before he introduces the concept of the 'internal attitude' or 'point of view'. They are, he says, included within it or at any rate fully understandable only with reference to it. Especially with regard to the second, this is obviously the case; the concept of a 'justified' or 'legitimate' criticism itself presupposes social standards, norms, or perhaps even *rules* about how people should deal with each other. And even as to the first, the question of what sorts of reactions by one person to another's doings constitute criticism requires for its answer reference to *attitudes*. We have, therefore, to look more closely at what Hart says about this attitude.

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'. (*C.L.* p. 57)

A further feature or element of this *attitude*, providing a further contrast with merely habitual behaviour, is that adults in relation to children or the otherwise uninitiated "strive to teach [and] intend to maintain [the pattern of behaviour as a pattern]" (*C.L.* p. 56). Also, as this seems to imply, people (when acting in relevant circumstances) display or evince their intention to maintain the pattern by actually shaping what they do in accordance with the pattern, at least whenever they become conscious of the eligibility of some alternative. Playing chess, one might be tempted to make an illicit move of one's knight in the hope of getting away with it; but one decides not to because one's *attitude* is one of 'critically reflective' commitment to 'playing the game'; at least, if caught, one acknowledges oneself to be in the wrong. Otherwise, one is not merely 'not playing the game', one is actually failing to play it.

Hart's theory as so far sketched is open to a serious objection. The notions of 'criticism' and 'justified criticism' were said to depend for their explanation on an identification of the postulated attitude; but the attitude appears to be explained centrally by reference to criticism and its justification. It is a 'critical reflective attitude'. This difficulty is not surmounted by his reference to the 'characteristic expression' of the attitude 'in the

normative[9] terminology of "ought", "must" and "should", "right" and "wrong".' Such expressions are equally available and equally used (characteristically) in situations where the speaker is not invoking any kind of a social rule. To take a commonplace counterexample to Hart's theory, vegetarians who say that it is wrong to eat the flesh of other animals may be quite well aware that there is no social rule condemning carnivorousness in their community. Yet (whatever the value of their moral opinions) they would make no linguistic error in calling eating flesh 'wrong'. And if they taught their children that it is wrong to eat animal flesh, neither would they be teaching the children an existing social rule, nor would the existence of a social rule be necessarily the outcome of this teaching, however successful.

Despite these problems, Hart's attempt to highlight and focus on an 'internal aspect' of social rules as against mere habits and external regularities of behaviour can legitimately be considered correct in its essentials. Let us first consider the force of the objection to taking the use of normative terminology as a sufficient identifier of the *attitude* Hart is trying to elucidate. What that objection shows is that attitudes matter, but that Hart has been insufficiently subtle in differentiating between relevant attitudes. What is the difference between somebody holding that meat eating is wrong and that same person holding that crossing a red light is wrong or that smoking before the Loyal Toast at formal dinners is wrong?

If there were no differences, the objection laid against Hart would lose force. If there are differences, and there are, how are we to capture them save by trying to understand the differences of judgment expressed in the three given instances of calling something 'wrong'? To capture that, we must grasp what we would be doing if we were the person making these judgments and making them seriously. That is to say that the explanation we seek must be sought not at the level of outward observation, experimentation, etc., but rather at the level of 'hermeneutic' inquiry. We have to interpret the meaning of such judgments from the point of view of being the person who passes judgment rather than from the point of view of one who scrutinizes behaviour from the outside. Hart's introduction of the idea of an 'internal aspect' into the discussion of rules was on this very account a decisive advance for analytical jurisprudence; as P. M. S. Hacker has said, it involved the introduction of the *hermeneutic method* to British jurisprudence.[10] And that method, as will be argued, is the essentially appropriate one to the subject matter.

These considerations suggest that Hart's elucidation of *rules* is not radically mistaken, but is only incomplete. What it rightly does is direct us to the question: what are the *attitudes* to patterns of social acting which, together with some regularity in action (or 'behaviour'), must exist or be held by human beings for it to be true that for some group of human beings a *rule* exists? To answer that crucial question we must start from, but cannot finish with, the materials which Hart has furnished.

