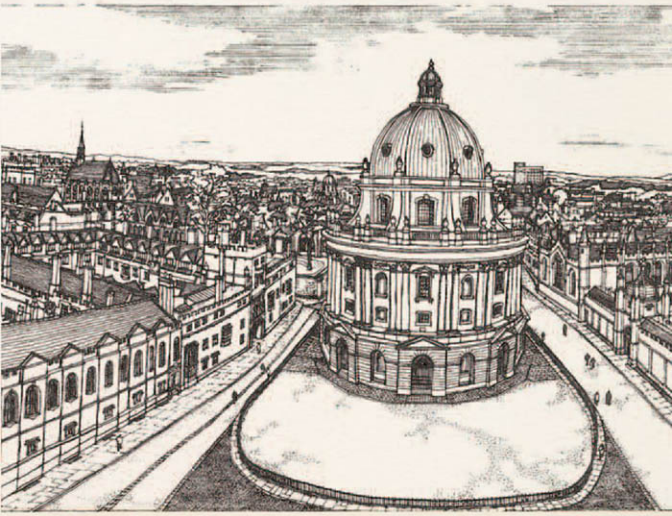

AW BRIAN SIMPSON

Reflections on *The Concept of Law*

OXFORD

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Foreword

I am delighted to have been asked to provide a Foreword to this, Brian Simpson's last book. Brian began his academic life as a legal historian of the common law—the body of law derived from the decisions and practice of the courts, as distinct from the laws imposed by statute. But he also played a significant part in debates about the method and scope of Oxford legal philosophy. Throughout his time at Oxford, he contributed to the informal jurisprudence discussion group organized by Professor Herbert Hart, and edited one of the influential sets of Oxford Essays in Jurisprudence. Particularly striking among Brian's several original—and sometimes devastating—contributions to legal theory was his 1973 essay 'The Common Law and Legal Theory', which is included in the second of this series.[1] But since then, whilst continuing to be interested and to read widely in the area, Brian's subsequent writings did not directly engage with Oxford analytical jurisprudence, until recently. *Reflections* revisits Brian's fascination with, and ambivalent respect for, Hart's *The Concept of Law* and analytical jurisprudence more generally (whether of the Oxford variety, or those originating elsewhere).[2]

There are several different ways of reading *Reflections*. At one level, it is an attempt to set out in some detail Brian's understanding of the historical and intellectual context in which *The Concept of Law*, first published in 1961, was written. Nicola Lacey's illuminating biography, *A Life of HLA Hart: The Nightmare and the Nobel Dream*,[3] has already laid bare much of Hart's life, but Brian is able to describe the academic environment from his own experiences as a young don in the Oxford of the 1950s and 1960s. Some of this material was published earlier in Brian's reviews of Lacey in the *TLS*[4] and in

1. In AWB Simpson (ed), *Oxford Essays in Jurisprudence* (2nd Series, OUP, 1973).
2. OUP, 1961; 2nd edn, 1994.
3. OUP, 2004.
4. AWB Simpson, 'Stag Hunter and Mole', *Times Literary Supplement*, February 11, 2005, 6–7.

the *Michigan Law Review*,[5] but in *Reflections* Brian draws out in a more sustained way the diverse, if flawed, jurisprudential traditions that preceded Hart, and the range of intellectual sources that appear to have influenced Hart when he was writing *The Concept of Law*, providing an important supplement to Lacey's account. This is intellectual history of the most engaging kind, not least because it is peppered with classic examples of Brian's famous wit. There is much pleasure to be gained from Brian's accounts of post war Oxford life, irrespective of the background they present to Hart's work; indeed, it is the autobiographical aspects of the book that provide some of the most illuminating and funny moments.

