THE CONCEPT OF LAW, SECOND EDITION. By H.L.A. Hart, ed. by J. Raz & P. Bulloch. Oxford: Clarendon Press, 1994. Pp. 315. ($45.95).

Professor Hart needs no introduction since his was a classical participation in the library of modern philosophy and the law. In his Preface to the second edition, Professor Hart states:

> My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law. The lawyer will regard this book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy. Moreover, at many points I have raised questions which may well be said to be about the meaning of words. Thus I have considered: how 'being obliged' differs from 'having an obligation'; how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials; what is meant by the assertion that a social group observes a rule, and how this differs from, and resembles, the assertion that its members habitually do certain things. Indeed, one of the central themes of the book is that neither law nor any other form of social structure can be understood without an appreciation of certain crucial distinctions between two different kinds of statement, which I have called 'internal' and 'external', and which can both be made whenever social rules are observed.[1]

Regrettably, Professor Hart did not live to savour the lavish praise from his editors and the countless disciples/students whom he taught in person or through his publications which has been brought forth by publication of this new edition. *The Concept of Law* was first published in the United States by Oxford University Press in 1961, and elsewhere throughout the world in a score of other literate cities from Athens to Toronto, and in many other places over the years.

This new edition has been produced under the editorship of Oxford scholars Joseph Raz and Penelope Bulloch, and includes a new postscript written by Hart. It was originally conceived by Hart as an additional chapter for *The Concept of Law*, but was never published in that form owing to Hart's reluctance to tinker with his influential text. As the Editors' Note explains, Raz and Bulloch had to compare the numerous alternative versions of this chapter prepared by Hart, and:

> [W]here they did not match, establish whether segments of text which appeared in only one of them were missing from the others because he discarded them, or because he never had one version incorporating all the emendations. The published text includes all the emendations which were not discarded by Hart, and which appear in versions of the text that he continued to revise. At times the text itself was incoherent. Often this must have been the result of a misreading of a manuscript by the typist, whose mistakes Hart did not always notice.[2]

If the editors found the problems of publishing the late Professor Hart's manuscript so difficult, this reviewer can only assure them that inclusion of this text in the handsome volume before him in 1996 presents intellectual challenges and delights which repay the demands, whatever hardship the editors encountered.

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[1] At v.

[2] At viii.

It must be remembered that Professor Hart was the disciple who carried John Austin's jurisprudence to the western world, into the generations that followed that masterly effort, *Lectures on Jurisprudence; or the Philosophy of Positive Law*.[3] The Austinian imprint embraced legal orders wherever the common law of England or anglo-American legal theory was taught.

This is no place to summarize Austin's *The Province of Jurisprudence Determined*.[4] But the demanding rationale of his work has touched the study of law and legal theory as few books in English have ever been able to do. Nineteenth and twentieth century positivism reached the courts and the classrooms through the severities of definition that Austin imposed on minds and systems wherever the Common Law reigned in whole or in part.

For example, it was Austin who demanded of the student a closeness and rigour of definition that made legal theory or jurisprudence the systemic tyrant wherever meaning was a challenge. Of course, the inclusion of Professor Hart's postscript which — especially in light of Hart's celebrated debate with Professor R.M. Dworkin — puts a different gloss on some of the arguments in the original edition. As Professor Hart says in his postscript:

> This book was first published thirty-two years ago. Since then jurisprudence and philosophy have come much closer together and the subject of legal theory has been greatly developed both in this country and in the United States. I would like to think that this book helped to stimulate this development even if among academic lawyers and philosophers, critics of its main doctrines have been at least as numerous as converts to them.[5]

Neither Austin, Hart's intellectual mentor, nor Hart himself could fault the continuing loyalty to Austinian doctrine and rigour that the new edition *Concept of Law* reflects. Indeed, the retention by the editors, of the sophisticated analytical style and complex grammatical structures of the original, would no doubt have pleased both Austin and Hart, should they have met in the heavens they jointly deserved as 'masters' on earth below. The following quotation gives a powerful illustration of the continuing relevance of Austin's/Hart's concepts and intellectual standards in relation to the philosophical debate about the nature of international law:

> The doubts which we shall consider are often expressed in the opening chapters of books on international law in the form of the question 'How can international law be binding?' Yet there is something very confusing in this favourite form of question; and before we can deal with it we must face a prior question to which the answer is by no means clear. This prior question is: what is meant by saying of a whole system of law that it is 'binding'? The statement that a particular rule of a system is binding on a particular person is one familiar to lawyers and tolerably clear in meaning. We may paraphrase it by the assertion that the rule in question is a valid rule, and under it the person in question has some obligation or duty. Besides this, there are some situations in which more general statements of this form are made. We may be doubtful in certain circumstances whether one legal system or another applies to a particular person. Such doubts may arise in the conflict of laws or in public international law. We may ask, in the former case, whether French or English Law is binding

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3 (London: Murray, 1904).

4 (London: Weidenfield and Nicholson, 1954).

