SCHAUER ON HART

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Replying to Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)).

Nicola Lacey's *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*[1] has attracted a great deal of attention, some controversy, and, deservedly, much acclaim. For me, reading this superb book was a painful experience. It tells a sad, at times tragic, story of a brilliant and attractive person who never fully enjoyed the respect and success that he earned. Indeed, it is a story of a conflicted individual who struggled with deep ambivalences about his Jewishness, his sexuality, his marriage, and his political commitments.[2] Herbert Hart was also tormented by self-doubt. Such doubts and ambivalences affected his professional life. It is mainly for this reason that this intimate biography sheds light on his work as a jurist.[3]

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[1] NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004).

[2] Hart also had mixed feelings about his legal practice; about the elitism of Oxford; about the "establishment" in general; about natural law, human rights, and utilitarianism; and about laws in general.

[3] A personal note: My relationship with Hart was also marked by mutual ambivalence. My interest in legal theory was first stimulated by Hart's lectures in Oxford in the mid-1950s, and especially his inaugural lecture, H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954), *reprinted in* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21 (1983). For a time I became an enthusiastic, but crude, exponent of "linguistic analysis"; later, I fell under the spell of Karl Llewellyn, and Hart seemed to consider this to be a mystifying lapse of judgment, perhaps even a betrayal, even though I spent a great deal of effort trying to reconcile the views of these two mentors. Hart was not receptive to my criticism of his treatment of "rule-scepticism" in *The Concept of Law*. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 32, 148–49, 255 (1973). However, he did make a partial retraction. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 970–71, 974 (1977), *reprinted in* HART, *supra*, at 123, 124–25, 128. He was clearly displeased by an article in which I argued for a rapprochement between legal philosophy and socio-legal studies and suggested, albeit diplomatically, that my former teacher was not fully realizing his potential. *See* William Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 LAW Q. REV. 557 (1979) [hereinafter Twining, *Academic Law*], *reprinted in* WILLIAM TWINING, THE GREAT JURISTIC BAZAAR 69 (2002). Thereafter, we were civil to each other and worked together closely on the Bentham Project, but we never had an intimate relationship. My own ambivalence toward Hart's jurisprudence is quite similar to Lacey's, as is illustrated by the "olive branch" thesis. *See infra* Part III, pp. 126–28. My views

Hart was as ambivalent about the law as Jeremy Bentham, and as ambivalent about Bentham as John Stuart Mill, to whom he was, in important ways, a twentieth-century analogue. Each was a progressive intellectual not completely detached from, but not wholly at home in, the centers of power in his society. A Marxist might say that these inner conflicts mirror the internal contradictions of liberalism; others might find both thinkers attractive just because they were involved in honest struggles with conflicting ideas, such as the tensions between liberty and equality.[4]

The saddest part of the story concerns *The Concept of Law*.[5] It is important to bear in mind that this book was intended as a prolegomenon rather than as a *magnum opus*. It was included in Oxford University Press's Clarendon Law Series, which Hart edited. This was intended to be a series of "general introductions" — the kind of book that undergraduates might be encouraged to read at the start or end of a course. Hart was surprised, indeed "baffled,"[6] by his work's reception. Within a few years he indicated that he was tired of discussing "that wretched book."[7] After *The Concept of Law* he made some significant contributions, but he never settled down to an agenda worthy of his talents. Unfortunately, he became obsessed with Ronald Dworkin's criticisms and got sucked back into a round of increasingly repetitious debates, as both spectator and participant. During his later years he struggled with a reply to his critics. This ended unhappily in the unfinished "Postscript," published posthumously, which dealt unconvincingly with only one critic, Dworkin.[8] If Hart had broken free from this obsessive concern, he might well have provided intellectual leadership for legal scholarship generally rather than for an important, but narrow, form of abstract legal philosophy. Jurisprudence, so inter-

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are set out at greater length in William Twining, *General Jurisprudence*, *in* LAW AND JUSTICE IN A GLOBAL SOCIETY 609–50 (Manuel Escamilla & Modesto Saavedra eds., 2005) [hereinafter Twining, *General Jurisprudence*]; WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 33–49, 108–16 (2000); and TWINING, THE GREAT JURISTIC BAZAAR, *supra*.

[4] The analogy rests in part on their internal conflicts, in part on the affinity of their ideas especially in relation to utilitarianism, liberty, and the enforcement of morals. More generally, they both belong to the tradition of English empiricism in philosophy. Of course, like all analogies, this one can be pressed too far.

[5] H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (1961).