THE INTERNAL ASPECT OF RULES RECONSIDERED[11]

A 'critical reflective attitude' can best be understood as comprehending an element of cognition, caught by the term 'reflective', and an element of or relating to volition or will, caught by the term 'critical'. The cognitive element covers the very notion of a 'pattern' of behaviour—a capacity to conceive in general terms some such abstract correlation of a certain act with certain circumstances as 'drivers stopping their cars when facing a red light', 'human beings refraining from eating animal flesh'. It further covers a capacity to appraise actual doings or contemplated doings against that abstract and general pattern and to register instances conforming to, not conforming to, or irrelevant to the pattern. Since the pattern is a generalized one of act-in-circumstances, whenever the circumstances exist, an act is either a conforming or non-conforming one, and when they do not exist, the pattern is irrelevant.

The element of volition or will comprehends some wish or *preference* that the act, or abstention from acting, be done when the envisaged circumstances obtain. Such wish or preference need not be unconditional; commonly, such a preference may be conditional upon the pattern in question being one for which there is and continues to be a shared preference among an at least broadly identifiable group of people. The preference depends on a network of mutual beliefs and expectations.[12] This would apply in the case of a person's preference or wish that those who drive cars in the United Kingdom drive on the left-hand side of the road. This would be pointless if it ceased to be a mutual preference shared by all or most such drivers. Further, as the last example indicates, such a preference or wish need not be conceived as an ultimate wish, a wish for something as an end in itself. I have an ulterior reason for preferring that drivers keep left, namely that adherence to some conventional arrangement (either 'keep left' or 'keep

right') will enhance my own and others' safety on the roads, and hence will conduce to the protection of life and limb.[13]

(What distinguishes our imagined vegetarians is that they make no assumption that the pattern of behaviour they favour, not eating meat, is a conventional one or one common to members of the groups in which they move. They hold it to be a preferable pattern to the common one, and their volitional commitment to it is a commitment on a point of principle and hence not in any way conditional upon common or shared observance in a group. This explanation depends upon the account of principles and other standards [as distinct from rules] developed in the later parts of this, and in the next, chapter.)

In so far as it is possible to distinguish between emotional elements and volitional elements in human attitudes, it seems correct to view the 'internal aspect of' or 'internal attitude to' rules as comprehending the volitional rather than the emotional. Hart stresses that the latter is not necessary to what he envisages:

> The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour. No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may have psychological experiences analogous to those of restriction or compulsion. When they say they 'feel bound' to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of 'binding' rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard . . . . (*C.L.* p. 57)

This seems correct in what it says. But it is a deficiency of Hart's account in *The Concept of Law* that he fails to elucidate what is denoted by rules being generally *accepted, supported* by criticism, supported by *pressure* for conformity, and so on. As I have suggested,[14] an elucidation of these features must be by reference to a volitional element: a wish or will that the pattern be upheld, a preference for conforming or non-conforming conduct in relevant circumstances. Such wishes or preferences may be, probably are normally, wishes or preferences for states of affairs which themselves are or conduce to some ultimate ends or values, as John Finnis has argued.[15] But people do have affective or emotional attitudes to whatever they do hold as ultimate ends or values. So we ought not to make the mistake of supposing any entire disjunction between the volitional and the emotional,

even while agreeing with Hart that 'feeling bound' in particular is not necessary to the 'internal aspect' of any rule.

SOME KEY TERMS REVIEWED

The foregoing account extends, but is consistent with, the theory expounded in *The Concept of Law*. It enables us to assign clearer meanings to some crucial terms and ideas in Hart's discourse about rules. The notion of an 'internal point of view' or 'internal attitude' is to be understood by reference to those who have and act upon a wish or preference for conduct in accordance with a given pattern. This applies both to their own conduct and to that of those others to whom they deem it applicable, as indicated *inter alia* by the criticisms they make and the pressures they exert.

