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# BOOK REVIEW

# BEAUTIFUL DREAMER: REVIEW OF *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM*, BY NICOLA LACEY

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*H.L.A. Hart is probably the most important legal theorist in the modern English-speaking world. The intriguing subtitle of Nicola Lacey's intimate biography, "The Nightmare and the Noble Dream," echoes the name of Hart's 1997 Georgia Law Review paper, in which he identifies two warring, equally inadequate, visions of law in American jurisprudence: the "nightmare" of complete indeterminacy and unbridled judicial discretion and the "noble dream" of a closed, deterministic legal system of judicial restraint. Lacey implies that Hart's life itself was both a nightmare and a noble dream. This book review expands on Lacey's work and suggests how both the most significant failing in Hart's theoretical work—namely his inability to formulate an adequate account of the "morality" that supposedly serves as law's defining other—as well as his passionate argument against what he perceived as the repressive "moralism" of conservative legalism, may reflect his internal personal struggles, particularly with respect to his repressed sexuality.*

## INTRODUCTION

H.L.A. Hart is probably the most important legal theorist in the modern English-speaking world. Not only did he revitalize jurisprudence in British law schools by introducing analytic philosophy into the legal academy, he was one of the most influential public intellectuals of the 1960s and '70s. His masterwork, *The Concept of Law,* remains the premier work of legal positivism to this day, while his more popular writings advocating the abolition of capital punishment and the elimina-

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tion of restrictions on abortion, homosexuality, and prostitution constitute "the resounding late twentieth-century statement of principled liberal social policy . . . [that] continue[s] to echo in both political and intellectual debates about a range of social and legal issues."[1]

The intriguing subtitle of Nicola Lacey's intimate biography of Hart, *The Nightmare and the Noble Dream*, echoes the name of Hart's 1997 *Georgia Law Review* paper,[2] in which he identifies two warring, equally inadequate, visions of law in American jurisprudence: the "nightmare" of complete indeterminacy and unbridled judicial discretion[3] and the "noble dream" of a closed, deterministic legal system of judicial restraint.[4] Lacey implies that Hart's life itself was both a nightmare and a noble dream:

> [The] contrast between his public and private worlds raises fascinating questions not only about Hart's background and personality but also about the nature of his intellectual creativity and about the quality of the social world, with its various intersecting hierarchies, in which he lived. These contrasts between external success and internal perplexities, between being an insider but feeling like an outsider, constituted dynamic tensions which shaped almost all Hart's work and relationships, and they provide the themes around which this book will explore Hart's life and scholarship.[5]

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1. NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 7 (2004). I have always held that Hart's jurisprudence contains unacknowledged psychoanalytic material. Hart's concept of law as rules closely parallels Jacques Lacan's notion of the master's discourse, one of Lacan's four discourses of psychoanalysis. I develop this analysis at greater length in Jeanne L. Schroeder, *His Master's Voice: H.L.A. Hart's Positivism and Lacanian Discourse Theory*, 18 L. & CRITIQUE (forthcoming 2007) and Jeanne L. Schroeder, The Four Discourses of Law or Turning Law Inside-Out (Mar. 23, 2006) (unpublished manuscript, on file with author).

2. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

3. "The Nightmare is that this image of the judge [as applying existing law] . . . is an illusion . . . ." *Id.* at 972. "[I]n spite of pretensions to the contrary, judges make the law which they apply to litigants and are not impartial, objective declarers of existing law." *Id.* at 973.

4. The noble dream

> represents the belief, perhaps the faith, that, in spite of superficial appearances to the contrary and in spite even of whole periods of judicial aberrations and mistakes, still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of particular constitutional provisions, statutes, or available precedents appear to offer no determinate guide.

*Id.* at 978. In *The Concept of Law*, Hart refers to this dichotomy as "[f]ormalism and rule-scepticism . . . the Scylla and Charybdis of juristic theory." H.L.A. HART, THE CONCEPT OF LAW 147 (2d. ed. 1994).

5. LACEY, *supra* note 1, at 3. Lacey makes a similar point in her concluding chapter:

The Hart Lacey presents is a complex figure. Acclaimed in his lifetime as one of the greatest Anglophone legal philosophers, he nevertheless suffered from a periodically debilitating sense of inadequacy. A thoroughly assimilated Jew,[6] outwardly more English than the English, he nevertheless deeply identified with, and could not forget, his religious heritage.[7] Critical of Zionism and sympathetic to Palestinian rights, he nonetheless left his private library to Hebrew University in Jerusalem.[8] Though party to an ostensibly successful marriage to "one of the most extraordinary women of her generation,"[9] his scrupulously private sexual orientation was homosexual.[10] Outwardly serene, Hart was inwardly plagued with self-doubt, panic, and depression. With extraordinary regu-

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> This public story of Herbert Hart's life was, of course, true; its validity in no way compromised by the equally true story of his struggle to overcome depression, his incompletely resolved attitude to both his sexuality and his Jewish and class origins, his volatile shifts between intellectual confidence and insecurity, his unconquerable emotional reserve, and his long-standing sense of not really being what he actually was: an influential and respected insider in the social and professional worlds in which he moved.

*Id.* at 363.

6. It seems significant that one of the very few times anyone reported seeing Hart express anger was when:

> Izhak Englard, then a young torts scholar with Kelsenian jurisprudential sympathies and later to become a Justice of the [Israeli] Supreme Court, asked him directly why he had not been to Israel before and what his attitude was to being Jewish. Herbert, a man who almost never lost his temper, flew into a rage, telling Englard that this was none of his business. The row was patched up, but the younger man believed that Herbert continued to feel some rancour towards him.

*Id.* at 268.

7. Hart himself claimed to have experienced overt anti-Semitism only once; a boorish remark by a fellow student at Oxford that Hart, generously, ascribed to ignorance. *Id.* at 33. This seems a telling example of repression as Lacey catalogs numerous other incidents, casual and vicious, including the retraction of an offer to become Principal of Hertford College, apparently after they learned he was Jewish. *Id.* at 312–14.

8. Lacey writes:

> Yet beneath the anglicized persona, there remained a deep sense of Jewish identification which is reflected in a striking comment which Herbert made to Ronald Dworkin . . . about the Oxford Chair of Jurisprudence. It was remarkable, Herbert said, that no English person had held the chair in recent decades. Amazed, Dworkin replied, 'But you are English.' 'No,' Herbert retorted, 'I'm Jewish.'

*Id.* at 271.

9. *Id.* at 2.

10. In an extraordinary letter in 1937 to his friend Christopher Cox explaining why he was not yet ready to leave his successful career as a chancery barrister to accept an offer to join the Oxford faculty, Hart stated "I am or have been a suppressed homosexual (I see you wince) and would become more so (I mean more homosexual and less suppressed) in Oxford." *Id.* at 61. In Lacey's words "the fact that the admission about his sexuality was juxtaposed with the communication that he was contemplating marriage, suggests not only the depth of Herbert's own ambivalence about his homoerotic feelings but also his acute consciousness of social prejudices about homosexuality." *Id.* at 61–62.

larity, he enjoined himself in his diaries to "keep up appearances." "To be a fraud," he wrote, "is bad enough, but to be an unsuccessful one is too humiliating."[11] In old age, these troubles culminated in a complete emotional breakdown, for which he was temporarily institutionalized.

Asked to write this biography by Hart's widow Jenifer (to whom the book is dedicated), Lacey was given complete access to his prodigious journals, notebooks, correspondence and personal papers. Indeed, Lacey quotes so extensively from these private writings that portions of the book are almost an autobiography. These ruthlessly self-critical diaries reveal a troubled introspective side of Hart largely unknown even to his wife and closest friends.[12]

Although the book contains many intimate revelations, it is no exposé. Lacey uses personal material only to the extent that it was "essential to any interpretation of him as a whole person."[13] Lacey emphasizes the connection between Hart's inner and outer lives, but she does not indulge in facile, armchair psychoanalysis. She largely lets Hart—as well as his friends and colleagues through extensive interviews—speak for himself, and generously allows the reader to draw her own conclusions.