At another level, *Reflections* is an extended critique of Hart's book, elaborating and extending the range of Brian's reservations about the methodology and substantive argument of *The Concept of Law*. From his earlier writings, we know that Brian was critical of what he saw as Hart's lack of attention in *The Concept of Law* to the workings of the common law tradition. Hart's emphasis on law as a system of rules was, he thought, more appropriate for the analysis of continental civil law systems. For Brian, the English common law system 'consists of a body of practices observed and ideas received by a caste of lawyers'.[6] Historically, cohesion was produced through institutional arrangements, such as the way the legal profession is organized, rather than by way of rules, which only developed when the previous consensus based on tradition or custom broke down. For Simpson, legal history and legal anthropology were therefore central tools in coming to an understanding of what law is; he considered that, for Hart, they were irrelevant. This earlier critique is developed further in *Reflections*, leading to further criticisms of *The Concept of Law*. The formulation of the rule of recognition, the absence of comparative law analysis, the difficulties with Hart's approach to adjudication, and the book's omission of any sustained discussion of human rights, are all analysed and criticized.

At a third level, *Reflections* comes as close as Brian ever came to setting out his own 'anti-grand-theory' theory of legal scholarship. Brian's own most important contributions to legal scholarship were in the area of legal history. During his time at Kent, but increasingly after he went to the United States, he developed the original idea, as Joshua Getzler, the Oxford legal historian has pointed out, that the 'leading cases' of the common law deserved the

5. AWB Simpson, 'Herbert Hart Elucidated' (2006) 104 *Michigan Law Review* 1437.
6. Simpson (ed), *Oxford Essays in Jurisprudence*, above, 94.

fullest possible study in their historical context.[7] He made this approach his own special area, drawing out new facts, and emphasizing the contingency of these leading cases, and deepening our understanding of their particular meaning and significance. His study of *Dudley and Stephens* (the 19th Century case in which shipwrecked sailors were prosecuted for killing and eating a cabin boy) became an immediate classic on its publication in 1984, under the striking title of *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise*.[8] *Cannibalism* was followed by a flow of fascinating studies of other leading common law cases. His study of detention without trial in Second World War Britain, effectively an extended study of *Liversidge v Anderson*, was published in 1992 as *In the Highest Degree Odious*.[9] A collection of shorter studies of several other cases, *Leading Cases in the Common Law*, was published in 1995. This genre of scholarship is now commonly known, according to Richard Helmholz, his former colleague at the University of Chicago Law School, as 'doing a Simpson'.[10]

One of the noteworthy aspects of this body of scholarship is the determined way in which Brian avoided being drawn into any sustained discussion of abstract legal theory, preferring to allow the books' relevance for legal theory to be drawn out by readers themselves. We know that Brian had in mind a book-length treatment of the common law tradition, along the lines of Merryman's book on the civil law tradition,[11] and this book might have addressed more directly his own theoretical views, but sadly it was not completed by the time of his death. In *Reflections,* however, in setting out his analysis of where he and Hart differ, we begin to get a clearer idea of Brian's own approach to legal theory. Agreeing with William Twining's description of him,[12] drawing on Isaiah Berlin's famous distinction,[13] as a fox rather than a hedgehog, he makes clear that his approach to law is essentially fox-like. In contrast, he regards Hart as an exemplar of a

7. JS Getzler, 'A.W.B. Simpson, Leading Cases in the Common Law' (1997) 18 *Journal of Legal History* 116–118.
8. University of Chicago Press, 1985.
9. OUP, 1994.
10. RH Helmholz, 'Brian Simpson in the United States', in K O'Donovan and GR Rubin (eds), *Human Rights and Legal History: Essays in Honour of Brian Simpson* (OUP, 2001), 285, 288.
11. John Henry Merryman, *The Civil Law Tradition* (Stanford University Press, 1969).
12. William Twining, 'The *ratio decidendi* of the Case of the Prodigal Son', in O'Donovan and Rubin, above, 149, 150.
13. Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfeld and Nicholson, 1953).

hedgehog's approach to law. For Brian, legal theorizing should derive from detailed empirical analysis of what happens in social practice. He is thus deeply sceptical of grand abstract theories that ignore the evidence of such practice. Not surprisingly, he considered that analytical jurisprudence should build from social practice, rather than seek to impose itself on social practice.

This is not the place to consider whether Brian's analysis of Hart is ultimately correct. There is no doubt that much of what he writes will create controversy, and attract debate. At least, I hope it does. He would have relished being once again an *enfant terrible*, of course, but he never courted controversy for its own sake. He was the ultimate scholar, in seeking to advance understanding about law through debate and contestation. He considered that those who espoused analytical jurisprudence had largely ignored the implications of his work and the challenges it posed for their work. In seeking to engage with *The Concept of Law, Reflections* not only pays Hart the ultimate compliment of treating him seriously, but also shines a clearer light than before on Brian's own intellectual development and scholarly approach.