'Acceptance' of a rule seems to cover two distinguishable attitudes. The stronger case, that of 'willing acceptance', is the same as the above with an elaboration upon it. Not merely has one a preference for observance of the 'pattern', but one prefers it as constituting a rule that one supposes to be sustained by a shared or common preference among those to whom it is deemed applicable. The latter feature, for reasons which will appear, is essential to acceptance of a *rule* as such.

When some people have that attitude of acceptance—*willing acceptance*—a weaker case may also exist. This is found in the case of those who are aware that there are some such willing accepters, who are aware that the rule is held as applicable to themselves, and who therefore have reason (a) to conform to it and so avoid justified criticism of themselves and (b) to prefer that it be generally applied to all others to whom it is held applicable rather than that their own unenthusiastic conformity be taken advantage of. People in this position may be said 'merely to accept' or 'unenthusiastically or reluctantly to accept' or to 'accept without fully endorsing' the rules.

This in turn would enable us to give some sense to the concept of a 'group' of people, which is a key term for but not explained by Hart.[16] From the standpoint of all those who accept (either willingly or reluctantly) a rule, that rule has some more or less determinate range of application to human beings. From that standpoint, all those to whom the rule is applicable constitute a *group*. Often, but not always, the ground for applying the rule is that the persons in question have some common characteristic (apart from the applicability of the rule) that is held to be a reason for the rule's applicability. Often there is more than one rule, even a coher-

ent set of rules, which is held to be applicable to whoever has the relevant characteristic. These are common cases, whether or not the characteristics relate to voluntary choices made by individuals (club membership, agreeing to take part in a certain game), are consequent on voluntary choices (taking a job that requires membership of a trade union because of a closed shop arrangement), or are considerations independent of a person's choice (membership of a family, baptism into a religious faith in childhood, for most people citizenship or nationality, membership in some racial or ethnic grouping). Even brief reflection on these distinctions between criteria of group membership would seem to indicate an interesting typology of differences between rules relative to the groups and types of groups to which they are attached.

What may be noted is the fact that some groups, including the group of citizens of a state (particularly important in a discussion of positive law), are not or are not mainly comprised of volunteers. Hence arises the possibility that people can be judged to be bound to conform to rules that they do not accept even in the weak sense. But, where that is so, such people may find themselves to have strong and purely prudential reasons for avoiding being detected in breach of rules, which once accepted are accepted as applicable to all group members. The strength of these prudential reasons is, obviously enough, proportionate to the numbers, power, and influence of those who do accept the rules and the weight of preference they have for conformity to this or that rule. Hart himself drew attention to this fact, although without explaining all that is necessary to clarify it:

> The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. (*C.L.* p. 90)

The foregoing suggestions aim at clarifying the central ideas of *group*, *member*, *acceptance*, *nonacceptance*, and hence *rejection*, which I would take to imply not merely a possibly passive absence of any wish or preference for conformity to a relevant 'pattern of behaviour', but an active preference for nonconformity, subject only to prudential avoidance of detected nonconformity.

There is a related difficulty about how we are to understand the 'external point of view'. What Hart calls the 'extreme external point of view' is the case of a person who, as an observer of human behaviour, restricts himself

to viewing it 'purely in terms of observable regularities of conduct, predictions, probabilities, and signs' (*C.L.* p. 89). Notice that there could be two cases in which one might hold this point of view. First, one might fail to understand or realize that some regularity in human behaviour is ascribable to rule-acceptance-and-observance as explained by Hart. For example, Kafka's novels abound with characters who observe others' behaviour but wholly fail to understand it as being oriented to social rules and conventions. Second, one might adopt the standpoint of a natural scientist or behavioural scientist concerned to establish regularities of human behaviour. Such a scientist might restrict his/her view solely to bodily conditions or movements without regard to supposed subjective grounds for acting held by the population subject to scrutiny. In this second case, the party may be one who, *acting as a scientist*, 'keeps austerely to this extreme external point of view' or may be one who, *acting as a citizen*, accepts the rules of the relevant community. Such a person's scientific observation is not necessarily a pointless enterprise. There are dimensions of understanding other than the hermeneutic, and the methods of natural science, while not relevant to interpreting the orientation of actions to rules, may help us to amend, partly at least, some of our understanding of and attitudes to behaviour and, hence, our readiness to subject it to rules. A case to which Hart drew attention (*L.L.M.* p. 68) was the contribution scientists made during the twentieth century to revolutionizing social attitudes to sexual behaviour.

