KEY CONTEMPORARY THINKERS

h.l.a. HART

MATTHEW KRAMER

H.L.A. Hart

Key Contemporary Thinkers series includes:

Jeremy Ahearne, *Michel de Certeau*
Lee Braver, *Heidegger*
John Burgess, *Kripke*
Claire Colebrook, *Agamben*
Jean-Pierre Couture, *Sloterdijk*
Colin Davis, *Levinas*
Oliver Davis, *Jacques Rancière*
Reidar Andreas Due, *Deleuze*
Edward Fullbrook and Kate Fullbrook, *Simone de Beauvoir*
Nigel Gibson, *Fanon*
Graeme Gilloch, *Siegfried Kracauer*
Christina Howells, *Derrida*
Simon Jarvis, *Adorno*
Rachel Jones, *Irigaray*
Sarah Kay, *Žižek*
S. K. Keltner, *Kristeva*
Matthew H. Kramer, *H.L.A. Hart*
Moya Lloyd, *Judith Butler*
James McGilvray, *Chomsky, 2nd edn*
Lois McNay, *Foucault*
Marie-Eve Morin, *Jean-Luc Nancy*
Timothy Murphy, *Antonio Negri*
Ed Pluth, *Badiou*
John Preston, *Feyerabend*
Severin Schroeder, *Wittgenstein*
Susan Sellers, *Hélène Cixous*
Anthony Paul Smith, *Laruelle*
Dennis Smith, *Zygmunt Bauman*
James Smith, *Terry Eagleton*
James Williams, *Lyotard*
Christopher Zurn, *Axel Honneth*

H.L.A. Hart
The Nature of Law

Matthew H. Kramer

polity

First published in 2018 by Polity Press

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Polity Press
101 Station Landing
Suite 300
Medford, MA 02155, USA

ISBN-13: 978-1-5095-2072-5
ISBN-13: 978-1-5095-2073-2 (pb)

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Kramer, Matthew H., 1959- author.
Title: H.L.A. Hart : the nature of law / Matthew H. Kramer.
Description: Medford, MA : Polity, 2018. | Series: Key contemporary thinkers | Includes bibliographical references and index.
Identifiers: LCCN 2018012974 (print) | LCCN 2018026770 (ebook) | ISBN 9781509520763 (Epub) | ISBN 9781509520725 (hardback) | ISBN 9781509520732 (pbk.)
Subjects: LCSH: Hart, H. L. A. (Herbert Lionel Adolphus), 1907-1992. | Law–Philosophy. | Jurisprudence. | Law–Interpretation and construction. | Law–Methodology. | Law–Moral and ethical aspects.
Classification: LCC K231 (ebook) | LCC K231 .K73 2018 (print) | DDC 340/.1–dc23
LC record available at https://lccn.loc.gov/2018012974

Typeset in 10.5 on 12 pt Palatino
by Toppan Best-set Premedia Limited
Printed and bound in the UK by CPI Group (UK) Ltd, Croydon

Contents

Preface

A few points of terminology should be highlighted here. First, whereas H.L.A. Hart persistently used the terms "rule" and "rules" in his writings, I much more often instead use the terms "norm" and "norms." My reason for doing so is that Hart's employment of the former terms led Ronald Dworkin (in his early critiques of legal positivism) to infer mistakenly that Hart was differentiating rules from principles. Dworkin concluded that the jurisprudential model expounded in *The Concept of Law* would not encompass principles. To avoid the confusion engendered by Dworkin on that point, I will usually employ the word "norm" to denote a standard that is endowed with any degree of abstraction or specificity and with any degree of vagueness or precision. Still, I will sometimes use the word "rule" (or "rules") as a synonym for "norm" (or "norms").

Second, some of the occasions on which I do use the term "rule" in that manner are any junctures at which I am discussing Hart's notion of the rule of recognition. Because the phrase "rule of recognition" is such a specialized and well-known item of Hart's parlance, any substitution of "norm" for "rule" in that bit of his wording would be unhelpful. However, in order to signal the specialized character of his phrase, I have departed from Hart by using uppercase letters; in this book, as in quite a few of my other writings, I employ the label "Rule of Recognition" (rather than "rule of recognition") to designate the fundamental standards for identifying the legal norms in any jurisdiction.