Christopher McCrudden FBA
Oxford
July 2011

Contents

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List of Abbreviations

AJCL	American Journal of Comparative law
BDCL	Biographical Dictionary of the Common Law
BYIL	British Yearbook of International law
CLJ	Cambridge Law Journal
DNB	Dictionary of National Biography
HFE	Hart-Fuller exchange
HLR	Harvard Law review
HREE	Human Rights and the End of Empire
JCLIL	Journal of Comparative Legislation and International Law
JLS	Journal of Legal Studies
JSPTL	Journal of the Society of Public Teachers of Law
Lacey	*A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (OUP, 2004)
LQR	Law Quarterly Review
MichLR	Michigan Law review
MLR	Modern Law Review
ODNB	Oxford Dictionary of National Biography
OJLS	Oxford Journal of Legal Studies
PAS	Proceedings of the Aristotelian Society
PBA	Proceedings of the British Academy
UCLALR	University of California Los Angeles Law Review
UCLR	University of Chicago Law Review
UPLR	University of Pennsylvania Law Review
YLR	Yale Law Review

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I

The Apology to the Reader

This book is about HLA Hart's *The Concept of Law*. I have called it *Reflections*, echoing the title used by WW Buckland in his *Some Reflections on Jurisprudence* (1949). The point is to indicate that this book is very much an egocentric piece of writing, devoted to explaining my personal relationship with a book which has fascinated me for some fifty years. *The Concept of Law* was first published in 1961, and is still in print in a second edition of 1994, in which the original text remains unchanged. It has sold over 150,000 copies. However success is properly to be judged, it has to be conceded that this book is the most successful work of analytical jurisprudence ever to appear in the common law world. John Austin's *The Province of Jurisprudence Determined* of 1832 has lasted longer, but is no longer widely read, if indeed it ever was. I have no idea how many copies were printed, but I should guess five hundred or so, and Hart's edition of 1954 might have run to a couple of thousand. Austin has ceased to function as the point of entry into the subject; it once did before Hart took it apart in *The Concept of Law*.

Going Back to Troy I

Readers of this book could be forgiven for reacting with some weariness at the prospect of yet another contribution to the abundant literature which has been developed around *The Concept of Law*, and the criticisms which have been levelled against it. There is certainly no shortage. Hart's successor in the Oxford chair, Ronald Dworkin, whose appointment was indeed engineered by Hart himself, established his credentials as a jurist in the manner of

the opening pages of *The Golden Bough,*[1] where a candidate to become the priest of Diana in the grove of Nemi has first to slay the current priest, whilst realizing that in the end he would suffer the same fate. Dworkin launched a vigorous attack on Hart's supposed failure to appreciate the significance of principles, as contrasted with rules, in the process of adjudication.[2] Apparently similar arguments had been advanced against views set out by Hart in undergraduate lectures by Dworkin in his final examination in Oxford in 1955—*The Concept of Law* did not exist in 1955.[3] Dworkin's continuous modifications of his arguments induced Geoffrey Marshall to say that arguing with him was like attempting to frisk a wet seal, and no doubt he can be faulted for this. But Neil MacCormick, in correspondence with me shortly before his death, suggested a more sympathetic view, whereby Dworkin is a person who just lets his ideas run, and they run forward. The moving finger writes, and having writ, moves on . . . There is no looking back over the shoulder, if seals have a shoulder, which I think they do. Since 1961 the volume of critical and expository literature has grown and grown. I do not propose to provide a bibliography, but there have been notable contributions, some sympathetic, some less so, from Neil MacCormick,[4] Joseph Raz,[5] Nicola Lacey,[6] John Finnis,[7] Frederick Schauer,[8] Jules Coleman and other contributors to a collection of essays on Hart's 'Postscript', published in the second edition of *The Concept of Law*[9],