[6] LACEY, *supra* note 1, at 233.

[7] Lacey correctly cites me as the source for Hart's use of that phrase, *id.*, but I have heard from other sources that he expressed this view more generally.

[8] HART, *supra* note 5, at 238–76. Hart's notes indicate that he intended a second section dealing with other critics, but clearly his main concern was with Dworkin. Like Schauer and many others, I believe that Hart and Dworkin had basically different concerns and standpoints, but that these are not quite captured by a distinction between general and particular jurisprudence. We are indebted to both of them, but very largely for quite different insights.

preted, has largely become a subject apart.[9] In my view, jurisprudence, as the theoretical or more abstract part of law as a discipline, should both feed off and feed into more particular legal scholarship.

Frederick Schauer's review of *The Nightmare and the Noble Dream*[10] is both judicious and insightful. I agree with his general assessment of Lacey's book and its value in judging both Hart's historic achievements and the continuing significance of his work. We also concur on a number of specific points.[11] Especially significant is the suggestion that a focus on the "philosophically interesting" may have led to the marginalization (and I would add caricature) of some jurists, who were not philosophically inclined but who contributed insights to understanding law.[12] In legal theory there are many issues that are juridically interesting to which philosophers can usefully contribute — even if many such issues are not philosophically interesting — if they take the trouble to acquire relevant legal knowledge. Understanding law is not, and cannot be, solely or even mainly an abstract philosophical enterprise.

Schauer and I have somewhat different perspectives, however, on the following four themes: Hart's legal positivism; the narrowness of "theories of adjudication"; the relationship between analytical jurisprudence and socio-legal studies; and Hart's conception and vision of jurisprudence.

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[9] As part of a series of heated exchanges, Ronald Dworkin has attacked recent debates within positivist jurisprudence for, inter alia, being out of touch with legal practice, *see* Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655 (2002); Brian Leiter in response has ferociously defended his analytical colleagues, *see* Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165 (2005); and Andrew Halpin has more temperately argued that there is force in the criticisms of both Dworkin and Leiter, but that both are out of touch with practice, *see* Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 CAN. J.L. & JURISPRUDENCE 67 (2006). The ferocity of the attacks may well be symptomatic of an area of concern that has run into a dead end.

[10] Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852 (reviewing LACEY, *supra* note 1).

[11] For example, we agree on Hart's influence on the next generation of analytical jurists, his specific method of conceptual elucidation, his insights on the concept of a legal system and related ideas, and the importance of his writings on punishment, criminal law theory, causation, and the enforcement of morals. I would put more emphasis than Schauer does on Hart's contribution to the revival of Bentham studies. I also endorse the opinion that the Postscript "hardly represents Hart's main interests or best work." *Id.* at 876 n.85.

[12] On the limiting role of "philosophically interesting questions," see Twining, *Academic Law*, *supra* note 3, at 569–70, *reprinted in* TWINING, THE GREAT JURISTIC BAZAAR, *supra* note 3, at 69, 81–82. A rather clear example of the tendency to dismiss (in this case mainly American) jurists because they were poor philosophers is Brian Leiter, *Is There an 'American' Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367 (1997) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

I. HART AS LEGAL POSITIVIST

One day in 1981 I traveled from Oxford to London by train in the same compartment as Herbert Hart. Neil MacCormick's *H.L.A. Hart*[13] had recently been published. I asked Hart for his reaction. He indicated general approval, but said emphatically that he considered himself to be more of a hardened positivist than MacCormick had depicted.[14] I have always interpreted this statement to mean that, not unlike Oliver Wendell Holmes, Hart looked on legal phenomena with a cold detachment, which was conditioned by his acute awareness both of the evil that can be done in law's name and of the moral ambiguities involved in most kinds of legal practice. Law is a product of power. For aliens, for most citizens, for legal scholars, and for Hart himself, it is generally the product of other people's power, even in a democracy.[15]

On this interpretation, Hart's positivism was at least as much an attitude as a philosophical position. Some academic lawyers, including Arthur Goodhart and Karl Llewellyn, can be said to love the law; many are ambivalent; and some can be categorized as legal masochists, who dislike and maybe despise the subject matters they teach and the profession that many of their students will enter. Like many positivists, Hart was somewhere in the middle of this spectrum: the separation thesis is motivated by a concern for clarity of thought that involves suspending judgment on the desirability or otherwise of particular legal phenomena.[16]

Schauer interestingly argues that many of the central ideas of *The Concept of Law* have significant value independently of positivism, going so far as to suggest the book might more accurately have been titled *Assorted Insights About Law*.[17] I disagree. Hart's positivist premises may have drawn attention away from some of his most valuable insights, but *The Concept of Law* is given coherence by Hart's standpoint and attitude toward law. His claims to be practicing general jurisprudence and to be describing the form and structure of

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13 NEIL MACCORMICK, H.L.A HART (1981).