In a sense this 'extreme external point of view' is a chief or primary target for Hart's criticisms. His argument in the earlier chapters of *The Concept of Law* is aimed at showing why John Austin's mode of theorizing about law is necessarily inadequate. Austin's[17] (and Bentham's[18]) starting point is that of a 'habit of obedience' by a population to an individual or collectivity (the *sovereign*), who issues general commands to the members of that population and has the power and the purpose to inflict some evil by way of sanction upon those who disobey. But to speak only of 'habit' in such a context is, in effect, to confine oneself to viewing conduct 'purely in terms of observable regularities of conduct, predictions, probabilities, and signs'. It is to confine oneself, in short, to the 'extreme external point of view' and thus to commit oneself to a scheme of description or understanding which precludes an adequate representation of rules, including legal rules, as they function within the consciousness of people in society.[19]

So the prime point of attention in relation to the 'extreme external point of view' is a methodological one. The method of observation of conduct

from that point of view, however useful it might be for certain scientific purposes, including at least some varieties of sociological inquiry, is inadequate to capture those concepts of lawyers and of laymen that are bound up with rules and standards of conduct. We must have a different point of view. But what point of view?

It is an unsatisfactory feature of Hart's account that he passes too lightly over the other variant—the nonextreme variant, presumably—of the 'external point of view'.

> Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. [Alternatively], we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the group. (*C.L.* p. 89)

If there is any point of view which seems to capture that which the Hartian legal theorist as such must hold, it is surely this 'nonextreme external point of view' depicted by Hart. He does, after all, describe himself as a legal positivist, taking as his ground for that the proposition that understanding a law or a legal system in its character as such is a matter quite independent of one's own moral or other commitment to upholding that law or legal system and of one's view as to the moral quality of the law or legal system in question. Hence, precisely what the legal theorist of Hart's school must do is take as his standpoint that of a person who understands and seeks to describe legal rules as they are held from the 'internal point of view' regardless of any commitment he himself has for or against these rules in their internal aspect.

To be an 'outsider' in this sense is neither necessarily to be a member nor necessarily to be a nonmember of the group governed by those legal rules (or, *mutatis mutandis*, some other set or system of social rules). It is simply to hold apart questions of one's own commitments, critical morality, group membership or nonmembership, in order to attend strictly to the task of the descriptive legal or social theorist concerned to portray the rules for what they are in the eyes of those whose rules they are.[20] This is no doubt easier to do if one is, for other purposes, an 'insider'. But that is contingent. This, surely, is the central methodological insight of Hart's analytical jurisprudence. It is what justifies our styling his approach a 'hermeneutic' one.[21]