1. JG Fraser, *The Golden Bough: A Study in Magic and Religion* (1890).
2. The attack opened with 'The Model of Rules' (1967) UCLR 35:14. See RM Dworkin, *Taking Rights Seriously* (1977) Chapters 2–4. This edition makes some changes to the original versions of what started life as articles in the UCLR (Ch 2), the Yale LJ (Ch 3) and the HLR (Ch 4). Dworkin's later development of his theories and frequent changes of position can be followed, albeit with difficulty, in *A Matter of Principle* (1985) and then into the wildly romantic *Law's Empire* (1986), and most recently into *Justice in Robes* (2006) as well as in his many contributions to the *New York Review of Books*.
3. See Lacey 185–6. Dworkin cannot today recall details. Hart kept Dworkin's exam scripts and returned them to Dworkin at a dinner in Brasenose. They no longer exist.
4. *Jurists: Profiles in Legal Theory, HLA Hart* (2nd edn, 2008). The first edition was published in 1981. See also *Legal Reasoning and Legal Theory* (1978); *Institutions of Law: An Essay in Legal Theory* (2007); *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005).
5. See his *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (1970); *Practical Reason and Norms* (1975); *The Authority of Law: Essays on Law and Morality* (1979); *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009).
6. *A Life of HLA Hart: The Nightmare and the Noble Dream* (2004).
7. *Natural Law and Natural Rights* (1980).
8. See eg, '(Re)taking Hart' (2006) 119 *Harvard LR* 852.
9. Jules L Coleman (ed and contributor), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001).

from Mathew H Kramer,[10] from contributors to a 2007 British Academy Symposium,[11] from DJ Galligan.[12] This list could easily be extended.[13] Inevitably over the course of the years what Hart wrote back in the 1960s has somewhat faded away. A cynic, which I am not, might compare its fate to that of Troy I, buried under layer upon layer of overburden and much rubbish, but with gold to be found if the archaeologist can make it to the site early in the morning before the labourers make off with it. Entirely new analytical concepts have been invented; in addition to positivism we now have 'positive positivism',[14] 'plain fact positivism',[15] 'presumptive positivism',[16] 'exclusive legal positivism', 'the semantic sting',[17] and so it goes on in a fever of creative labelling.

In this book, however, I do not propose to consider this literature except very exceptionally. Instead the plan is to go right back to Troy I, paying virtually no attention to Troy II, or the rest of the overburden: back to *The Concept of Law* as it was written back in the 1950s and 1960s, and to the intellectual context in which it was produced. To this end I shall consider a number of Hart's writings which date from around this time. There will be one major exception. David Sugarman, to whom we should all be extremely grateful, arranged to interview Hart in 1988, which may of course embody some *pensées d'escalier*. Most of the interview has been published.[18] Sugarman has kindly also provided copies of a Legal Education Questionnaire which Hart completed for him in 1988 before the interview took place, Hart's observations on Oxford Legal Education, which were not included in the interview as published, and an uncorrected text of the published interview, together with a copy of the tape recording. I shall not give detailed footnote references to this material, and it will be obvious what is being used.

10. *In Defense of Legal Positivism: Law Without Trimmings* (1999).
11. MH Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (2008).
12. *Law in Modern Society* (2007).
13. There is a bibliography in *The Legacy of HLA Hart* which lists around 450 items, but not all of these are post 1961. The Hart industry is not however remotely comparable to the Wittgenstein industry. For an extensive bibliography of a more wide ranging type see W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009).
14. Kramer, note 10 above, at 130–161.
15. Dworkin in *Law's Empire* at 33 and generally.
16. Schauer, *Playing by the Rules* (1991) 196–206.
17. Dworkin in *Law's Empire* 45 and ff.
18. 'Hart Interviewed: HLA Hart in Conversation with David Sugarman' (2005) *JLS* 32:267.

What will be involved will in a sense be a game of let's pretend; let's pretend we are reading the book in 1961, having never had the opportunity to read the doubts and criticisms which have deluged out since those far off days. For this plan I need to offer both an explanation and a justification.