14 I do not recall his exact words, but they included either "hard" or "hard-nosed." What Hart meant was that he thought it was important to maintain the distinction for the sake of clarity of thought about both law and morals. Subsequently, the terms "hard" and "soft" positivism have been used to refer to different interpretations of the rule of recognition.

15 *See* TWINING, GLOBALISATION AND LEGAL THEORY, *supra* note 3, at 108–35.

16 Andrew Halpin suggests that positivists tend to have some sort of identification with the law, "perhaps even a sort of lawyerly pride in being one of those with ability to work with it." E-mail from Andrew Halpin to author (Jan. 12, 2006) (on file with the Harvard Law School Library). Of course, one can be a positivist and yet have some moral commitment to one's own legal system or more generally to one or another version of the rule of law ideal. Or one may take pride in being a lawyer. But these are contingent, not necessary, features of positivism.

17 Schauer, *supra* note 10, at 881.

(state) legal systems, and his insistence that the rule of recognition is based on social fact, are all rooted in a positivist attitude toward law. A more accurate title might have been *A/My Conception of State Law*. Hart was steadfast in his adherence to the basic premises of legal positivism: the separation thesis and the social sources thesis. However, doubt and ambivalence reappear in relation to political morality, as is clearly illustrated by his treatment of natural law, nonlegal rights, and utility. Thus, on positive law Hart was a hedgehog, while on political morality he was more like a fox — almost the obverse of Dworkin.

II. THE NARROWNESS OF "THEORIES OF ADJUDICATION"

Schauer argues that Hart's successors have framed the central issues of jurisprudence in ways that unduly narrow its focus and divert attention from some of Hart's most important concerns and contributions. For instance, some successors, exhibiting an American bias, have concentrated on Hart's "theory of adjudication." Schauer rightly says that "Hart simply did not have much of an account of adjudication."[18] Schauer omits to say that "theories of adjudication" such as Dworkin's are almost entirely confined to reasoning about and justifying decisions on questions of law in hard cases in common law systems.[19] Such theories tell us virtually nothing about argumentation on questions of fact, questions of mixed fact and law, sanctioning, or procedure — let alone about routine judicial administration or other forms of dispute processing. Furthermore, they say little about how courts differ among municipal legal systems. It is plausible that how courts are institutionalized, the kinds of work they receive, and how they operate — factors that vary considerably between (and to some extent within) jurisdictions — are more local or particular than styles of appellate court reasoning and argumentation, which can also be diverse. This is one reason theories of adjudication that focus on legal reasoning are not very helpful to comparatists: they tend to ignore institutional context and local legal cultures.

III. THE OLIVE BRANCH THESIS: ANALYTICAL JURISPRUDENCE AND SOCIO-LEGAL STUDIES[20]

Hart wrote in the Preface to *The Concept of Law* that "the book may also be regarded as an essay in descriptive sociology."[21] I have

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[18] *Id.* at 875. I here sidestep the issue whether a theory of law needs a theory of adjudication, a question that turns in part on how one interprets these terms.

[19] The same point applies to the all-too-common narrow usage of the term "legal reasoning" as contrasted with the broader sense of "reasoning in legal contexts."

[20] For a longer treatment of this topic see Twining, *General Jurisprudence*, *supra* note 3.

[21] HART, *supra* note 5, at v.

always interpreted this notorious sentence to mean that good sociological work needs adequate conceptual tools for interpretation and description of social phenomena.[22] I have also suggested that it could be interpreted as an olive branch offered by Hart to socio-legal studies.[23] However, David Sugarman and Nicola Lacey have convinced me that, historically, this interpretation is over-optimistic, in that for most of his life Hart shared an Oxonian antipathy towards sociology.[24] The suggestion is nevertheless analytically correct, because social scientific investigation needs precise concepts as much as does legal exposition. Tradition, function, order, dispute, institution, culture, corruption, and profession are just a few examples of concepts that could benefit from the application of methods of conceptual analysis developed within analytical philosophy.[25] If the olive branch had been accepted, a quite unnecessary chasm between analytical jurists and socio-legal scholars might have been bridged sooner.

