ABSTRACT. This paper seeks to uncover and rationally reconstruct four theoretical prescriptions that H. L. A. Hart urged philosophers to observe and follow when investigating and theorizing about the nature of law. The four prescriptions may appear meager and insignificant when each is seen in isolation, but together as an inter-connected set they have substantial implications. In effect, they constitute a central part of Hart’s campaign to put philosophical investigations about the nature of law onto a path to a genuine research program. The paper takes note of certain prevalent and robust trends in contemporary legal philosophy that detract its practitioners from the four prescriptions, and that have them revert to the same older modes of thinking from which Hart sought a decisive break. A number of contemporary legal philosophers’ views and commitments are taken up and assessed, and in particular those of John Gardner and Leslie Green.

* An earlier version of this paper was presented at a workshop on John Gardner’s book Law as a Leap of Faith (2012), held at the University of Edinburgh, and at a legal philosophy seminar at the University of Genoa, both in May 2013. I thank the members of the two audiences for their instructive and friendly questions and comments, and especially Gardner for his reactions in Edinburgh and Luís Duarte d’Almeida for thoughtful written comments on the draft. I also thank Felipe Oliveira de Sousa and Giovanni Ratti, respectively, for organizing and inviting me to the two events. A little before writing this paper, I wrote and published a short review (2013) of Gardner’s book. My intention in this paper was to take a step back and to examine more thoroughly than I had in the review what may really be motivating Gardner’s thinking. As I tried to do so, other people’s positions, the positions that I believe share much with Gardner’s, came into view. In particular, a few weeks before the Edinburgh workshop, Les Green presented an earlier version of his paper ‘The Morality in Law’ (2013) at the Analytic Legal Philosophy Conference in Miami, and the impression I formed then was that Gardner and Green share significant commitments with which I disagree. I take these to be some of the core commitments of what amounts to the orthodox and dominant position in contemporary legal philosophy, which commitments I believe are in many ways misguided and reverts to some old trends in legal philosophical thinking from which H. L. A. Hart sought a decisive break. Or so I argue in this paper. What resulted is a more wide-ranging paper than a typical contribution to a symposium on a single author’s book. I thank Gardner for agreeing to have, and even encouraging, a paper of this sort as a contribution. I also want to take the opportunity to express my gratitude to Green, not only for sharing the copy-edited version of his (2013) with me, but also for his generosity over the years. My serious study of legal philosophy began with reading his review (1996) of the second edition of The Concept of Law, which as a student editor I had commissioned and edited for the Michigan Law Review. Through various steps, many undetectable to me, I have now come to disagree with him on many fundamental issues. Along the way, however, Green has been a consistent source of instruction and encouragement.
Yet the answer is a prosaic one: don’t ask what time is but how the word ‘time’ is being used.

Friedrich Waismann.

I miss the future.

Jaron Lanier.

I. INTRODUCTION

Certain leitmotifs predominate contemporary legal philosophy both in its construal of earlier contributors’ works and in its conceptions of the theoretical options now available. New theoretical vistas open up, I believe, when these leitmotifs are turned down a bit in volume, and we listen more closely to some persistent but recently neglected themes that were contained in H. L. A. Hart’s legal philosophy. Even Hart himself was not always consistent in his performance of these themes, and some of the themes I have in mind are only implicit in Hart’s writings.

The purpose of this paper is to uncover and highlight four recently neglected themes that were explicitly highlighted or at least implicitly relied on by Hart in motivating his legal theory. More particularly, the themes I have in mind are certain prescriptions that we should keep in mind and guide ourselves with in devising theories about the nature of law. Each of these prescriptions may appear inconsequential and meager when taken in isolation. But together they have substantial implications, and some of the aforementioned leitmotifs in contemporary legal philosophy lose much of their hooky appeal when the prescriptions are taken seriously.

No doubt, The Concept of Law has become the classic work that it is partly because it has the richness and ambiguities that invite disparate understandings. I also now and then remind myself of what Scott Shapiro wisely once said during a conversation – that most legal philosophers become legal philosophers by first reading and becoming intimate with Hart’s work, and that telling them that they are wrong about Hart is like telling them that one knows their parents or spouses better than they. Obviously, I want to minimize the risk of appearing so vain and illiberal. For this reason, although, for the sake of expositional convenience, I will be speaking below as