An Autobiographical Explanation: The Hart Group

The explanation is autobiographical. I was an undergraduate at Queen's College Oxford when Hart was appointed. I can still recall the excitement which was generated by it, though I, like many in the law school, including some of the dons, had never heard of him before. In company with my legal history tutor, Derek Hall, I attended his inaugural lecture in May 1953, urged to do so by Hall. In 1954 Hart was one of my examiners, and I was delighted and flattered when he gave my jurisprudence paper the mark of $\alpha - ? -$ I should perhaps explain that the Oxford grading system allowed for considerable subtlety, and I myself once gave a candidate the grade $\alpha\ \beta\ \gamma\ \delta$.[19] Hart's grade indicated some doubt as to whether two minuses was fair, and this again pleased me. An indirect consequence of Hart's view of my papers was that he supported me as a candidate for a junior research fellowship at St Edmund Hall, and for the tutorial fellowship which I was invited to take up at Lincoln College in 1955. Apparently the only other person considered was Norman St John Stevas, later a prominent conservative politician. The position was not advertised. The fellows were under the misapprehension that I played bridge, and needed a fourth player. It also led to an invitation in 1955 to join the faculty discussion group which Hart had established soon after he took up the chair. This met on Monday afternoons in the rooms of Rupert Cross in Magdalen; Rupert was blind, and this arrangement was the most convenient for him.[20] Hart called this a 'class' which it was not, but the use of the term is significant. Hart viewed the function of the group as being the education of his intellectually deprived colleagues in the law faculty. In his 1988 interview he mentioned only three of those who attended—his

19. The person involved was impossible to classify, and in the end was given a second on a split vote, much to the fury of David Daube, who had a high opinion of his abilities. Shortly afterwards he was appointed to a chair of law.
20. He became Vinerian Professor in 1964; the other candidate was John Morris who had been so rude about All Souls College (to which the chair was attached) that it was hardly possible for him to consider taking the position.

co-author Tony Honoré, Rupert Cross, the only other member of the law faculty with whom he developed a collaborative relationship, and the philosopher Tony Woozley. Woozley no longer attended in my time, having left for St Andrews in 1954. Those who also regularly attended were Tony Guest, then a law fellow at University College; Patrick Fitzgerald, law fellow at Trinity (who had gained a first in Greats and taken the bar finals, but held no law degree); and Geoffrey Marshall, politics fellow at Queen's. From time to time others joined the group, for example Nigel Walker, John Eekelaar, and Colin Tapper, and sometimes guests were invited, for example Barbara Wootton and Arthur Goodhart. Proceedings were informal and anyone could suggest a topic for next week's discussion, but Hart was very much the presiding, though not overly dominating, member.

Although it was not the practice to read formal papers, members of the group came to collaborate in the publication of a series of papers in *Oxford Essays in Jurisprudence*. The first volume was edited by Tony Guest and was published in 1961; Hart read and commented on all the papers in this collection, so that it was in a sense a collaborative work. The second was edited by me and appeared in 1973; my recollection is that on this occasion Hart was not so heavily involved, and I sent out draft papers to various academics for advice and comment as seemed appropriate. From the list of contributors one can identify individuals who came to attend the group, if only occasionally, and by no means all the published papers originated out of topics discussed in it. The series continued to a fourth volume published in 2000. I continued to attend the group until I left Oxford in 1972, though its character changed in ways which I did not entirely like when Dworkin replaced Hart in 1969. Nevertheless during my time in Oxford the meetings of the group ranked for me as far and away the most interesting and valuable event of the week. And attendance meant that I came to know Hart well at a professional level, though I never became a close friend or collaborator.[21] As I have explained elsewhere I had no idea of the three sources of anxiety which dogged him: his lack of confidence in his abilities as a philosopher, his insecurity over his sexuality, and his unease as to what he should do with the fact (of which I was long unaware) that he was a Jew.[22] I was not a diligent

21. I did later collaborate in responding to various queries arising from his editorial work on the Bentham project.
22. See my 'Herbert Hart Elucidated' (2006) MichLR 104:1437.

attender of lectures, and I only went to a few of Hart's; I did not find him an inspiring lecturer. At this time it was in any event not a common practice for teaching faculty members to attend professor's lectures, one reason being that they had very little time to devote to this—I used to teach something like twenty hours a week. I did however attend a joint seminar he ran with Tony Honoré on causation,[23] which I found very interesting, and I have a memory of attending a seminar on criminal responsibility he ran with Rupert Cross.[24]

Sitting at the Feet of the Masters

During my early time as an Oxford don I very much sat at the feet of those I conceived of as masters: Derek Hall for legal history, Herbert Hart for legal philosophy. Tony Honoré had been ill when I worked on the jurisprudence syllabus, and although I was greatly impressed by his abilities I found him somewhat intimidating, and failed to establish a close relationship with him, which I regret.

