

A Life of HLA Hart: The Nightmare and the Noble Dream

Nicola Lacey

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A cactus in the desert remains a cactus. To regard it as a melon or a bunch of grapes is a pitiful illusion which will quickly be shattered on closer inspection (not to speak of contact).¹

Then there was only him. Now a hundred flowers bloom. This is his lasting contribution.²

Of all the distinguished people I came into contact with as a result of the War, Herbert was the one I admired and prized the most. (Dick White, MI5 colleague and later Head of MI5).³

A reader unacquainted with Nicola Lacey's work might approach her intellectual biography of Herbert Hart warily, given the warnings in her introductory note about her unfamiliarity with the genre. The warnings are not justified. This is a very good book, an accomplished biography of a man about whom the above quotations reveal mixed evaluations. It is a thoroughly researched book, with the cooperation not only of the British Great and Good and aspirants thereto, but also of Hart's widow, Jennifer. It is no criticism of Lacey's book that her subject's academic achievements are now of more socio-cultural and political than intellectual interest to one concerned with the history of twentieth century Britain. As Harari's suppressed 'Letter' — and the suppression itself — suggest, there were some extremely arid areas in English intellectual life in Hart's era, accompanied by a certain smugness.⁴

There were redeeming and some dismaying features of this environment, to which Lacey alludes — sometimes directly, sometimes one may infer (but with no guarantee) that one has caught her meaning. Because of the 'relative wealth', as she puts it, which enabled Hart to employ caterers to entertain his tutors in his rooms at Oxford, and because of his secular Jewishness, he avoided the anti-Semitism which plagued the — in my view — more exciting scholar, but more orthodox Jew, Julius Stone, a direct contemporary, through his life, to the United States and to Sydney. Stone came from a much poorer background. The English class system, in other words, gave Hart some protection from the prejudice he may otherwise have encountered. On the other hand, the same latitudinarian qualities of Oxford may — despite its

¹ Harari (1972). Several journals refused to publish this paper, and I am grateful to Susan Maidment for having made it available to me some time ago.

² Zenon Bankowski, quoted in Lacey, p 361.

³ White, quoted in Lacey, p 360.

⁴ See Anderson (1992).

impressive range of talent in other areas of philosophy — accorded Hart an exaggerated jurisprudential reputation.

Hart's philosophical work in law is vastly overshadowed by subsequent writing by, for example, Goodrich, Douzinas and others, and not because they came after and built on Hart's pioneering rescue of jurisprudence from the dreary verbosity of Austin or the banality of Goodhart, but because they have changed the direction of thought. In Sugarman's interview,⁵ Hart affirms the centrality for him of the law–philosophy connection in understanding law and society, remarking in his famous introductory sentence in the 1961 *Concept of Law* that the fact that it was an essay in descriptive sociology did not mean that it was sociology, but that it would provide tools with which sociologists could work. But, as Lacey points out, the attempted philosophical underpinnings are flawed. The Wittgensteinian language games he invokes are, at least for Wittgenstein, embedded, as Lacey observes, in 'social practices and forms of life':

Once the notion of context is broadened out, the inexorable conclusion is that the illumination of legal practices lies not merely in an analysis of doctrinal language, but in a historical and social study of the institutions and power relations within which that usage takes place. (p 219)

Philosophy cannot for these purposes be the master discipline which, as Lacey comments, 'would have threatened Herbert's idea of himself as a philosopher'. Other scholars have noticed that the 'official' whose endorsement Hart's law requires as one of its origins cannot logically precede the law whose imprimatur it requires in his account. An official is an agent of legality. More sinisterly, and this may be an unacknowledged effect of philosophy's claim to master discipline status, are the 'other private persons' upon whose concurrence with the mysteriously conceived officials law's validity depends. Who are they? What is the basis or justification for their peculiar privilege? Nothing in Hart's work confronts the issue raised in Maureen Cain's analysis⁶ that law is not a glorified fax machine, capable of being used and experienced equally by those who sleep in cardboard boxes and by the tenants of rooms at Oxford, but an uncontingently commodified component in a system based on capital — and not only upon capital, but upon a form of capital in which the acceptance by the citizen of the rules renders her not a critically reflective being, but a sheep who might well end up in the slaughterhouse.⁷

Unfortunately, Hart's depiction of *The Concept* as an essay in descriptive sociology did influence 'non-lawyers, drawing on and reinforcing the sociologist's and, relatedly, historian's research assumptions that 'law' was a self-contained, internally coherent body of rules which they could incorporate

⁵ Sugarman (2005).