This being an intellectual biography, Lacey presents a succinct description of each of Hart's major works, presenting both epitomes of Hart's theses as well as accounts of their critical reception. Consequently, this book can serve as an introduction to readers who only have a passing knowledge of his reputation. Nevertheless, I believe that the book will be of the greatest interest to those who are already students of twentieth century jurisprudence. No doubt both Hartians and anti-postivists could quibble with details of Lacey's descriptions. To do so, however, would be to lose sight of Lacey's goal. Lacey sets out to en-

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11. *Id.* at 129.

12. Lacey's examination of Hart's extensive diaries and notebooks reveal that this side of the man was unknown to his closest intimates. "It was not only Jenifer who was unaware of the full extent of his anxieties. His colleagues and students had no idea that he was anything other than a secure and happy man." *Id.* at 130. Even after his breakdown, he was able to recover his outward appearance of equilibrium. Joseph Raz, who had visited Hart in the hospital at perhaps his lowest point, *id.* at 344, reported to Lacey that, when he arranged for Hart to attend a *Festschrift* in his honor in Israel, "Raz had two of the most anxious days of his life wondering if Herbert would crack up; in private he was still very fragile, although, typically, he seemed perfectly alright in public." *Id.* at 345.

13. *Id.* at xx. For example, she describes Hart's diaries during his first year teaching:

> In the nature of such things, the crisis of confidence did not restrict itself to Herbert's professional life, and his diaries of the time give intriguing insights into the juxtaposition of outer confidence and inner insecurity which often characterizes people's reaction to life in elite social institutions.

*Id.* at 128.

hance the reader's understanding of Hart's work by situating Hart's ideas within the personal and social context in which they developed.

Despite the fact that Lacey became a friend of Hart late in his life,[14] this book is no hagiography. Though open in her admiration for Herbert and affection toward Jenifer, Lacey is unsparingly honest in her portraits. This critical and personal biography of a complex and flawed man shows why he was so important and influential in the history of legal thought.[15] Perhaps no one ever really knew the true Hart in life, yet the book makes comprehensible why, in spite of this private torment, almost everyone[16] with whom he came into extended contact—colleagues, students, family and friends—became devoted to him. By the end of the book one can only agree that here was a rare man who, in spite of flaws, deserved to be both admired and loved.

According to Lacey, the conflicts between Hart's public and private life have everything to do with the conflict in Hart's work between his devotion to moral critique and his insistence on the logical amorality of the law. Lacey's revelations concerning Hart's sexuality shed special new light on Hart's famous debate with Patrick Devlin on the role of law in establishing conventional morality, which Lacey characterizes as "probably *the* debate of the decade . . . [which is] still read by practically

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14. Lacey defends her decision to refer to Hart in the text by his given name Herbert on the grounds that "I have tried to bring alive on the page the complicated, very human man whom so many readers of his academic work think of as the impersonal icon." *Id.* at xvii. Given the extreme introspection of the diaries from which she generously quotes, this familiar address is on the one hand arguably appropriate. On the other, given Hart's extreme sense of propriety, the use of his surname, like a hospital smock, might have better preserved his modesty during the intimate examination to which he is submitted.

15. "These criticisms have shaped my interpretation of his work in this book. But they have not diminished my admiration for the clarity and vision with which he framed his ideas, nor my assessment of the decisive importance of his work the development of legal and political theory." *Id.* at xix.

16. There were a handful of notable exceptions. His relationship with Ronald Dworkin, his hand-picked successor in the Oxford Chair of Jurisprudence, grew so frosty over time as Dworkin's work became increasingly critical of Hart's that they fell into communicating through a younger scholar who acted as a *de facto* mediator. *Id.* at 330, 334. His relationship with Julius Stone was fraught because of early rivalry, apparent envy on Stone's part, and, perhaps more important, their different views on the classic Jewish debate over assimilation (Hart being for and Stone being against). *Id.* at 189–90. Finally, there is the bizarrely tragic case of Abraham Harari, a graduate student who was denied his doctorate partly because of Hart's negative assessment of his dissertation. *Id.* at 274–75. Although Harari nevertheless landed an academic position in Australia, he devoted himself to writing an "open-letter" to Hart explaining the errors of his ways that drowned what is arguably valid criticism of Hart's theory in obsessive vitriol. *Id.* at 275–76. After widely circulating the letter, but before Hart could formulate a response, the unfortunate Harari died suddenly of a brain tumor. *Id.* at 276–77. Assuming the true point of the letter was to wound the sensitive Hart, it was a success. His perennial self-doubts as to his scholarship and personal worth were now also encumbered with feelings of guilt. *Id.* at 277.

all students of law, politics, and sociology . . . [and] the nearest thing to a manifesto for the homosexual law reform movement."[17] Yet, Hart did not publicly associate himself with the Homosexual Law Reform Campaign, something he "was to regret in later life."[18] Lacey implies that Hart's reticence stemmed from the overwhelming desire to keep up appearances and not reveal his inner unhappiness.

This Review proceeds as follows. I briefly describe some of the highlights of Hart's life and work as presented in Lacey's fascinating book. As I have already suggested, much of this material will be new even to those familiar with his career and, I believe, will add insight into Hart's scholarly project. In this light, I then turn to the theme that unifies Lacey's analysis: the continuing presence of a "nightmare" that lurks beneath Hart's "noble dream." Hart's attempt to hide his private demons beneath a carefully groomed public persona is reflected in the recurring dichotomies that characterize his work. The most influential of these is his insistence on maintaining a distinction between law and morality, which I argue can be re-characterized as one between description and essence, form and substantive content. Here, I expand on Lacey's work and suggest how both the most significant failing in Hart's theoretical work—namely his inability to formulate an adequate account of the "morality" that supposedly serves as law's defining other—as well as his passionate argument against the repressive "moralism" of the conservative legalism of Lord Devlin, may reflect his internal personal struggles, particularly with respect to his repressed sexuality.

## I. "A SAD TALE'S BEST FOR WINTER"[19]

Lacey's life of Hart is a sad, wintry tale.[20] She presents a vivid picture of the privileged intelligentsia[21] who came of age after the First World War, were annealed in the fire of the Second, and achieved maturity in the changed world of the fifties. The England, generally, and Oxford, specifically, of Hart's formative years are gone forever. But this is

17. *Id.* at 2.

18. *Id.* at 221.

19. WILLIAM SHAKESPEARE, THE WINTER'S TALE act 2, sc.2.

20. LACEY, *supra* note 1, at 353.

21. It is hard to disagree with Lacey's characterization that Hart was benefited by privileges that no longer exist. "By the standards of contemporary academic life, the idea that a former undergraduate with no further academic experience should be sought out for a permanent appointment over a decade after graduation is virtually unthinkable." *Id.* at 114. She does, however, modify her disapproval by adding, "Even by the standards of the 1930s and 1940s, it was extraordinary, and a testimony to the regard in which Herbert had been held as a student." *Id.*

a picture completely devoid of nostalgia. The intellectual environment Lacey describes is arid and backward,[22] an odd combination of the conventional and the bohemian, the pleasure seeking and the anhedonic, the luxurious and the scruffy that Lacey describes with her favorite adjective, "shambolic." Lacey's description is far from the romantic images of Britain that we glean from Masterpiece Theater or Merchant-Ivory films. It becomes easy to see why Hart was perceived as a breath of fresh air in his time.

Though Hart was personally an unhappy man, this did not prevent him from developing a rapier wit that shined through in his correspondence and conversation. But his pointed wit was strictly private. In his formal work, Hart rarely allowed humor or personal anecdote to leaven the purity (or pomposity) of his prose. Perhaps his stylistic insistence on separating humor from scholarly exegesis should be seen as an offshoot of his intellectual insistence on separating morality from law, his private internal self from his public external persona.