Masters do not have to be saints—indeed some masters are extremely unpleasant people, such as was Sir Isaac Newton. Hart was not in any way an unpleasant person, he came with warts like the rest of us, but I only became aware of them later in my time in Oxford. Briefly they may be summarized as follows. He was, if ever there was one, a champagne socialist. He had a tendency to become morally worked up on trivial or misconceived issues. He endlessly meddled in appointments, and was a poor judge of the merits of candidates; he promoted a disastrous candidate for a readership in tort law, being over impressed by an article which he wrongly imagined presented original views on tort law, a subject about which Hart knew little. There was a much better local candidate in Robert Heuston; there was fury that he had been passed by, and Hart's protégé was in effect driven out of Oxford. He also promoted John Barton for a fellowship at Merton, for which that college never really forgave him, though to be fair Barton, though profoundly eccentric, was a person of considerable ability. Hart's conduct over the choice of his successor, which involved ditching

23. This would be in Trinity Term 1953.
24. Lacey 162–4. This seminar was first given in Hilary Term 1966 under the title 'Mental Conditions of Criminal Responsibility'.

Honoré, his obvious successor, was appalling, though Honoré, seems to have forgiven him. He lacked a critical attitude to his own professional conduct; he was not immune from hypocrisy. He was thus human like the rest of us, and, notwithstanding his faults, he was an agreeable person to know, and generous in making himself accessible to graduate and undergraduate students. In spite of his own insecurity, which he successfully concealed, the public impression he gave to me reflected the arrogant and inhibiting self-confidence of the Oxford philosophers; they were, so they thought, extremely clever. He was extremely well read in both philosophical and general English literature; he was not at all well read in legal scholarship, though it was some time before I realized this. He was lucid in discussion, always seeking to put forward his views clearly and accurately.

In my early years at Lincoln College in the company of well-known scholars such as Howard Florey, Edward Abrahams, Sir John Beazley, Walter Oakeshott, Wallace Robson, David Henderson, and now forgotten figures such as Donald Whitton, and Harold Cox, I was in general hugely impressed by the scope of their scholarship, and the breadth of their reading. I was very conscious of the fact that my education at Oakham School, though first class in modern history, for there was one outstanding teacher, Robert Duesbury, who was justly idolized by his pupils, was otherwise quite second rate. I had first specialized in classics; the sixth form classics teacher, one John Moore, was a kindly man, but a poor classicist except at a purely technical level. His teaching method was continuous shouting and his main interest cricket. The intellectual culture of the country vicarages in which I had been brought up had been narrow and impoverished, though my father was something of an antiquarian. Given this background it was natural that I viewed Hart with awe, and I remain extremely grateful to him for all I learnt at his feet. And it was Hart who encouraged in me an interest in philosophy, which, for better or worse, will be reflected in this book.

I do not recall the Hart group ever having a general discussion of the central features or Hart's theory of law: the concept or a social rule, the internal and external attitudes to rules, the classification of rules as primary and secondary rules, the rules of recognition, change and adjudication. We never discussed *The Concept of Law* systematically. From time to time however discussion would develop on issues which were fairly directly connected to Hart's legal theory. Thus on one occasion Arthur Goodhart attended for a discussion of his *English Law and the Moral Law* (1953), and the

consensus was that he had not been unconvincing in his defence of his position against Hart.