⁶ Cain (1994).

⁷ Fitzpatrick (1992), p 200.

more or less fully formed into their own work of reforming policy in the present and understanding the past. It was not until feminist theory, cultural studies and social history that a serious attempt could begin of the study of 'power relations', as Lacey puts it, and the everyday experience of the fluid boundaries between various normative systems as they affect differently positioned subjects. To blame Hart for this state of affairs is not appropriate, but it is apposite to suggest that Julius Stone's work took us much closer to this kind of project.

Lacey deals with Hart's theoretical work and its limitations in a way accessible to the non-expert, and sympathetically with his support for law reform, particularly in raising questions about causation and punishment and in relation to the long-overdue changes recommended by the 1957 Wolfenden Committee on prostitution and homosexuality. This support was, of course, consistent with his Millite conviction that private conduct was, by and large — in the Wolfenden Committee's words — 'not the law's business' and, with another conviction he derived from Mill, that the state should rarely interfere with conduct that concerned only the actor and threatened no harm to another. It was consistent with his minimalist approach to the notion of natural law — the view he shared with legal positivists in general — that law and morality were generically different.

Particularly fascinating in Lacey's biography to the averagely curious human being is the information Lacey derives from the documentary material made available by his widow — his intermittently difficult relationship with Jennifer. Initially, passion — 'my practice is ruined so you'll have to keep me in your bed' — 'solicitors give me documents and I lose the place because visions of your breasts, hair and shoulders float across the paper'; then 'jealousy ... withdrawal and reserve' (Lacey, pp 78, 79, quoting Hart; and p 82). And the extraordinary affair between Jennifer and Isaiah Berlin, about which Hart's refusal to acknowledge, whilst knowing of it, suggests a unusual capacity for denial. His continual, perhaps mounting, doubts about his sexual orientation are perhaps not unusual, but plainly more troubling in an earlier era. The scurrilous allegations that Hart had abused his wartime MI5 position to supply information to the Soviet Union via his wife, who had once — like many idealists — identified as a communist were widely circulated in the British tabloids, but what is perhaps new to most readers is that the episode precipitated Hart from intermittent depression and self-doubt into a clinical breakdown and hospitalisation. What emerges vividly from Lacey's biography was that Hart was a good man who did not deserve this.

With what are we left? Like every good narrative, Lacey's enables us to ponder her subject. The comparison with Stone is inevitable. Hart suffered emotionally despite the intellectual reputation that Fitzpatrick might attribute to his closeness to the Great and the Good, but with abilities that nevertheless few of us could aspire to. Stone perhaps steered the academic community in ultimately more progressive directions, but suffered from his distance from the British Great and Good and their Australian fawns.⁸ I think Lacey leaves us

⁸ Starr (1992).

with Hart as a figure brilliantly evoked by Brendan Edgeworth.⁹ He belongs with the architects of the British welfare state who, after the hiatus that Lloyd George left, designed the British way of life until Thatcher — whose policies, Lacey tells us, Hart detested for what he saw as their inhumanity; with Beveridge, with Butler, with Keynes, in the tradition of the Webbs.¹⁰ Hence, as Edgeworth notes, he put his trust in ‘the official’ who, far from leading his charges to the slaughterhouse, actually stopped the slaughterer at Calais and subsequently delivered education, health, social security and financial stability.

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⁹ Edgeworth (1989).

¹⁰ Addison (1977).