Although most American lawyers probably think of Hart primarily as an Oxford law professor, he actually had an interesting and varied career that spanned the gamut of English legal life. Born in Northern England to a relatively prosperous family of Jewish merchants, he spent a brief, but classically miserable, time at an English public (i.e. private boarding) school, before graduating from grammar (i.e. public high) school and having a brilliant career as an undergraduate at New College, Oxford. Nevertheless, despite the fact that he was his teachers' favorite, he did not win a desired research fellowship at All Soul's College because of surprisingly disappointing results on the requisite exams, apparently on account of one of the many panic attacks that would plague his life.[23]

Disappointed, he sat for the bar, became a successful barrister and served as a prominent officer in M15, Britain's intelligence agency, during WWII. After the war, friends and former professors who remembered Hart fondly arranged for him to receive an offer to join the New College philosophy faculty at the late age of 38. Despite the fact that he did not hold a graduate degree in law, Hart was named to the Chair of Jurisprudence in 1952. He held this chair until 1968, when he resigned to

22. At the time Hart was appointed to the Chair of Jurisprudence of the Oxford Law Faculty, "They variously referred to the 'terrible law faculty', with jurisprudence a 'dead-ish and sour subject'; a 'corpse' into which Herbert might inject some life, while bringing 'literacy and logic to the law school.'" *Id.* at 148.

23. Hart spoke of his decision not to take the exams again as caused by "panic." *Id.* at 42. "[R]eferences in later letters to a 'breakdown' at the time of the first failure show that he took it very hard." *Id.*

become the editor of a definitive edition of Jeremy Bentham's writings. He then became head of Brasenose College, Oxford—a sleepy school[24] filled with, in Hart's words, "old turks and young fogeys."[25] After rousing Brasenose from its slumber, he returned to the Law School as an emeritus professor.

While holding these positions, he also served as a member of the British Monopolies and Mergers Commission and, especially later in life, worked to further his leftist political agenda as a rabidly anti-Thatcherite public intellectual. Perhaps his most significant contribution in the public sphere was his participation with Lord Devlin in debates on laws enforcing conventional sexual morality, first broadcast on BBC and later published. Not only did Hart's arguments help rally support for the subsequent liberalization of British law on homosexuality, abortion, and prostitution, they help explain the emotional, as opposed to intellectual, basis for Hart's insistence on the separation of law from morality.

Lacey's book is full of anecdotes and academic gossip. Perhaps my two favorite stories both spring from his visit at Harvard Law School in 1957. First, during this visit, Dean Griswold somehow managed to forget to invite Hart to the official dinner held in his honor in connection with his famous Holmes lecture.[26] The second will bring a grimace of recognition to the face of anyone who has had the pleasure of publishing in an American, student-edited law review (and the *Harvard Law Review*, specifically). Lacey tells how the famous Hart-Fuller exchange almost never saw light of day. After receiving the proofs of the text of his Holmes lecture edited by the editors of the *Harvard Law Review*, the mortified Hart wrote Lon Fuller, his interlocutor:

> Meanwhile a spot of trouble! The L. Rev. boys had *mutilated* my article by making major excisions of what they think is irrelevant or fanciful. They have made a ghastly mess of it and of the references to Bentham and I have written to say they must not publish it under my name with these cuts which often destroy the precise nuance. . . .
>
> . . . Such an interference with an author's draft is unthinkable here and I am astonished that so gross and insensitive a thing should be possible at Harvard.

24. "As one joke put it, Brasenose 'toiled at games and played at books' . . . a conservative, sports-oriented, and unintellectual environment . . . at a turning point, with the recent decision to become one of the first small group of men's colleges to admit women . . . ." *Id.* at 315.

25. *Id.* at 317.

26. *Id.* at 196–97.

> I have told them if they will undertake to restore the listed cuts I will get down to the unwelcome task of patching it up all over again. But meanwhile I will not return the proof.[27]

When the mortified Fuller read Hart's letter, he "went over to the Review and found the President busily engaged in restoring [Hart's] article to its original form."[28] According to Lacey, "It was an experience which confirmed all of Herbert's prejudices about Americans' attitude to precision."[29]

Precision was a real point for Hart. Lacey describes Hart's experience as a visitor at UCLA Law School and Philosophy Department, where, "[a]s at Harvard, he was struck by a certain lack of rigour in American habits of discussion, and he retreated into the unappealing Oxford habit of reflecting in his diary on how clever—or how lacking in intellectual acumen—his new colleagues appeared to be."[30]

Precision is in the eye of the beholder, however. Hart thought that American scholars tended to be sloppy in their use of words. Yet Hart, whose jurisprudence centers on accurate description of what is meant by the word "law," was himself notoriously sloppy in his quotations and citation of others.[31] Even his co-author Tony Honoré found Hart's "attitude to close textual scholarship . . . irritatingly casual."[32] It seems odd, therefore, that after resigning from the Chair of Jurisprudence he should choose to undertake the project of editing Jeremy Bentham's writings, many of which had never been published. This seems a task for which he was uniquely ill-suited.[33] When Hart's edition of Bentham came out, another scholar published "a list of corrections to textual errors" made by Hart.[34] Lacey characterizes the "majority" of these corrections to be

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27. *Id.* at 200.
28. *Id.* (quoting Fuller's letter of apology to Hart).
29. *Id.*
30. *Id.* at 245.
31. Lacey elsewhere refers to Hart's "carefree attitude to references." *Id.* at 214.
32. *Id.* at 301.
33. Lacey questions this peculiar career choice:

> The episode suggests that the project of devoting himself to Bentham studies was indeed a 'fantasy': not in the sense of being unrealistic at a practical level, but in the deeper sense that it promised an illusory escape from anxieties which, far from originating in everyday work pressures, were in fact alleviated by the containing structures of institutionalized professional life. With many of these removed, Herbert—in an extreme version of an experience which many academics have on sabbatical leave and which other people often feel when first on holiday after a period of intense work—found himself confronting, unmediated, his own fragile psychology and the brutal imperative of individual creativity.

*Id.* at 311.
34. *Id.*

"trivial"[35] and states that Hart's colleagues viewed the critic's actions as "somewhat tactless, the upshot an embarrassing but not a disastrous episode."[36] Nevertheless,

> Herbert's reaction verged on the hysterical. Since the errors were born of his lack of taste for detailed editorial work and consequent over-reliance on research assistance, he had reason to feel ashamed of the lack of self-knowledge which had led him into work to which he was not obviously suited. [His critic's] list implied that he had been lazy in following [another edition] on a number of points rather than doing the meticulous research himself, or that he had not supervised his assistants adequately.[37]

Lacey includes this episode to illustrate Hart's predisposition to depression and panic attacks. He "even talked to one colleague of suicide, so deeply did he feel the shame of this public exposure."[38]

Nevertheless, for all the Oxford school's self-proclaimed "precision," numerous critics (including myself) have been struck by the ambiguity of so much of Hart's writing. As Lacey points out, many of Hart's central concepts are not fully worked out. Even such an admiring commentator as Neil MacCormick admits that Hart often fails to elucidate his distinctions.[39] Lacey distances herself from those

> sceptics [who] have attributed what they see as the intellectually puzzling success of this 'vague and parasitical little book' [*The Concept of Law*] to factors such as the clubbish support of a powerful Oxford elite and even the personal power of Herbert Hart over the graduate students and younger colleagues whose decisions to take his book as

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35. *Id.*

36. *Id.* at 312.

37. *Id.*

38. *Id.*

39. "[I]t is a deficiency of Hart's account in *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." NEIL MACCORMICK, H.L.A. HART 34 (1981). "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." *Id.* at 35 (citation omitted). "There is a related difficulty about how we are to understand the 'external point of view.'" *Id.* at 36.

> The point is that terms such as 'obligation', 'duty', 'offence' and 'wrongdoing', though interrelated, are not identical in use. . . .
>
> If the hermeneutic method is a sound one, it ought not to have the effect of lumping all these categories and concepts together under so potentially misleading a title as 'rules of obligation.'

*Id.* at 58–59. MacCormick also admits that Hart's core distinction between primary and secondary rules contains "serious ambiguities." *Id.* at 103.