It was at this time common for members of the group to view Goodhart's abilities as a jurist with some disdain, and nobody could confuse Goodhart with any kind of philosopher. My first venture into publication in jurisprudence involved an assault on a much read and cited article by him. I suppose I, like Dworkin, must have grasped the fact that the way to establish a reputation in the academy was to go for the jugular of the guru. Insofar as Goodhart had any claim to guru status this depended on his theory as to how you determined the *ratio decidendi* of a case; at this time this was standard reading in both England and the USA. So between 1957 and 1959 I became involved in a somewhat tedious controversy over the matter, which greatly irritated the unfortunate Goodhart, though, being a kindly person, he forgave me.[25] The group did not discuss this, and Hart, curiously as it seemed to me, showed not the least interest. There is no explicit reference to it in *The Concept of Law,*[26] nor even to Goodhart's original article.[27] As we shall see Hart never developed an interest in the detailed analysis of the conventions and practices of legal argument and reasoning.

Chinks in the Armour

Indeed in due course I began to understand that there were aspects of legal scholarship and issues of legal theory in which Hart was wholly uninterested, and indeed wholly uninformed. There was no consequential sense of the fallen idol, merely a growing awareness that the great man was not a legal polymath. So far as my legal history master was concerned I similarly came to be aware of his weaknesses too. He was supposed to supervise me for a D Phil on late mediaeval and early modern law reporting, and had not the least idea how to perform this function, having himself never written a book, as opposed to editing a text. For books an author has

25. See (1957) 20 MLR 413, (1958) 21 MLR 155, (1959) 22 MLR 492. When the Hambledon Press published my collected papers in 1986 I excluded these pieces which I had come to view as simplistic. It was Goodhart who secured for me a visiting appointment to teach jurisprudence, not legal history, at the Dalhousie Law School in 1964.
26. In CL the expression occurs once on 134.
27. AL Goodhart, 'Determining the *Ratio Decidendi* of a Case' (1931) 40 YLJ 161, reprinted in *Essays in Jurisprudence and the Common Law* (1931).

to establish a structure; an editor of a text is provided with one on a plate. So I abandoned the enterprise, but retained the highest respect for his skills as an editor, and his general incisiveness as a scholar.

Encouraged by membership of the Hart group I began to read a fair amount of philosophy, and soon began to have doubts over the Oxford linguistic analysis school to which Hart belonged. As we shall see Hart had collaborated with the philosopher JL Austin, and professed considerable admiration for his abilities. Along with Gilbert Ryle, Austin was a dominant member of the Oxford group which espoused the cause of linguistic analysis, or ordinary language analysis. In the immediate post war period, and indeed earlier, the emphasis in philosophical circles was on the analysis of forms of communication which were thought to express statements or descriptions, which could, arguably, be true or false. Austin however was in particular associated with work on what came to be called 'performative utterances'. The basic insight was that some forms of human communication, whether by the use of speech or texts, constitute actions, in contrast to the making of a statement, as when one drops a brick on one's toe and utters the 'f-word'. Swearing is surely an action. I was quite unable to see what was so path-breaking in JL Austin's work on performatives.[28] What on earth was so innovatory about it? In what weird world did the Oxford philosophers live in, which pointing out the obvious ranked as some kind of intellectual breakthrough? What sort of hole had they dug themselves into, and why? And his style of writing seemed to me to be pretentious and ugly, though this is at its worst in his reconstructed and posthumously published works. He was incapable of presenting his ideas in lucid English, or perhaps unwilling to do so.

At this time I naively imagined, as indeed did Wittgenstein after he published a work, written in German, known as the *Tractatus Logico-Philosophicus* in 1921,[29] that philosophers might sometimes solve problems. Indeed Wittgenstein thought he had solved the lot, and for some time gave the subject up. Later, around the period in which we are interested, the idea

28. A short version, originally a BBC talk, is 'Performative Utterances', reprinted in JL Austin, *Philosophical Papers* (3rd edn) at 233. The full version is JO Urmson (ed), *How to Do Things with Words: The William James Lectures delivered at Harvard University in 1955* (1962). Publication of the full text, which develops an excruciating jargon which elaborates on the basic idea, has not changed my view.

29. English version by CK Ogden (1922), coauthor of *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism* (1923).

was entertained both in Cambridge and Oxford that once certain 'puzzles' or 'conundrums', themselves the product of mistaken ideas invented by philosophers, were cleared out of the way it would turn out that there were in reality no serious philosophical problems left. I myself did not appreciate that in the main, except when they stated the obvious, as in the case of performatives, philosophers were in the business of either identifying or even generating problems. Nor did I then, or indeed now, have any clear idea of what counts as solving a philosophical problem. In this I am in good company.