Further to elucidate this 'nonextreme external point of view', we must refer back to the clarification given earlier of what the 'internal point of view' requires. We saw that it has two elements: cognitive and volitional. Now we may notice two points. The 'nonextreme external point of view' requires (a) full sharing in the *cognitive element* of the 'internal point of view'—the understanding of the pattern or patterns of behaviour as such—and (b) full appreciation of, but not necessarily sharing in, the *volitional element*—the will or preference for conformity to the pattern as a standard. Take a case: I, who am not a practising Christian but who has had much exposure in particular to the Scottish Presbyterian mode of Christian observance, can give an account of the rules and articles of faith by which Presbyterians conduct themselves. I could doubtless do it better if I were or had for some time been a fully committed member of the Church. But my giving a fully adequate descriptive account of the rules and articles of faith would require understanding and appreciation of these as committed members understand them, not volitional commitment by me to them. Here, of course, one touches on a range of subject matter, focal to one strand in the hermeneutic tradition, that is concerned with explanation and interpretation of religious texts and traditions. But there are, as here indicated, other strands. And for that reason, and to avoid the awkwardness of continuing to talk of a 'nonextreme external point of view', I shall henceforward dub that position the 'hermeneutic point of view', and foist this upon Hart in the hope of making clearer an essential but not fully elucidated fulcrum of his theory and methodology. His theory stands or falls upon the truth of the propositions that social rules can only be understood, analysed, and described from this 'hermeneutic point of view' and that legal systems can only be understood, analysed, and described as specialized systems of social rules.

A part of the grounding Hart gives for these propositions is the evidence of linguistic usage, in particular the use of the 'normative terminology of "ought", "must", "should", "right", and "wrong".' What Hart has to tell us here is concerned with the presuppositions implicit in our use of such terminology. Those who speak of what one *ought* to or *must* do or not do, who discourse about what is *right* or *wrong*, reveal themselves as presupposing some standard of rightness or wrongness. That is, they disclose that their point of view is an internal one with respect to such standards. Hence Hart chooses to call statements of the right and the wrong and such like 'internal statements'. That we are familiar with and regularly make or hear such statements is one way of drawing our attention to that very 'internal point of view' that, upon consideration, we see them to presuppose. This, Hart claims, is the real payoff of the linguistic approach to philosophy.

> . . . [T]he suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our awareness of phenomena'. (*C.L.* p. v)

The words just quoted are drawn from the point in the preface to *The Concept of Law* where Hart made a claim (since hotly disputed[22]) to be engaging in 'descriptive sociology' as well as conceptual analysis. The words and the claim were uttered with reference to the asserted importance of the distinction between 'internal' and 'external' statements.

There is, it is submitted, an important point and a sound claim to be made here. But the point and the claim are vitiated by the ambiguity earlier discovered in Hart's talk of the 'external point of view'. We distinguished an 'internal', a 'hermeneutic' or 'nonextreme external', and an 'extreme external' point of view. If there are *three* distinct points of view, not a simple internal/external dichotomy, what is to become of the internal/external distinction in relation to statements?

The answer is that it is simply not true that all statements of *ought, must, should, right, wrong, obligation, liability*, or whatever do presuppose an assumption *on the speaker's part* of the 'internal point of view' or of committed acceptance of rules or other standards. Such statements do certainly presuppose some rule or standard to which reference is made. But it need not be a standard that the speaker accepts or adheres to from the 'internal point of view'. Consider the difference between 'As a good Catholic, you ought to go to Mass today' (i) uttered by a parish priest to a member of his flock and (ii) uttered by a nonbeliever to a friend whom she supposes to be one of the faithful. There is a difference indeed, but the truth of the statement *conceived as a statement* (not an exhortation, an implied reproach or criticism, or whatever) is quite independent of the character, or standing, or viewpoint of the person who utters it.

Any such normative statement may be made *either* from the 'internal point of view' *or* from the 'hermeneutic point of view', and the mere act of making such a statement is entirely ambiguous in its presuppositions between the two. What is the case, however, is that the 'hermeneutic point of view' is possible only if an actual or hypothetical 'internal point of view' is postulated or presupposed. In this way, it is true that what Hart perhaps misleadingly calls 'internal statements'[23] do presuppose and thus draw attention to the actual or hypothetical existence of an 'internal point of view'. My ability to state, explain, and interpret rules and other standards and their applicability to given cases (my ability to take on the 'hermeneutic point of view') does indeed depend upon the supposition that somebody or some people accept(s) such rules or standards. But I need not be one of those people; nor does my making such a statement of itself disclose any volitional commitment of my own.