> their primary reference point undoubtedly contributed to its growing reputation.[40]

Yet Lacey does dutifully (indeed, reluctantly) recount:

> Other critics have argued that the main 'data' presented—the linguistic practices out of which distinctions are drawn and put to theoretical use—are so unsystematic as to amount to, at best, a kind of Oxford Senior Common Room armchair sociology. It has also been pointed out that Herbert's argument is sometimes expressed in terms which invite confusion between analytic and historical claims. The distinction between primary and secondary rules, for example, can be taken as either a conceptual or a functional distinction: a distinction between structurally different forms of rule, or a distinction between rules with different social purposes. And the account of the emergence of secondary rules as 'curing the defects' of a system of primary rules, if taken as a historical claim, is both inaccurate and serves implicitly to represent as the acme of 'civilization' the contours of modern Western legal order.[41]

In other words, would much of what Hart saw as "precision" better be described as consensus among like-minded thinkers? When Hart came to the United States and encountered, even in the relatively homogenous 1950's, a wider spectrum of perspectives, he interpreted this as imprecision. Perhaps he could not recognize, in scholarly conversation that did not center on details, basic differences about first principles.

The last section of Lacey's book recounts Hart's struggle to write an epilogue to *The Concept of Law*. This will be, no doubt, the part of the book that will be of the most interest to, and cause the greatest controversy among, Hart scholars. The posthumous *1994 Postscript* added to the second edition to *The Concept of Law* is much puzzled over and dissected by positivist legal philosophers.[42] Lacey describes the *Postscript* as

> uneven [in quality], and scholars are divided in their view of whether it enhances Herbert's reputation. The intensely sad story of its writing does, however, give real insights into the nature of Herbert's in-

40. LACEY, *supra* note 1, at 232.

41. *Id.* at 229.

42. Joseph Raz, *Two Views of the Theory of Law: A Partial Comparison*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 1, 5, 29 (Jules Coleman ed., 2001) [hereinafter HART'S POSTSCRIPT].

> tellectual and emotional life, as well as some disturbing glimpses of the costs of exceptional professional success.[43]

Lacey's account explains why the *Postscript* is so strangely unsatisfactory. Its argument is anemic in comparison with the book to which it is appended. It has a petulant, whiny tone that reads as though it were written by a completely different author from the book itself. Upon first reading it when it was originally published, I ascribed this to the different times in which the book and its postscript were written—perhaps the crotchety old Hart was in effect a different person from his younger self? Lacey suggests that more was afoot.

Hart's *Postscript* is to a large extent an attempt to respond to Ronald Dworkin's critique of his theory. Although partisans of Hart sometimes give the back of the hand to Dworkin's argument as though it were beneath notice,[44] Hart took it deadly seriously. His journals and notebooks indicate that he tried out alternate answers to Dworkin for more than ten years, without ever settling on a definitive response at the time of his death.[45] This suggests not only why Hart never finished the work eventually published as the *Postscript*, but also that Hart may not have been satisfied with the argument set forth in it. It is thus unclear whether Hart would have wanted it to be published. Lacey notes,

> From his very earliest encounters with Dworkin's ideas, Herbert had recognized that they presented a formidable challenge to his own position. . . . As it was, Herbert's sensitivity to Dworkin's criticisms was fueled by a sense that there was something wilful or even lacking in honesty about Dworkin's reading of his work. And, despite his own outstanding talent for intellectual debate, Herbert found the experience of debating ideas with Dworkin increasingly frustrating—a frustration which would have been accentuated by the contrast be-

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43. LACEY, *supra* note 1, at 353.

44. *See, e.g.*, Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003) ("Rather, it seems to me—and, I venture, many others by now—that on the particulars of the Hart/Dworkin debate, there has been a clear victor, so much so that even the heuristic value of the Dworkinian criticisms of Hart may now be in doubt."). "Dworkin's constructive interpretivism presents no pertinent challenge to legal positivism, since it is thoroughly question-begging . . . ." *Id.* at 19. "It is now well-known, of course, that Dworkin misrepresented Hart's views on all but [one] point." *Id.* at 20.

45. In Hart's *Essays on Bentham* published in 1983, Hart "indulged in a swingeing critique of the legal theory of his successor in the Oxford Chair, Ronald Dworkin, in a confident style," LACEY, *supra* note 1, at 325, but he, apparently, was never convinced that he had completely gotten his hands around Dworkin so that this earlier critique "contrasts starkly with his uncertainty in dialogue with Dworkin from the mid-1980s onwards," as indicated by the fact that he was never able to finish his epilogue. *Id.* Lacey describes in detail the various, changing arguments against Dworkin that Hart tried out in his notebooks. *Id.* at 349–51.

> tween Herbert's meticulous style in discussion and Dworkin's more free-wheeling approach.[46]

Indeed, Hart was so distressed that, although he hand-picked Dworkin as his successor at Oxford, at the end he could barely speak to Dworkin directly, much to Dworkin's distress.[47]

Consequently, "[j]ust as his intellectual exchange with Dworkin in person had ossified, Herbert's work on his reply, despite over ten years of work, remained unfinished at his death."[48] Hart's Oxford colleague, Ruth Gavison, finally convinced Hart to have some of his notes typed up, but, in Lacey's opinion, these "fell short of the standards of elegance, clarity and comprehensiveness to which [Hart] always aspired."[49] Ap-

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46. *Id.* at 330.

47. *Id.* at 352. Lacey states:

> There is sadness, too, in Dworkin's side of the story. When he read the 'Postscript', he was shocked both to think how long Herbert had been working on it and by what he felt to be its occasionally angry tone: 'It is written as if he had never met me. We could have talked about it.'

*Id.* at 353.

Once again, as an American, one is struck by the insularity of Oxonian academia in the 50s through 70s. Hart supported the appointment of Dworkin as his successor to the Chair of Jurisprudence precisely because he thought Dworkin was potentially the foremost critic of his theory, but then could not cope when Dworkin left the arena of mere disagreement to a complete break on basic conceptual understandings. Lacey notes:

> Herbert's ambivalence towards his successor may have been further exacerbated not only by a social discomfort with Dworkin's personal style and frank enjoyment of his affluent lifestyle but also—though Herbert would certainly have hated to think this—by an unacknowledged sense that Dworkin owed him a certain level of gratitude or recognition as the predecessor who had pressed his claims to the Chair.

*Id.* at 330.

Lacey insinuates that much of the tension between Hart and his supporters and Dworkin was based on the clubby protection of the ultimate Oxford insider from the presumptions of the brash American outsider.

> The combination of his intellectual stature, his wit, and his modest, fresh, innocent personal style marked him out in the intense Oxford environment as a figure for whom others could feel not only affection and admiration but something near to reverence, even a form of hero-worship. Douglas Millen, the redoubtable long-serving Head Porter of University College, used to like to say to anyone he could get to listen that Professor Hart, whom he (like many others) regarded as the quintessential Oxford gentleman, had forgotten more than Professor Dworkin would ever know . . . . [Dworkin was never] entirely accepted at Oxford.

*Id.* at 329.

48. *Id.* at 352. Hart's distress can be seen in what Lacey calls "a fascinating and poignant marginal note" to one of his drafts of the planned epilogue. Hart recommended to himself that he consult his journals to see how he dealt with bouts of depression in the past: "'Look for despair over job changes etc—15/1/45 17/2/45 2/4/52', an entry which reveals that he used the paths through depression tracked in his earlier diaries as emotional resources in later moments of anxiety." *Id.* at 350.

49. *Id.* at 352.

parently, Hart himself never revised or edited these notes. In a letter written to Hart's widow after his death, Gavison stated "I take it that not much was done with the epilogue to *The Concept of Law*? I have the sense that this is the way he wanted it: He did not feel he was up to it."[50]

What was eventually published as Hart's *Postscript* was "as complete a version of the response to Dworkin as could be construed from Herbert's notes"—presumably the notes Gavison had typed up.[51] Its editors were Joseph Raz, Penny Bullock, and Timothy Endicott. Lacey describes this so-called *Postscript* as a "tragedy."[52] Although she is too gracious to say so expressly, it is hard not to conclude that she believes that it should not have been published as such under Hart's name without more complete disclosure as to the circumstances of its origin. The title "*Postscript*" might be misleading insofar as it suggests that it was Hart's definitive response to Dworkin—Hart's private papers indicate that he never arrived upon one. It was Hart's "last word" on Dworkin only in the temporal sense.