5 At 238.

> on a particular person as regards a particular transaction, and in the latter case we may ask whether the inhabitants of, for example, enemy-occupied Belgium, were bound by what the exiled government claimed was Belgian law or by the ordinances of the occupying power. But in both these cases, the questions are questions of law which arise *within* some system of law (municipal or international) and are settled by reference to the rules or principles of that system. They do not call in question the general character of the rules, but only their scope or applicability in given circumstances to particular persons or transactions. Plainly the question, 'Is international law binding?' and its congeners 'How can international law be binding?' or 'What makes international law binding?' are questions of a different order. They express a doubt not about the applicability, but about the general legal status of international law: this doubt would be more candidly expressed in the form 'Can such rules as these be meaningfully and truthfully said ever to give rise to obligations?' As the discussions in the books show, one source of doubt on this point is simply the absence from the system of centrally organized sanctions. This is one point of adverse comparison with municipal law, the rules of which are taken to be unquestionably 'binding' and to be paradigms of legal obligation. From this stage the further argument is simple; if for this reason the rules of international law are not 'binding', it is surely indefensible to take seriously their classification as law; for however tolerant the modes of common speech may be, this is too great a difference to be overlooked. All speculation about the nature of law begins from the assumption that its existence at least makes certain conduct obligatory.
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> In considering this argument we shall give it the benefit of every doubt concerning the facts of the international system. We shall take it that neither Article 16 of the Covenant of the League of Nations nor Chapter VII of the United Nations Charter introduced into international law anything which can be equated with the sanctions of municipal law. In spite of the Korean war and of whatever moral may be drawn from the Suez incident, we shall suppose that, whenever their use is of importance, the law enforcement provisions of the Charter are likely to be paralysed by the veto and must be said to exist only on paper.
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> To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligations contained in the theory that law is essentially a matter of orders backed by threats. This theory, as we have seen, identifies 'having an obligation' or 'being bound' with 'likely to suffer the sanction or punishment threatened for disobedience'. Yet, as we have argued, this identification distorts the role played in all legal thought and discourse of the ideas of obligation and duty. Even in municipal law, where there are effective organized sanctions, we must distinguish, for the variety of reasons given in Chapter III, the meaning of the external predictive statement 'I (you) are likely to suffer for disobedience', from the internal normative statement 'I (you) have an obligation to act thus' which assesses a particular person's situation from the point of view of rules accepted as guiding standards of behaviour. It is true that not all rules give rise to obligations or duties; and it is also true that the rules which do so generally call for some sacrifice of private interests, and are generally supported by serious demands for conformity and insistent criticism of deviations. Yet once we free ourselves from the predictive analysis and its parent conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions.[6]

This passage also shows how the entire book may now be seen as a running debate over meaning and the meaning of meaning. The lazy and the immovable will not apply to this firm.

The new postscript provides considerable evidence that the author was aware of the very extensive developments in legal theory, scholarship, and teaching throughout the law schools of the United States and Canada. It is fair to say that the teaching of

[6] At 216-18 (emphasis in original).

jurisprudence in the United Kingdom was clearly being influenced by the intensive philosophical/legal theory challenges in the U.S. teaching and writing, and concerned responses to these challenges not only in the U.K., but in many parts of the common and civil law worlds as well. Indeed, the reference to Professor Lon Fuller,[7] a leader in U.S. jurisprudential thought and scholarship, says much for the intellectual interaction of the two countries, and the awareness of Professor Hart and his U.K. successors of the powerful influences of so much U.S. work in the field of legal philosophy.

It is probably true that the effects of this interaction of U.S. and U.K. academic and professional thinking about legal/philosophical questions have also affected the past two generations of Canadian legal knowledge and law school curriculua, as well as Canadian juridical interests and styles of thought. (As an aside, in this respect the civil law of Quebec and the common law co-existing with increasing intellectual harmony and understanding is merely part of a broader trend.) It is interesting to consider how far Austinian models persisted in influence in Canada in contrast to the rising authority of the Yale school of jurisprudence as well as other U.S. sources ranging from Mr Justice Oliver Wendell Holmes Jr. to, inevitably, the effect of U.S. Supreme Court judgments. That Court had so powerful a thrust on international legal thought because of the presence of judges of the calibre of Justices Holmes, Brandeis and Frankfurter, as well as Chief Justices such as Stone. Canada has been fortunate to have had graduate students and law teachers emerge showing the influence of both the United Kingdom and the United States in Canadian written scholarship and professorial reputations.

And so the second edition is its own memorial. Students of Professor Hart and those who came before or after will not purchase this volume for its condign pleasures. This review in short is a warning. Purchase at your peril. The effort is neither simple nor obvious but one long wrestling with meaning, definitions, sentences, adjectives, learned nouns, verbs and the rest of the grammarians' satisfactions. This writer must invite the reader to risk a challenge in the tough analytical school where teaching must be a high art and learning a severe discipline. That is Hart's invitation to join the family of legal theorists providing a path to rigorous reason and the law.

Maxwell Cohen[*]

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[7] See R.C.L. Moffat, "The Perils of Positivism or Lon Fuller's Lesson on Looking at Law: Neither Science nor Mystery-Merely Method" (1987) 10 Harv. J.L. & Pub. Pol'y 295.

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