Hart's view of this matter is different. At pages 102–3 of *C.L.*, he characterizes an *internal statement* as one that 'manifests the internal point of view and is naturally used by one who, accepting the rule . . . applies [it]'. The *external statement* by contrast is 'the natural language of an external observer . . . who, without accepting [the] rule . . . states the fact that others accept it'. But the error here is in supposing that those who are outsiders to a particular rule or rule system are restricted to stating facts *that* . . . or facts *about* the rule. Not so. In the first edition of this book a contemporary example of this was given:

> As a non-citizen of the USSR, and one who has little liking for its political and legal principles, I can nevertheless make true statements *of*, as well as true statements *about*, Soviet Law. 'Soviet citizens may not hold or deal in foreign currencies' is a true statement of a rule of law which obtains within the USSR. It is not a statement *about* that rule. Here is a statement *about* it: 'It is unlikely to be repealed in the coming decade'. Neither statement *itself* says that anyone accepts the rule, though they both presuppose that someone does.

It is a pleasant irony that repeal of such Soviet laws did come just outside the decade in question.

Hart (*C.L.* p. 101) certainly did make the point that the student of Roman law may make the study of that subject more 'vivid' by speaking 'as if the system were still efficacious', discussing 'the validity of particular rules', and solving problems 'in their terms'. That implicitly recognizes the difference between what is involved in stating a rule and in making statements about it. To that extent, it demonstrates rather than alleviates the unsatisfactory quality of his earlier distinction between internal and external statements.

RULES AND OTHER STANDARDS

A further difficulty that was raised but not resolved earlier can be raised again in this connection. Not all of the statements (or utterances of other kinds) that people make using normative terms do in truth presuppose

the existence of a *rule* as such. Certainly, they all presuppose *some* standard (rightness, or wrongness, etc.). But are all such standards *rules*, let alone *social* rules? Or are rules (or social rules) merely one group among the standards of judgment of conduct that people may hold, appeal to, or apply? Hart reveals himself as assuming an affirmative answer to this question when, for example, he sets out his starting point for clarifying the nature of morality:

> It is . . . necessary to characterize, in general terms, those *principles, rules and standards* relating to the conduct of individuals which belong to morality and make conduct morally obligatory. (*C.L.* p. 168; italics added)

Later, in the same passage (on the following page), he uses *standards* in a way that suggests it is in fact a general term embracing the whole group of 'rules, principles, and standards'.

Surely he is right in this. The vegetarian whom we thought about earlier presumably holds it as a principle that one ought not to eat the flesh of animals. But is there from his or anyone's viewpoint a *rule* against doing so? Being noisily drunk on a public bus offends a widely held conception of decency, propriety, or good behaviour, and this may be manifested in criticism, pressure to be quiet and behave oneself, and so on. (An incident involving noisy drunkenness occurred in the Edinburgh bus on which I travelled home on the evening I originally wrote this.) But such incidents can occur without its being true that there is a *social rule* against being noisily drunk on buses (in Edinburgh or anywhere else). Shared standards of propriety, decency, and good behaviour are not necessarily *rules*. The trouble is not that Hart fails to see and give some allowance for the fact that not all *standards* are *rules*, nor that *principles* are distinct from *rules* (a key point in Ronald Dworkin's criticism[24] of Hart's theory). The trouble is that Hart has not himself clarified what the assumed distinction is.

What follows is no more than a brief sketch of the outlines of a possible Hartian clarification of that point, one that he might have moved toward accepting in his own later thought.[25] *Principles* are, both in the legal[26] and the moral[27] case according to Hart, characterized as being *rational* grounds of conduct and as being *general* in their scope. *Rules*, it would seem by contrast, are essentially *conventional* and thus may be (in a sense) *arbitrary* in the specific form they take, as with the British 'keep left' rule in driving—why not 'keep right' as elsewhere? The point or *principle* involved is clear—to

provide safe driving conditions. The *principle* is eminently rational, but that does not make 'keep left' more rational than 'keep right' or vice versa. An arbitrary choice having been made or an arbitrary practice having developed, one would be irrational not to adhere to it, so long as it is indeed a *shared* standard rather obviously shared by almost all of one's fellow drivers. So in relation to *standards* that are *rules*, it would seem important to note the point made earlier—that the element of *preference* involved in the 'internal point of view' tends to be *conditional*. One has a *preference* that a given pattern be adhered to by all, and this *preference* is in some degree *conditional* upon the pattern's being and continuing to be supported by common or convergent *preferences* among all (or nearly all) the parties to the activity contemplated.