This is not to suggest that the editors to the second edition were disingenuous or that they intentionally suppressed the unfinished state of Hart's manuscript upon his death, but rather that they may have implied that the portion that they published was in a much more finalized version than Lacey suggests it was.[53] Perhaps more importantly, the peevish tone of the *Postscript* suggests a pettiness that would, given Lacey's ac-

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50. *Id.* at 353.

51. *Id.*

52. *Id.*

53. In their *Editor's Note*, Penelope A. Bullock and Joseph Raz state that the fact that the epilogue "was unfinished at the time of his death was due only in part to his meticulous perfectionism." Penelope A. Bullock & Joseph Raz, *Editor's Note* to HART, *supra* note 4, at vii. They declare, "[Our] foremost thought was not to let anything be published that Hart would not have been happy with. We were, therefore, delighted to discover that for the most part the first section of the postscript was in such a finished state." *Id.* They acknowledge that there were numerous versions of the work extant, but that "changes [to the work] over the last two years were mostly changes of stylistic nuance, which itself indicated that he was essentially satisfied with the text as it was." *Id.* at viii. They speculate that incoherencies in the text were likely

> the result of a misreading of a manuscript by the typist . . . . At other times it was no doubt due to the natural way in which sentences get mangled in the course of composition, to be sorted out at the final drafting, which he did not live to do. In these cases we tried to restore the original text, or to recapture, with minimum intervention, Hart's thought.

*Id.* They also note that they found two versions of the opening paragraph and published one as the text and the alternative as an endnote. *Id.* at viii. They conclude: "There is no doubt in our mind that given the opportunity Hart would have further polished and improved the text before publishing it. But we believe that the published postscript contains his considered response to many of Dworkin's arguments." *Id.* at ix.

count, have mortified this generous and kind man.[54] As Lacey shows throughout her book, Hart used his personal writings as a form of confession and analysis. He recorded his feelings as much to extirpate them as to understand them. His *ressentiment*, although correctly revealed in a biography, was never intended to be expressed in his scholarship.

## II. THEORY AND PRACTICE; LAW AND MORALITY

Being an analytical philosopher and, therefore, a positivist, Hart identifies his project as describing what law is, as opposed to describing what any particular rule of law *should be*.[55]

Probably the most influential conclusion that Hart draws from his descriptive or positivist account of law is what can be called the "separation thesis"—the proposition that there is no necessary conceptual relationship between law and morality. As I describe in more detail below,[56] I maintain that the separation thesis can be strongly restated as the proposition that the formal status of any specific positive legal rule *as a valid law* is independent from its substantive content. Furthermore, I believe that Hart's choice to characterize the separation thesis not as a distinction between form and content, but between law and morality, led many of Hart's critics[57] to misread him as asserting that law is not subject to moral critique, when Hart intended precisely the opposite. Indeed, Hart's career as a public intellectual should be seen as an extended moral critique of British law of his day. More importantly, I believe that Hart's choice of terminology also ultimately confused Hart's analysis of morality, which he equated with *moralism*, rather than ethical philosophy.[58] I suggest that Lacey's biography offers hints why such a moral (in the

54. Hart's perspective on his marriage provides an illustration of his extreme generosity. Many men would blame his marital distress at least partially on his wife, who not merely grew increasingly petulant and shrewish over the years, but repeatedly cuckolded him (to use an old-fashioned term that seems appropriate to the time), even with his best friends. Hart, however, saw himself as the cause of his wife's behavior: his emotional impoverishment leading to her bitterness and his lack of heterosexual desire driving her into the arms of other men. Being a man both of his time and of his word, he seems to never have broken his vows nor translated his homosexual desire into action. *See id.* at 204–05.

55. Hart's goal is "to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958). Morality is, precisely, the judgment of what ought to be. JULES COLEMAN, MARKETS, MORALS AND THE LAW 11 (1988). Consequently, to include a moral dimension in the definition of law —to say that an immoral law is not *law*—is precisely to "blur[] this apparently simple but vital distinction." Hart, *supra*.

56. *See infra* text accompanying notes 71–77.

57. *See infra* text accompanying notes 60–63, 75–78.

58. *See infra* text accompanying notes 68–84.

sense of ethical) man as Hart should have been so wary of appeals to morality.[59]

In this section I demonstrate, on the one hand, how many critics who have tried to critique Hart's separation thesis on moral grounds have been wrong to date while, on the other hand, showing how Hart's own account of the relationship—or more accurately, non-relationship—between morality and law fails through his inadequate and internally inconsistent account of "morality." I argue that Lacey's account of Hart's life might give us some insight into how Hart came to this impasse.

### *A. The Amorality of the Separation Thesis*

Some critics of Hart, most notably Lon Fuller in their famous debate that was eventually published in the *Harvard Law Review*, assume that Hart's insistence on the logical amorality of positive law is an immoral position. But sympathetic readers have shown that Fuller's reading of Hart is completely mistaken.[60] If Hart said that law is *logically* amoral, it is because Hart himself was ferociously and fearlessly moral.[61] In Lacey's words, "there was a strong *moral* case for espousing the inclusive, positivist concept of law according to which even morally unappealing standards may count as fully valid legal rules."[62] Divorcing morality from law was the necessary first step in subjecting actual legal regimes to moral critique. Only if law and morality are separate can morality serve as an external yardstick by which law might be measured and chastised.[63]

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59. *See infra* text accompanying notes 84–86.

60. MacCormick explains:

> Indeed, as Hart frankly acknowledges at the end of his book the ultimate 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 which is. 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.

MACCORMICK, *supra* note 39, at 24–25 (citations omitted).

61. MacCormick continues:

> 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.

*Id.* at 25.

62. LACEY, *supra* note 1, at 351.

63. In Lacey's words:

The conflation of law with morality, Hart argued, leads to the twin errors of the nightmare and the noble dream.[64] These are reactionary conservatism and anarchism—although one can disagree as to which result is noble and which is nightmarish. He states:

> There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.[65]

The reactionary fantasizes the noble dream of a perfectly just society in which all positive laws are in fact moral. Believing that no immoral law can be true law, but wishing to uphold legal order, she makes the mistake of assuming that all existing laws must be moral by definition and that one is morally obligated to obey the law. She who says "'This is the law, therefore it is what it ought to be,' . . . stifles criticism at its birth."[66] This leads to the blind acceptance of the most wicked of

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> In 1957, his argument had been that the clarity gained by a differentiation of legal and moral standards had both intrinsic moral and intellectual merit and political advantages. It was honest to be clear-sighted about the different considerations at play for citizens confronted with evil laws: first, are they legally valid; second, should they be obeyed?

*Id.* at 351–52.

64. In MacCormick's words:

> Hart affirms that natural lawyers' moralization of the concept of law tends either towards a form of extreme conservatism (whatever is law must be moral, therefore all law is morally binding) or towards revolutionary anarchism (since whatever is law must be moral, governments must be disobeyed or even overthrown if that 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 all laws as always open to moral criticism since there is no *conceptual* ground for supposing that the law which *is* and the law which *ought to be* coincide.

MACCORMICK, *supra* note 39, at 24.

65. Hart, *supra* note 55, at 598.

66. *Id.* As Robin West describes the Hartian position:

> If we "fuse" law and morality, if we fuse the "is" of the positive law with the "ought" of moral ideals, we will not be able to criticize what is by reference to what ought to be. If we think erroneously that law and justice—that which is posited and that which ought to be—are one, we will not be able to identify, much less rectify, those laws that are unjust. When we commit the "naturalistic fallacy" in this way, we look at the law through Panglossian, rose colored glasses: We see only justice and truth, rather than acts of power. As a consequence, we incapacitate ourselves for meaningful, enlightened legal reform; we lose the ability to speak truth to power when we confuse the two.

Robin West, *Three Positivisms*, 78 B.U. L. REV. 791, 793 (1998).

legal regimes—the noble dream of a moral law metamorphosizes into a nightmare.