Third, in my penultimate chapter I also use upper-case letters to distinguish between the Rule of Law and the rule of law.[1] Whereas the Rule of Law is a moral ideal that comprises the formal and procedural aspects of a liberal-democratic system of governance, the rule of law obtains whenever a legal system of governance exists (regardless of whether the system is liberal-democratic or authoritarian). Unlike the Rule of Law, the rule of law is not an inherently moral ideal.

Fourth, I use the terms "legitimate" and "permissible" – and "legitimacy" and "permissibility" – interchangeably throughout the book. Hence, a course of conduct CC is morally legitimate if and only if it is not in contravention of any moral duties. An ascription of moral legitimacy to CC does not per se indicate whether CC is also morally obligatory, nor does it per se indicate whether the adoption of CC will impose some moral obligations on anyone. All that can be inferred from such an ascription is that CC is morally not wrong.

Fifth, I employ the word "citizens" in this book to denote private individuals (including public officials in their capacities as private individuals). That word is not limited to the individuals in any jurisdiction who are full members of the polity there. It extends also to residents who are not such members. The operative contrast is not between citizens and other residents, but is instead between citizens and people who are acting in their capacities as officials.

Sixth, I use the following terms and phrases interchangeably: "viewpoint," "point of view," "perspective," "standpoint," "vantage point."

Seventh, I use the term "valid" (or "validity" or "validly") in two main ways. When I refer to the validity of norms as laws in a jurisdiction, I am following Hart in talking about the inclusion of those norms in the array of laws comprised by a system of governance. When I refer to the validity of an argument or an inference, I am talking about validity in the ordinary logical sense. That is, an argument is valid if and only if it cannot be the case that all the premises of the argument are true and its conclusion is false.

Any citations consisting solely of page numbers are citations to the second edition (1994) of *The Concept of Law*. Every citation to some other work – whether the work is by Hart or by anyone else – includes the year of publication. Each such citation also includes

[1]As is evident, the word "rule" in the phrase "the rule of law" is not being used as a synonym of "norm."

the author's surname if the identity of the author has not been clearly specified in the text.

I thank George Owers at Polity Press for commissioning this book in 2016, and I thank Julia Davies and Rachel Moore and Sarah Dancy at Polity Press for helping to steer the book through the process of production. I am also grateful to the two anonymous readers of the book proposal which I submitted in response to the commissioning invitation. Their comments were very helpful. Extremely helpful as well was an anonymous assessment of the antepenultimate version of the book. Equally valuable have been a number of conversations with one of my current PhD students, Jyr-Jong Lin. My reflections on the import of power-conferring norms and on Hart's intermittent neglect of that import have been greatly sharpened by my discussions with Jyr-Jong, whose own approach to such matters is interestingly different from mine.

Cambridge, England
November 2017

1

A Discourse on Method

A full exposition of the philosophy of H.L.A. Hart would cover five main areas: (1) legal positivism and the general nature of law; (2) causation in the law; (3) responsibility and punishment; (4) the nature of rights; and (5) liberal political philosophy and civil liberties. His writings in each of those categories will continue to influence philosophical debates for many generations to come, but there is little doubt that the magnitude of his achievement is greatest in the first category. *The Concept of Law* will continue to be read – in its original language or in any of the myriad of languages into which it has been translated – until human beings altogether cease to be interested in the philosophy of law. It has rightly attained a place among the foremost classics in that area of philosophy. Hence, given that the limit on the length of each volume in the Key Contemporary Thinkers series will require selectivity in my engagement with Hart's *oeuvre*, the appropriate focus for that engagement is quite straightforward. Although the present book will occasionally refer to Hart's work on some of the other topics listed above, it will concentrate chiefly on *The Concept of Law* and on several of his main essays that likewise explore the fundaments of legal systems.

My principal aim in this book is to expound Hart's arguments and to assess their philosophical merits. Matters of intellectual history will enter into this volume only insofar as they help to shed light on the substance or quality of Hart's lines of reasoning. This rigorously philosophical orientation tallies nicely with his own objectives

in writing *The Concept of Law*. As Hart stated at the outset of his classic text (vii), he sought to contribute to the philosophy of law rather than to the history of ideas.