This may in turn remind us of another feature of *rules*—that we think of them as relatively 'cut and dried', often even as captured in writing. The way in which we sometimes talk of 'unwritten rules' conveys a hint that these are considered relatively unusual. An 'unwritten rule' is an instance of a conventional *standard of conduct* that is well understood and clear-cut in its provisions, as is usual with rules which are enshrined in a particular verbal formula.[28] This expresses better the point about arbitrariness, and points to a difference between *rules* and broader or vaguer *standards* of rectitude, propriety, decency, or whatever. The difference simply arises from the degree to which people share in conceiving a reasonably cut-and-dried 'pattern of behaviour' as the standard or something altogether vaguer.

These reflections are not unimportant for those whose focus of concern is law, in particular *positive law* or *state law*. It is (certainly in Hart's view) a particular feature of governance under law that state legal orders are characterized by the existence of institutions and procedures for formulating in relatively clear, precise and authoritative ways those governing *standards of conduct* that are legal. If the reflections of a moment ago were correct, then it would be a noticeable and distinctive feature of legal order that it does, through its institutions and procedures, convert vaguer standards of conduct into *rules* as such. And indeed these reflections are significant outside the sphere of *positive law*. The other walks of life in which *rules* as such apply tend to be those where there exist institutions and procedures that likewise give some precision to standards and conventions. This is the case in organized games, voluntary associations, families (to some degree), companies, trades unions, schools, universities, and the like. In some of these cases, moreover, the rules are actually given the name of 'laws', 'stat-

utes', or 'bylaws', as in the instance of the 'Laws of Golf', the 'Laws of Association Football', the 'Statutes of the University', or the like.

To the extent that my sketched differentiating features of *rules* as against *standards of conduct* in general are acceptable, they do then give ground for supposing that *rule* may be a concept particularly apposite and relevant to/in jurisprudence. What would be less convincing would be to suppose that *rules* as such would have any great prominence in morality, which (aside from some forms of religious ethics) is not in any large degree institutionalized.[29] Indeed, according to the powerful Kantian school of ethical thought, which insists on the autonomy[30] of moral agents as such, morality cannot be authoritatively institutionalized through social agencies. The heteronomous moral development of the child may be mediated through the inculcation of rules laid down by parental authority, but eventually the adult agent is his or her own final moral authority.

Hart's own recognition of this is somewhat muted by the prominence that he gives to the concept of a *rule* and by his failure to expound the distinction that he implicitly observes as holding between *principles, rules*, and other *standards*. It is, however, significant that it is within those chapters of *The Concept of Law* dealing with "Justice and Morality" (ch. 8) and "Morals and Laws" (ch. 9) that he most stresses the important part played by *principles* and other kinds of standards alongside of *rules* as such. Of the relative standing and relative importance of rules and other standards in morality there is a good deal more to be said; but it will be said in the next chapter.

SUMMATION

We have considered here the central and distinctive element of Hart's contribution to descriptive jurisprudence—his elucidation of the idea of a *social rule* and the methodology he applies in that elucidation. His idea that *rules* have an 'internal aspect' has been endorsed but has not been found sufficient to distinguish *rules* from the other kinds of standards whose existence he acknowledges. The 'internal aspect' and its associated *attitude* (the 'internal point of view') have been found to be well-grounded but insufficiently analysed; a fuller analysis discloses both cognitive and volitional elements in the attitude. *Willing acceptance* of rules involves the full volitional commitment that the 'internal point of view' entails, while there

is a weaker case of mere reluctant or unenthusiastic acceptance parasitic on the former. Where there is common acceptance of certain standards envisaged as being shared or conventional standards, those who accept them belong to a *group*. But (from the 'internal point of view' *of these accepters*) so do all to whose conduct the standards are deemed applicable, and that in turn commonly depends on the possession of some characteristic that is not necessarily a voluntarily acquired one. Hence, Hart's crucial conception of a *group* appears not to have been prior to or definable independently of his conception of a *rule*.