Alternately, Hart argues that the conflation of law and morality can create the radical anarchist "who argues thus: 'This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it.'"[67] Because we are mere men and not angels, no actual legal system will ever be truly moral. The anarchist concludes from this that, if law must be moral, then no actual legal system can ever be true law. The anarchist, therefore, sees all existing legal structures as a nightmare of immorality. Morality, therefore, seems to demand that we reject the legitimacy of all legal systems. That is, the anarchist's nightmare image of society leads her to fantasize a noble dream of a utopia without law.

Neither of these two extreme positions are tenable in a world in which we must have some positive law as a practical matter, and in which we can expect that at least some positive laws will be wicked as an empirical one. This means that morality does not permit us simplistically to accept or reject all positive law but demands that we do the hard work of distinguishing between the good and the bad.

The separation theory can help us do so. Analytic philosophy, in general, and positivist jurisprudence, specifically, strives to describe what things *are*, rather than defining what they *ought to be*. Moral philosophy is, arguably, nothing but the consideration of what should be. Although description can be the first step in bringing together what is and what ought to be, positivism itself cannot aid further in this enterprise once its descriptive role is accomplished. Another philosophical system is needed for this purpose. Indeed, this may help to explain Hart's late interest in Bentham's utilitarian moral philosophy.

### *B. Theoretical Separation, Practical Conjunction*

I believe that Lacey's account provides insight into one of the more disappointing aspects of *The Concept of Law*, at least from the perspective of critical theory. This is Hart's odd definition of morality that is not only unpersuasive, but seems inconsistent with how he implicitly uses the word in his debate with Lon Fuller and his discussion of the separation theory. Lacey's examination of Hart's notes for the unfinished epilogue to *The Concept of Law* shows that late in life Hart de-emphasized or even abandoned his earlier argument that the separation of law and morality was itself moral. Lacey suggests that perhaps this relates to the peculiar definition of morality that Hart offered in *The Concept of Law*.

67. Hart, *supra* note 55, at 598.

Hart's notebooks reveal that he was particularly troubled by Dworkin's criticism that Hart's "account of morality as a system of social rules only works for *conventional* morality and not for critical (even if convergent) morality."[68]

I believe Dworkin's analysis is exactly correct and this understanding helps to bring seemingly divergent elements in Hart's work together. For example, Hart's definition of moral obligation in *The Concept of Law* does not seem to encompass the concept of morality as understood by the speculative tradition, such as that of Immanuel Kant. [69] It is one thing to conclude that Kantian moral philosophy is mistaken, and another thing to promulgate a supposedly universal functional definition of how people use the word "morality" that excludes this influential moral tradition.[70] Perhaps more surprisingly, Hart's definition of morality set forth

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68. LACEY, *supra* note 1, at 337 (emphasis added). *The Concept of Law* claims to consider the distinction between "'*the* morality' of a given society or the 'accepted' or 'conventional' morality of an actual social group . . . to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives." HART, *supra* note 4, at 169. I take Dworkin's point to be that Hart's account of morality is, in fact, only consistent with the former and does not adequately describe many forms of individual morality, most notably, Kantian morality.

69. Indeed, the Oxford school rejected the speculative tradition. As Lacey points out, although Kant was taught (to be refuted), "Nietzsche, Marx, Kierkegaard, and Hegel were notably absent" from the Oxford syllabus. LACEY, *supra* note 1, at 142.

70. Hart lists the "four cardinal related features" which collectively serve to distinguish morality not only from legal rules but from other forms of social rule. HART, *supra* note 4, at 173. The first feature is "importance" as expressed

> first, in the simple fact that moral standards are maintained against the drive of strong passions which they restrict, and at the cost of sacrificing considerable personal interest; secondly, in the serious forms of social pressure exerted not only to obtain conformity in individual cases, but to secure that moral standards are taught or communicated as a matter of course to all in society; thirdly, in the general recognition that, if moral standards were not generally accepted, far-reaching and distasteful changes in the life of individuals would occur.

*Id.* at 173–74.

The other features Hart identifies with morality are immunity from deliberate change, *id.* at 175, the voluntary character of moral offences, *id.* at 178, and the form of moral pressure exerted in its support, *id.* at 179. For reasons that are beyond the scope of this book review, although Kant thought that moral law was important and to be obeyed despite passions to the contrary, I do not believe any of the other features described by Hart accurately apply to Kantian morality. For example, Kant did not merely believe that moral duty must be obeyed despite passions to the contrary, he thought that if any emotional or consequential concerns entered into one's decision as to whether to perform one's duty then the act is smeared with pathology and not truly moral. That is, it is immoral to obey a moral law because one feels that it is "good" rather than logically concluding that it is right. Because it is impossible for us to fully understand our true motives, all human acts are "rooted" in immorality and, therefore, to some degree "radically evil" (which can be seen as Kant's rewriting of the Christian doctrine of Original Sin). *See* Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 309–11 (2002).

in *The Concept of Law* is also too narrow to encompass the utilitarian moral theory to which he was drawn. Accordingly, Hart seems eventually to have realized that his definition of morality was not merely inadequate to the task of critiquing law, but that it might actually stand in the way of progressive reforms of law. The "morality" Hart describes in *The Concept of Law* is, in fact, bourgeois *moralism*—the repressive demand that individuals conform to the status quo, particularly with respect to sexual behavior. Lacey's biography makes clear that Hart came to fear that invocations of a *moral* critique of positive law would devolve into a *moralistic* justification for specific laws. As such, the rhetoric of morality would not be liberating, but would make, or preserve, law as a tool of oppression.

Perhaps more importantly, Hart's conflation of morality with conventional morality or moralism actually weakened the analytical force of his account of the separation theory by obscuring what is at stake in the distinctions he makes. By stating that law is separate from *morality*, he can be misunderstood as promoting an amoral, if not immoral, theory of law. Hart's point, however, can be more strongly and clearly stated as: the status of law as law is independent from its substantive content. The fact that Hart's true concern is with content, generally understood, rather than moral content,[71] specifically, is revealed in another of his great jurisprudential innovations—the concept of secondary rules of law, generally, and rules of recognition, specifically. Indeed, read this way, rules of recognition are a logically necessary corollary to the separation thesis.

That is, if a valid positive law cannot be identified as such by its *content*, as the separation thesis posits, then society must determine another way, a *formal* way, of identifying the rules to be obeyed.[72] Hart argues that this requires that society adopt not only primary but also secondary rules of law. Simplistically put, primary rules are what most of

71. Joseph Raz refers to this concept as content independence. Raz, *supra* note 42, at 5, 29.

72. Hart's point is sometimes simplified by saying that law is identified by its "source" or its "pedigree." This is largely how the rule of recognition is described in *The Concept of Law* as Lacey so notes. However, the examples of the rule of recognition given in *The Concept of Law* are just that, examples. Hart's point is that the identification of law does not necessarily *require* reference to its content (so that identification of pedigree *might* be enough in a particular legal system). It does not, however, *preclude* any and all references to moral content in the sense that a rule of recognition could itself be content based. For example, prior to recent changes in European Union law it might have been correct to say that British law could be recognized by its pedigree because of the principles of Parliamentary supremacy—whatever is enacted by the Queen in Parliament is law. This is not true in the United States in that legislation enacted by Congress would not be law if it were unconstitutional. In order to tell if a specific statute is constitutional, it is necessary to examine its substantive content. *But see infra* note 75.

us think of as laws—such as rules that tell legal subjects what they or may not do, that delineate their relative rights and obligations, etc.[73] As such, they have substantive content. Secondary rules, in contrast, relate not to legal subjects but to the primary rules—they are the rules that govern the recognition, creation and adjudication of primary rules.[74]

The entire point of the concept of secondary rules of recognition is that the substance of primary rules is *logically* irrelevant to their identification as law.[75] It follows from this that Fuller's question, "is the content moral?" is also logically irrelevant. The morality of law is only relevant to a completely different, albeit important question from the identification of law—such as the question of whether we should amend the law or, more radically, disobey a specific law despite its status as law. As such, content is not internal to law as law, but an external constraint.