Before we examine Hart's philosophical thinking, however, we should glance at his life.[1] Herbert Lionel Adolphus Hart was born into a Jewish family in Yorkshire, England in 1907. He pursued his undergraduate education at New College, Oxford, where he obtained a degree in 1929 in Literae Humaniores (a mixture of classical languages, ancient history, and philosophy). After completing his undergraduate endeavors, he undertook private studies in law that led to his qualifying as a barrister in the English legal profession. Having practiced law in London for several years during the 1930s, he worked for the British intelligence service MI5 during World War II. When the war ended, Hart returned to Oxford to take up a fellowship in philosophy at New College. In 1952, he was elected to Oxford's Professorship of Jurisprudence and to a concomitant fellowship of University College. Through his publications and his training of students, he made Oxford into the world's pre-eminent center of jurisprudential scholarship. A few years after stepping down from the Professorship of Jurisprudence in 1968, he became Principal of Brasenose College, Oxford. During the closing years of his career as an active scholar, he devoted much of his time to editing and interpreting the works of Jeremy Bentham. Hart died at the age of 85 in 1992. Many former students of his, including Joseph Raz, John Finnis, Neil MacCormick, Herbert Morris, and Wilfrid Waluchow, have been among the most prominent legal philosophers of the next generation.

1 Posing the questions

The opening chapter of *The Concept of Law* is a discourse on method. That is, Hart there broached the questions which he would address and the general approach which he would adopt for coming up with answers to those questions. His overarching concern was to delineate the general characteristics of law or of legal systems. However, instead of directly tackling that concern as a single question – the question "What is law?" – he differentiated among three main avenues of investigation that could together yield an answer to the overarching inquiry.

First, Hart proposed to ferret out the similarities and dissimilarities between the mandates introduced by a legal system and the

orders uttered by a gunman. To what extent are the operations of a legal system analogous to the issuance of dictates that are backed by threats of force? In other words, to what extent are the multifarious legal relations in any society analogous to an array of starkly coercive relations? Hart addressed this question predominantly in the first half of his book, though naturally he drew upon his responses to it – implicitly or explicitly – throughout the rest of the volume.

Second, Hart sought to pin down the differences and affinities between legal requirements and moral requirements. Law shares with morality a repertoire of key notions. Both in legal systems and in the domain of morality, we encounter duties and rights and liberties and powers and immunities and so forth. Both legal norms and moral norms are authoritative standards by reference to which the normative import of anyone's conduct can be gauged. Are legal obligations, then, a subset of moral obligations? Is there always a moral obligation to comply with legal requirements? These and other questions pertaining to the relationships between law and morality were addressed by Hart primarily in the eighth and ninth chapters of *The Concept of Law* (and in some of his concomitant essays), but he touched upon them in virtually every other chapter as well.

Third, Hart endeavored to explain what norms are, as he pondered the extent to which any legal system operates as a system of norms. When we ask what norms are, we are asking about the difference that is made by the presence of any norms. What is the difference between behavioral regularities that occur through the guiding sway of some norms and behavioral regularities that are not similarly oriented toward any such guiding sway? What is the difference between an adjudicative or administrative decision that implements some pre-existent norm(s) and an adjudicative or administrative decision that is not similarly an application of any such norm(s)? To what extent do the decisions by adjudicators and administrators in a legal system give effect to laws that prescribe determinately correct outcomes, and to what extent do those decisions amplify or modify the existing law through discretionary choices? Hart came to grips with these questions in the early chapters of *The Concept of Law* and in the pivotal seventh chapter. Given his commitment to the proposition that legal systems are systems of norms, and given the centrality of that proposition in his efforts to differentiate his own theorizing from that of his great legal-positivist predecessors Jeremy Bentham and John Austin, the success of his

jurisprudential project hinged in no small part on the adequacy of his answers to these questions.

2 Elucidation of a concept

Together, the three foregoing lines of enquiry can lead to a distillation of the fundamental properties of legal systems. In setting out to pursue those lines of enquiry, Hart aspired to elucidate the prevailing concept of law. Such a characterization of his project is easily misunderstood, however. As will be emphasized shortly, he was not engaging in a lexicographical enterprise whereby he would try to formulate necessary and sufficient conditions for the applicability of the term "law" or of the phrase "legal system." On the contrary, he repeatedly indicated that he regarded any such definitional endeavor as futile and misguided. Thus, although concepts undoubtedly correspond to general terms that are associated with them, the concept of law which Hart sought to elucidate is not a matter of linguistic usage. Rather, it is a way of understanding or apprehending some phenomenon. It is an understanding of law (or of legal systems) that informs everyday discourse and reflections.