Since I shall be making a fair amount of reference to philosophical ideas and writers, whilst this book is written primarily for those who have not studied the subject, I think it will be useful for me to suggest some intelligible further reading, through which it is possible to obtain a basic grasp of the ideas and theories which were out there back in the post war period. Here there is no problem whatever, for Bryan Magee's brilliantly lucid *Talking Philosophy: Dialogues with Fifteen Leading Philosophers* could hardly be improved upon for this purpose.[30] Magee contrived to sign up outstandingly able teachers of philosophy to engage in a modern revival of the literary form of the platonic dialogues, and the resulting text does not engage in any sort of dumbing down for the general reader. Also strongly to be recommended is Magee's *The Great Philosophers: An Introduction to Western* Philosophy;[31] this is a book to be read as a whole. There are to be sure many other introductory texts, but I should not recommend them. Of course these books merely offer an entry into philosophy; gluttons for punishment will want to read more. But for the purposes of understanding *The Concept of Law* what is needed is a grasp of some fairly simple ideas.

Criticizing the Masters

By the 1960s I had begun to have reservations over the argument presented by Hart in his inaugural lecture, and by now I had developed sufficient self-confidence and pushiness to risk publishing a criticism of Hart, the reigning jurisprudential guru. So it was that in 1964 the *Law Quarterly Review*

30. 1978. The more important dialogues for our purposes are 1 (Isaiah Berlin), 5 (Anthony Quinton), 6 (AJ Ayer), 7 (Bernard Williams), 10 (John Searle), and 13 (Ronald Dworkin).
31. 1987. Hereafter cited as Magee.

published an article of mine[32] which criticized both Hart's view, and views which had been published by Alf Ross[33] and Wesley Hohfeld.[34] My basic argument was that it was an error to suppose that the elucidation of the nature or meaning of legal concepts could be advanced by reference to the typical or regular function legal words or sentences served. This article was written in a somewhat irritating style, and would have been hugely improved if I had run a draft past a linguist, or lexicographer, which I did not do since I knew no linguists or lexicographers.[35] It has never provoked a response, and indeed has been more or less totally ignored. There is an odd practice in the academy of simply ignoring critical writings, sometimes perhaps because they are thought to be rubbish, but sometimes because those criticized can think of no reply. Hart himself was well able to crush opponents if he felt the need, his abilities being well illustrated in his demolition of Professor Bodenheimer in 1956–7.[36] But I escaped, albeit at the price of being ignored. The article was however discussed in the Hart group, Hart himself taking virtually no part in the discussion; I recall only that Tony Guest was unimpressed. Outside the group David Daube congratulated me. I continue to think that the arguments put forward were broadly correct.

Hart himself also came to the conclusion that the thesis he had advanced in his inaugural lecture was not quite correct, but he never suggested that my article played any part in this. The evidence is that it did not. For in the introduction to his *Essays in Jurisprudence and Philosophy* (1983) he wrote that his reservations over his lecture arose because it did not take on board JL Austin's distinction between the *meaning* and the *force* of statements. Austin had in his BBC talk, and much more fully in his *How to Do Things With Words*, distinguished between the meaning of an utterance such as 'I name this ship Peerless', and what he called in his ugly invented jargon its *illocutionary force*.[37] The distinction is basically quite simple: it is one thing

32. 'The Analysis of Legal Concepts' (1964) 80 LQR 531. Reprinted in my *Legal Theory and Legal History: Essays on the Common Law* (1987) at 335.
33. 'Tû-tû' (1957) 70 HLR 812.
34. *Fundamental Legal Conceptions* (1923) Chapter 1.
35. It was written when I was teaching in Dalhousie, and a draft was read by the late George Nicholls, who was a prominent Canadian academic lawyer.
36. 'Analytical Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer' (1957) UPLR 105. See also the ferocious review of Dias and Hughes *Jurisprudence* in (1958) 4 JSPTL 143.
37. For discussion see KT Fann, *Symposium on J. L. Austin* (1969) at 26ff, 420ff, 445ff and Magee 10.