Perhaps Hart's unfortunate conflation of substantive content, broadly understood, with morality, and his further conflation of morality with moralism springs in part from the way Fuller framed the debate on the relationship of law and morality in 1957, coupled with the different way Devlin framed the debate on the relationship of law and morality in 1959. *The Concept of Law*, with its unfortunate definition of morality, was published in 1961.

Fuller criticized positivism on the grounds that an *immoral* law cannot be true law. In my mind, Hart should not have joined this argument so formed. By joining Fuller on his own terms, Hart found himself engaged in this irrelevant task of *describing* morality as law's defining other. The problem is that, in Hart's analysis, law and morality are *not* opposed, in the sense that one is not the negation of the other. Law and morality are not either-or contradictories. Indeed, they have much in common in that they are both forms of obligation and "share a vocabulary." Hart noted, "[A]s a matter of historical fact, the development of legal systems [have] been powerfully influenced by moral opinion, and conversely, that moral standards [have] been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or prin-

73. HART, *supra* note 4, at 81.

74. *Id.* at 96–97.

75. Hart as a "soft" positivist suggests that it *might* be possible for society to adopt a rule of recognition that makes reference to a "moral" or substantive principle (such as due process, or fairness), but the point is that is not necessary that it do so. *See supra* note 72. This is in contrast to the "hard" positivist approach associated with Joseph Raz that insists that law, as law, must be distinct from anything external to law, such as its moral content. Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 25 (2003); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT, *supra* note 42, at 356–59.

ciples."[76] Consequently, to Hart morality is not the yin to law's yang. Rather, law is other than, or qualitatively different from, morality in the same sense that form is qualitatively different from content. Although primary laws may be identified as such by their form, they may also have content—in fact, they probably always do. Consequently, although laws need not be moral in order to be law, certainly there are laws that are, in fact, moral.

Once Hart misperceived that he had to define morality as law's defining other, he was hindered by the analytic insistence that philosophers should only *describe* concepts as they exist and function, and not attempt to define them by their essence. He could not *define* what morality *is*, he could only *describe* how people tend to use the word and how that word functions in society. As such, he may very well be right that many people—particularly reactionaries like Devlin—in fact use the word "morality" to mean traditionally received and unquestioned conventions relating largely to sexual activity.[77] However, the concept of morality that Fuller invoked—and the concept that is implicit in Hart's separation thesis—is something else entirely. If positive law is what is, then morality is what *should be*. Consequently, Hart's appointed task of *describing* what morality *is* (as opposed to what it should be) was probably stillborn. In other words, Hart was arguably conflating two very different uses of the English word "morality."

Another way of putting this is that Hart's account of the separation thesis which forms the heart of *The Concept of Law* is largely a continua-

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76. Hart, *supra* note 55, at 598. *See also* HART, *supra* note 4, at 172.

77. "After all, a most prominent part of the morality of any society consists of rules concerning sexual behaviour . . . ." HART, *supra* note 4 at 174. Anticipating his debate with Devlin, Hart denies that there is a utilitarian reason for the rules of conventional sexual morality (in the sense that harm would come to society generally if they were not enforced). Rather, "[t]hey are abhorred, not out of conviction of their social harmfulness but simply as 'unnatural' or in themselves repugnant." *Id.* at 174–75. As Lacey correctly maintains, Hart asserts rather than argues or proves his position. That is, he does not explain why, if the point of utilitarianism is to increase the aggregate happiness of society, the repugnance that conventional moralists experience in knowing that "deviants" are engaging in "perversions" should not be included in the calculus. "He defended a form of physical paternalism, limiting people's freedom in order to prevent them from harming themselves. But he maintained that this was distinct from moral paternalism or the legal enforcement of morality 'as such': so-called 'legal moralism.'" LACEY, *supra* note 1, at 258. "A . . . weakness [in this argument] is the fact that his all-important, limiting condition—the specification of what counts as harm—is not self-defining." *Id.* at 259. *See infra* note 86.

Moreover, his argument against Devlin is primarily empirical. According to Hart, Devlin does not offer any evidence that society would fall apart if conventional sexual morality were not enforced. However, Devlin could justly reply that Hart does not present any empirical evidence that it would not. *Id.* That is, both Hart and Devlin's arguments boil down to a disagreement over whose unsupported assertions seem intuitively more attractive.

tion of the Fuller debate. Nevertheless, in the chapter of that work in which Hart defines morality, he uses the term in a way that is more in keeping with Devlin's approach. Though Fuller and Devlin were both ostensibly debating the relationship of law and morality, they were in fact talking about two very different concerns. Fuller's concern was what one should do when confronting a wicked law that violates one's moral code. Devlin's concern was how law can be used to inculcate others to lead a conventionally moral life.

When Fuller argues that there should be a necessary connection between law and morality, he was writing in the context of the immediate aftermath of World War II. He had one specter of wicked law in his mind—Nazism. He sought a legal theory that would prevent the reoccurrence of a regime that could slaughter millions of innocent people in the name of law. His problem was, of course, that Nazi society followed a legalistic form. Consequently, Fuller wanted to argue that Nazi "law" was not law because it was wicked. Fuller hoped that we might prevent wickedness committed in the name of law by adding an affirmative moral requirement to law.[78]

When Devlin discussed the necessary connection of law and morality he had another vision of wickedness in mind. This was the breakdown of what we today might call "traditional" moral values, as evidenced by the growing acceptance of divorce, prostitution, abortion, and homosexuality. To Devlin, the movement to decriminalize these activities was itself dangerously immoral. Law was necessary to enforce morality and to inculcate moral values. That is, Fuller invoked morality as a means of eliminating what he saw as immoral laws, whereas Devlin invoked morality as a justification for enacting and enforcing laws with conventional moral content.

Hart, in contrast to Fuller and Devlin, implicitly had a third picture of wicked law before him—law that cruelly enforced conventional morality upon the sexually unconventional, such as himself. As such, Hart is revealed as Devlin's reversed mirror image. As I have said, Hart's de-

78. I find it telling that in their written debate, neither Fuller nor Hart raised what I think is the most germane practical issue generated by their disagreement: when and how does one reject wickedness that purports to be law? Does a Fullerian judge refuse to enforce something that purports to be law on the grounds that it is too wicked to be law? Does a Hartian judge refuse to enforce a law that he believes is valid under the appropriate rule of recognition because it is nonetheless wicked?

Rather, they debated the best theory that would justify post-Nazi Germany's punishment of individuals who used Nazi legislation to commit their own personal wickedness. Specifically, they debated the case of the adulterous wife who tried to get rid of her inconvenient husband by telling the authorities that he had criticized Hitler in violation of a statute prohibiting such speech.

scription of moral obligation in *The Concept of Law* is more accurately a description of one way the word "morality" is used in colloquial, and frequently political, speech—*i.e.* the way Devlin used the word. If, as MacCormick argues, Hart should be seen primarily as a moral theorist, his morality is critical and should not be conflated with the conventional morality identified in *The Concept of Law.* In this sense, in his separation thesis he implicitly adopted a concept of law similar to Fuller's (although he disagreed with Fuller as to the jurisprudential implications).

Lacey's account also suggests that there might be a hidden subjective reason why Hart was attracted to logical arguments as to why law and morality should be separated. That is, he was personally worried about the use of *false* claims of morality as a means of justifying laws that reflect one's prejudices and of silencing one's critics. Lacey shows that this was the force that drove Hart's practice as a public intellectual and political activist.

Specifically, this concern formed the basis of Hart's debate with Lord Devlin about the appropriateness of legislating conventional morality, a debate that would later lead to Hart's book, *Law, Liberty and Morality.*[79] Devlin maintained that "a failure to enforce conventional morality would lead to social disintegration."[80] "He argued that the punishment of certain kinds of private immorality—those such as bigamy which give rise to widespread indignation or disgust—could be justified in the same way as the punishment of treason: as wrongs which threaten the social order as whole."[81] Hart's opposition to Devlin sprung from his utilitarian moral theory that sought to maximize human happiness which was informed by his deeply felt libertarian intuitions, as well as his own personal experiences as to what made people miserable.