Lacey has advanced a further explanation of the narrow focus of much contemporary analytical legal philosophy.[26] According to her, Hart tended to draw a sharp distinction between philosophical questions and empirical questions. He generally treated historical and sociological criticisms of *The Concept of Law* as irrelevant to his con-

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[22] Some support for this interpretation can be found in such statements as: "[E]ven some historical and sociological statements about law are sufficiently general and abstract to need the attention of the philosophical critic." H.L.A. Hart, *Problems of the Philosophy of Law*, *in* 6 ENCYCLOPEDIA OF PHILOSOPHY 264 (P. Edwards ed., 1967), *reprinted in* HART, *supra* note 3, at 88.

[23] WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE 168–69 (1997); William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT. J.L. IN CONTEXT 5, 12 n.27 (2005).

[24] LACEY, *supra* note 1, at 230–31, 260–61, 322; David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J. LAW & SOC. 267, 291–93 (2005). In some contexts terms like "sociology of law," "sociological jurisprudence," and "law and society" may suggest that the main, or even the only, important relationship between law and social science is with sociology. In circles in which sociology is held in low esteem, this conflation of sociology with the social sciences can be used as a not too subtle kind of put down. *See* LACEY, *supra* note 1, at 149–50, 185, 260–61. *Cf.* Thomas Nagel, *The Central Questions*, LONDON REV. BOOKS, Feb. 3, 2005, at 12. The British term "socio-legal" refers more precisely to the relationship between law and all the social sciences (including "soft" sub-disciplines, such as anthropology, social history and social theory). It is a mistake to emphasize sociology as the primary discipline in this context. *See* William Twining, *Reviving General Jurisprudence*, *in* TRANSNATIONAL LEGAL PROCESSES 3, 17 & n.58 (Michael Likosky ed., 2002), *reprinted in* TWINING, THE GREAT JURISTIC BAZAAR, *supra* note 3, at 335, 356–57 & n.58.

[25] *See, e.g.*, Twining, *Academic Law*, *supra* note 3, at 578–79, *reprinted in* TWINING, THE GREAT JURISTIC BAZAAR, *supra* note 3, at 69, 90–91.

[26] *See* Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. (forthcoming 2006) [hereinafter Lacey, *Analytical Jurisprudence*]. This is a development of arguments introduced by Lacey in her biography of Hart, *see* LACEY, *supra* note 1, at 209–42, 260–61, and in Nicola Lacey, '*Philosophical Foundations of the Common Law': Social Not Metaphysical*, *in* OXFORD ESSAYS IN JURISPRUDENCE 17 (Jeremy Horder ed., 4th ser. 2000) [hereinafter Lacey, *Philosophical Foundations*].

cerns. As a result, Hart and those who followed him in this regard failed to resolve the tension between emphasizing that law is a social phenomenon and shying away from considering it empirically.[27]

Lacey extends this criticism to *Causation in the Law*.[28] Hart and Honoré presented a detailed account of the discourse of legal causation, which omitted any "systematic analysis of the institutional, practical, professional context in which that legal language was used."[29] Its account of the different social functions of contract, crime, and torts was at best rather thin. Law is analyzed as a body of doctrine rather than as a social practice.[30] *Causation in the Law* would have been very different if it had given a richer account of the contexts in which the legal language of causation is used.[31]

Lacey's criticism of attempts to draw a sharp line between philosophical and social perspectives on law elicited sharp criticism from Thomas Nagel, who defended Hart's distinction.[32] But Nagel misses Lacey's main point, which is that legal concepts and legal doctrine can be understood only in the institutional and practical context of their use and that an account of causation or corporate responsibility in English law is likely not merely to be incomplete but also to be misleading if these contextual factors are ignored.[33] The uniformity or diversity of such contextual factors is an empirical matter.

IV. AGENDAS FOR LEGAL THEORY

Schauer and I both share Lacey's concern with bringing about a rapprochement between analytical jurisprudence and socio-legal stud-

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[27] Lacey, *Analytical Jurisprudence*, *supra* note 26.

[28] H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985) (1959).

[29] LACEY, *supra* note 1, at 217.

[30] Lacey, *Analytical Jurisprudence*, *supra* note 26 (manuscript at 45, on file with the Harvard Law School Library). *Cf.* Lacey, *Philosophical Foundations*, *supra* note 26. Lacey further illustrates her thesis with reference to Hart's theory of responsibility and the social and institutional bases of corporate criminal responsibility.

[31] LACEY, *supra* note 1, at 218.