The 'external point of view' is not necessarily that of an outsider to the group. In its 'extreme' form it comprehends the point of view of all those who, whether from ignorance of the agents' subjective meanings or from scientific commitment, are restricted or restrict themselves to observation of human behavioural regularity. This viewpoint is distinct from Hart's 'non-extreme external point of view'. I called that the 'hermeneutic point of view' because it is the viewpoint of one who, without (or in scientific abstraction from) any volitional commitment of his own, seeks to understand, portray, or describe human activity as it is meaningful 'from the internal point of view'. Such a one shares in the cognitive element of that latter point of view and gives full cognitive recognition to and appreciation of the latter's volitional element. Thus she can understand *rules* and *standards* for what they are, but does not endorse them for her part in stating or describing them or discussing their correct application. This 'hermeneutic point of view' is in fact the viewpoint implicitly ascribed to and used by the legal theorist, scholar, or writer who follows Hart's method; this is why Hart ought to have sharpened his distinguishing of it better than he did.

That being so, Hart's definition of 'internal statements' of legal and other rules has to be rejected. 'Normative statements' as I call them, following Joseph Raz,[31] do indeed presuppose an actual or hypothetical 'internal point of view' held by someone, but not necessarily the statement maker. The making of such statements is compatible either with the 'internal point of view' or with the 'hermeneutic point of view'. And, we may add, the understanding of them is essential to the prudentially calculated survival or comfort of the group member who does not accept the *rules* but wants to avoid the reactions of those who do. It may be a bit highfalutin to ascribe to train robbers a 'hermeneutic point of view', but to the extent that they use legal understanding to avoid detection or conviction, that is what they have.

Finally, reflection on the presuppositions of such statements led us back to recognition that Hart insufficiently defines the differentiating features of rules as against principles and other standards; although, certainly, he has made his case for distinguishing all these from concepts such as 'habit' conceived in external terms.

CHAPTER FIVE

Morality, Positive and Critical

PRELIMINARY

In the previous chapter, it was observed that it is particularly appropriate to use the term *rules* for certain standards of conduct. This term well suits those standards that contain some tinge or element of the purely conventional or arbitrary and perhaps for that reason have achieved some canonical or authoritative formulation. Such formulation may take place through established institutions or procedures, not necessarily those of the state and its organs or institutions. On the one hand these can be distinguished from principles, on the other from standards *simpliciter* or 'norms in a general sense'. These distinctions must be held in play in any consideration of Hart's work. Before we proceed to a study of Hart's specifically legal analysis, there are points here to be probed. Even though this involves an inversion of Hart's order of proceeding in *The Concept of Law*, it seems best to come at them first through a consideration of the descriptive and analytical part of his moral philosophy.

POSITIVE MORALITY

In a relatively early essay on "Legal and Moral Obligation", Hart gave vent to a criticism of what he took to be excessively 'protestant' in R. M. Hare's ethics.[1] His criticism was directed against theories that base the whole of morality on the autonomous self-legislating choice of the moral agent. For such theories, moral obligation depends on such an agent's laying down his or her own universal prescriptions of conduct for himself or herself and (so far as concerns that agent's judgment and treatment of them) all other moral agents. Why does Hart see this as 'too protestant'? The answer is that in Hart's vision of them, morality and moral obligation are at base social conceptions.

Morality stands alongside law (and above manners, etiquette, tradition, convention and usage, even linguistic usage, scholarly discipline, rules of