> In [Hart']s view, Devlin's argument overplayed—without adducing any empirical evidence—the power of law as a socially stabilizing and educative force. What good, he asked, can outweigh the cost in human misery of enforcing morality? Social moralities can be multiple and mutually tolerant: they do not have intrinsic worth; rather, their value is the secure happiness for individuals. A truly moral attitude is distinguished not by any particular substance but by its formal value: self-control, impartiality, reciprocity are 'universal virtues', but they can be mapped onto many different moralities.[82]

79. H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963).
80. LACEY, *supra* note 1, at 7.
81. *Id.* at 221.
82. *Id.* at 258.

Hart thought that "law uses coercion to enforce standards [i.e. such as those prohibiting sexual behavior between consenting adults] which may conflict with people's deepest feelings," and he "denounced the legal enforcement of morality as a form of cruelty."[83] Lacey's revelation of Hart's profound suffering from his feelings of the need to suppress his homosexual desires helps to explain why *Law, Liberty and Morality* is written with a passionate intensity which stands out among Hart's work.[84]

In other words, although Hart claimed that his separation of law and morality was *descriptively* correct (he was describing what law was, not what it should be), his description, in fact, matched his normative predisposition. He hoped that law *could* be separated from the conventional moralism that he found cruel from his bitter personal experience. His political activism showed that whether or not the concept of legal obligation understood from the "internal perspective" is distinct from the obligations of conventional morality, he recognized that the content of actual positive legislation frequently incorporates such "conventionally moral" values. Moreover, his political activity consisted precisely in trying to change positive laws so that their content would cease to mirror such "false" morality.

### *C. Abandonment of the Moral Critique of Law*

Late in life, Hart lost faith in what had been his intuitively attractive defense of the separation thesis—that it enables us to clarify our moral vision of law and that "this clear-sightedness would be more likely to foster the reflective approach to legal obedience which properly underlies liberal citizenship and a robust attitude to tyranny."[85] Lacey asks, "Why had these persuasive arguments disappeared from later statements of his position?" and speculates that "it seems likely that he recognized that they were claims the ultimate proof of which depended on further moral argument or empirical data. And in constructing his legal philosophy Hart was, as all the evidence shows, reluctant to involve himself in the investigation of such wide-ranging questions."[86]

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83. *Id.* at 259.

84. *Id.*

85. *Id.* at 351–52.

86. *Id.* at 352. Lacey takes Hart to task for wanting to have it both ways on empiricism. His analytic philosophy claimed that it was descriptive, rather than empirical—but what is description but an assertion about empirical fact? His best argument that empiricism cannot stand up to its own criteria would apply equally to Hart's theory.

> [Hart] suggested that sociology can never match the test of empirical rigour which it sets for itself. His view boiled down to the idea that because the social sciences can

One might go further and state that Hart's experience in debating Devlin actually provided empirical evidence falsifying his original hypothesis that a clear-sighted moral vision would lead to a more critical, libertarian attitude towards law. Devlin demonstrated that appeals to moral critique can cut both ways. Hart had thought that the reactionary conservative supported coercive laws because he conflated law and morality. This reactionary error consisted in thinking that if it is law, then it must be right. But, Devlin hoisted Hart on his own petard and subjected positive law to a reactionary moral critique. Devlin argued, in effect, that if it is right, then it *must* be enacted into positive law. Hart saw that his call for a *moral* critique of law was easily perverted into a *moralistic* one.

## III. THE NOBLE DREAM AND THE NIGHTMARE

Hart's life demonstrates that although law and morality may be conceptually separate, they cannot be separated as a practical matter.[87] Every law necessarily has content that can be morally evaluated.[88] Consequently, morality demands that we analyze the content of positive laws, with an eye toward changing those laws that are wicked.

In *The Concept of Law*, Hart could not develop a jurisprudence that could determine what law should be. The presumed Hartian response to this criticism is that Hart's goals were modest—the positivist one of describing law as it is. The normative task was just not the one that he set out to perform.

This response is unsatisfactory. While Hart claimed that he was describing "law," he, in effect, excluded a large portion of legal activity from his definition. Indeed, Hart excluded almost his entire professional

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> never produce evidence as compelling as the natural sciences, they are not worth pursuing. This is a convenient rationalization for staying firmly within philosophic method, which is not the sort of enterprise which concerns itself with empirical data in the first place.

*Id.* at 261. Consequently, "[h]is impeachment of Devlin for failing to provide any empirical evidence to support his contention . . . was, it must be granted, a classic case of the pot calling the kettle black." *Id.* at 259.

87. As MacCormick states:

> It is not because law does *not* encapsulate, at least in part, a morality, that it is open to moral criticism. That it *does* always and unavoidably encapsulate some elements of positive morality is a powerful additional reason why it *must* always be subjected to the searching criticism of critical moralists.

MACCORMICK, *supra* note 39 at 156.

88. MacCormick continues, "Positive law is always relevant to morality *both* for that reason *and* for the special reason that the law invokes force and fear, at least in its contemporary manifestations." *Id.*

career as a lawyer, civil servant, jurisprude, administrator, and social critic, from his concept of law.[89] This parallels the disjunction between his internal and external self. Hart could never reconcile his public persona as the confident, successful, married, Oxford insider with his private experiences as a depressed, self-critical, gay Jew.

When Hart joined the New College faculty in 1945, he enthusiastically embraced the new analytic, linguistic philosophy.[90] Thus, he rejected traditional metaphysics that defined concepts in terms of essences in favor of a common sense examination of how words were used and functioned in a specific context.[91] The analytic slogan was "look for the use, not the meaning."[92] Reading Lacey, one might surmise one reason why this philosophy might be so appealing to a man who was wracked by feelings of disjunction between his public success in his professional career and the perceived inadequacies of his internal essence that he described in his diaries as "brokenness."[93] Did he want to convince himself that the external, active self was the "true" Herbert Hart, or at least, the self that mattered?[94]

If Hart wanted to believe that the external is all, he suffered from what he perceived to be a disjunction between his carefully cultivated external appearance and his true, essential self. This is why he condemned himself in his journals as a fraud. He never seriously considered the possibility that he could, or should, be both at the same time—that the normative and positive Hart could co-exist. And, perhaps, they could not in

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89. Only his stint on the Monopolies Commission in which he acted as an official applying British anti-trust law would arguably fall within his definition of law.

90. After reading Wittgenstein's *Blue Book* and *Philosophical Investigations* (which of course, represented the related, albeit rival, Cambridge School), the ordinarily reticent Hart remarked that "It was if the scales had fell from my eyes" and that "I've been up all night! I've been up all night! I can't think of anything else!" LACEY, *supra* note 1, at 140.

91. According to Lacey, this "clarion call . . . was premised on the idea (if not always practiced on the basis) that context was all-important." *Id.* at 144.

92. *Id.*

93. *Id.* at 265.

94. Lacey also suggests a less flattering explanation of the appeal of analytics to a man entering academia relatively late in life—it both freed him from the hard work of gaining expertise in earlier schools of philosophy and, because the field was so new, potential rivals would not have a significant head start over Hart.

> [C]ommon-sense, linguistic philosophy must have held some discrete attractions for a late returner to philosophy who had doubts—as his 1940s notebooks show—about his capacity to get to the bottom of the deepest questions of epistemology and logic. The flight from metaphysics, in other words, offered the seductive prospect of escape from a painful further period of apprenticeship in the arcane craft of traditional philosophy—an apprenticeship which some of Herbert's colleagues felt that he had left too soon.

*Id.* at 143.

mid-twentieth century Anglophone academia, which might have not tolerated Hart coming out of the closet during a public debate on homosexual rights. To some extent it was the times that condemned Hart to the secret image of himself as a fraud—as not what he ought to have been.

Because he clung to a noble dream of law without moralism, he experienced the necessity of morality in the law as a nightmare. So, while his career was what most academics would view as a noble dream, he lived his life as a nightmare.