[32] Nagel, *supra* note 24, at 13. Nagel criticizes Lacey for associating Hart's neglect of institutional and practical context with differences between J.L. Austin and Wittgenstein. If Lacey had implied that Wittgenstein would have actually undertaken empirical work her claim would be misleading, but she denies this. Lacey, *Analytical Jurisprudence*, *supra* note 26 (manuscript at 28–29 n.54, on file with the Harvard Law School Library). Simon Blackburn and Jeremy Waldron defended Lacey's philosophical thesis in Simon Blackburn & Jeremy Waldron, Letter to the Editor, LONDON REV. BOOKS, Feb. 17, 2005, at 4. In my view, the argument about Wittgenstein has obscured the more important point about the relationship between conceptual elucidation and socio-legal studies.

[33] For similar reasons, abstracted accounts of "legal reasoning" or "adjudication" are likely to be overgeneralized or inaccurate in other ways if differences in institutional and other contexts are overlooked. *Cf. supra* note 18.

ies.[34] However, I would go further than both of them in emphasizing the limitations of Hart's conception of jurisprudence in today's context. Hart is vulnerable to the criticism that while he may have revolutionized the method of analytical jurisprudence, he left its agenda relatively unchanged. In his inaugural lecture, the key text on method, he criticized traditional approaches to classic questions that had been interpreted as requests for definitions.[35] Like his predecessors, Hart's focus was on legal words and concepts, the conceptual apparatus of legal doctrine and its presuppositions — basic concepts of "law talk" such as rights, ownership, possession, and corporation. He extended this range in *The Concept of Law* to concepts presupposed by such discourse, such as legal rule, legal system, and sovereignty. Even when he used concepts that are recognizably sociological, such as social practice, function, institution, and order, he did not subject them to the same careful scrutiny. In some of his other writings he slightly extended the range (for example, on punishment and responsibility), but he was still working within the doctrinal or expository tradition of academic law. It may have been this tradition as much as his concern with the boundaries of philosophy, and ideas about what is "philosophically interesting," that narrowed his vision of the enterprise of understanding law. Throughout the twentieth century, approaches that emphasize so-called "black-letter law" were under sustained attack from a variety of perspectives, which converge on the point that such approaches are too "narrow." Hart's conception of jurisprudence was often criticized on this ground.

Recently the discipline of law and its theoretical part, jurisprudence, have had to respond to the challenges of the complex processes and events loosely referred to as "globalization." As the discipline of law becomes more cosmopolitan, there needs to be a geographical, cultural, and political broadening of its agendas. Contemporary legal theory needs to tackle issues relating to legal traditions, non-state law, legal pluralism, multiculturalism, human rights, transnational justice, diffusion of law, problems of comparison and generalization, and our collective ignorance of other legal traditions and cultures.[36] Until recently, hardly any of these topics were dreamt of in Hart's legal philosophy or those of most of his followers. Yet nearly all of these topics deserve the scrutiny of philosophers and analytical jurists. This is beginning to happen.

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[34] I also agree with Lacey's emphasis on the evaluative dimensions of socio-legal studies, *see* Lacey, *Philosophical Foundations*, *supra* note 26, but this theme is beyond the scope of this Reply.

[35] *See* Hart, *Definition and Theory in Jurisprudence*, *supra* note 3, *reprinted in* HART, *supra* note 3, at 21.

[36] *See generally* Twining, *General Jurisprudence*, *supra* note 3.

To suggest that the agendas of jurisprudence are changing does not mean that Hart's contributions are no longer relevant: his analytical method, many of his particular apercus, and his style still have much to teach us. Even *The Concept of Law* provides not only a usable model for describing the form and structure of municipal legal systems, but also a sounding-board for constructing broader conceptions of law, as Brian Tamanaha has shown.[37]

Our juristic canon needs to be reviewed and extended. We do Hart's reputation no disservice by suggesting that *The Concept of Law* has dominated the foreground too much and for too long. It deserves to join the small section of legal classics on Calvino's "hypothetical bookshelf" on which the canon gradually changes.[38] As for any analytical jurist who senses that some recent debates and obsessions have become too abstracted and have run their course, the remedy is simple: she can step out of that self-reflexive loop and once more listen to and reflect on other voices and discourses, with modesty and wonder proportionate to her ignorance, as good philosophers normally do.

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[37] *See* BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001).

[38] ITALO CALVINO, *Whom Do We Write For? or The Hypothetical Bookshelf*, *in* THE USES OF LITERATURE 81 (Patrick Creagh trans., 1986) (1967).