Hart sketched that understanding of legal systems in some very early pages of *The Concept of Law* that are frequently overlooked or forgotten. Near the outset of his introductory chapter, he attributed to "[m]ost educated people" – or to "[a]ny educated man" – a general awareness of the structures of legal systems and a general familiarity with various types and instances of the laws that emanate from those systems (2–3). Such awareness and familiarity are components of the common-sense knowledge acquired by any reasonably well-educated person as a result of growing up in a society with a functional system of governance. That common-sense understanding is what Hart ventured to illuminate through his philosophical ruminations.

When Hart maintained that he was endeavoring to elucidate that everyday understanding of law – the concept of law – he meant that he was clarifying and refining it by expounding its presuppositions and entailments. In other words, he was attempting to show both what is taken for granted by that understanding and what follows from it. With his exposition of the nature of law, he was of course trying to shed light on an array of major institutions that profoundly affect the lives of people wherever those institutions operate, but he was also trying to acquaint his readers better with

themselves. By gaining a more sophisticated comprehension of the workings of legal systems, Hart's readers can likewise gain a more sophisticated grasp of their own outlooks and assumptions.

Hence, the title of Hart's classic text denotes both the starting point and the destination of his enquiry. Hart embarked on his jurisprudential reflections by adumbrating a simple understanding of law that is serviceable for nearly all ordinary purposes. He then parlayed that elementary understanding into a philosophically rigorous theory, by elaborating its underpinnings and corollaries. Having begun with a relatively superficial concept of law, he finished with a greatly deepened concept.

What should be noted here is that the quotidian understanding of legal institutions that serves as the point of departure in *The Concept of Law* is indispensable for the very intelligibility of the book's theorizing. Hart relied throughout on the familiarity of his readers with the notions which he needed to invoke in order to develop a philosophical account of law. Had he and his readers not already been possessed of a pre-theoretical comprehension of law, he could not have arrived at a refined theoretical comprehension – because the transition from the former to the latter requires the building blocks which the former provides. Neither a philosophical theory nor any other theory can arise from nowhere; some propositions have to be treated as givens if a theory is to have any basis for its conclusions and any material for reaching those conclusions. In *The Concept of Law*, the paramount givens are the common-sense items of knowledge which Hart imputed to most educated people near the beginning of his book.

3 A method of central instances

Having framed the questions which he would tackle, and having recounted the elementary understanding of legal systems that would be his point of departure, Hart concluded the opening chapter of *The Concept of Law* by mulling over the method through which he would answer those questions. As has already been observed, he firmly eschewed any aspiration to supply a definition of the term "law" or of the phrase "legal system." As he wrote, "it seems clear, when we recall the character of the three main issues which we have identified as underlying the recurrent question 'What is law?', that nothing concise enough to be recognized as a definition could provide a satisfactory answer to it" (16). Believing that a definitional

approach would consist in distilling the individually necessary and jointly sufficient conditions for the applicability of the term "law" or of the phrase "legal system," Hart was concerned that any such approach would be fruitless and inordinately rigid. It would oblige him to resolve certain matters straightaway – matters relating to marginal or borderline types of legal systems – which he wished to defer to the end of his investigation. Had he shaped the key elements of his theory to take account of those marginal matters *ab initio*, he would have been allowing the tail to wag the dog. He would have been skewing the central portions of his theory by adjusting their contours to fit the peripheral portions. Or so Hart contended, as he remarked that peripheral instances of legal systems would be "only a secondary concern of the book. For its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested."[2]

This relegation of the borderline types of legal systems to the end of Hart's enquiry is indicative of the method at the heart of the enquiry. Hart embraced that method through his rejection of the cardinal assumption that underlies a definitional approach: namely, the assumption that the sundry phenomena covered by the concept of law are related to one another through their sharing of some distinctive set of properties. Hart did not deny that the phenomena grouped together by some other concept could be related to one another in such a fashion, but he maintained that the concept of law is different. He submitted that, when we contemplate the multifarious arrangements or institutions to which the concept of a legal system can correctly be applied, we will not find any set of distinctive characteristics common to every one of them.[3] Instead of searching quixotically for such a set, Hart trained his focus on central or standard instances of legal systems. With the aim of developing a jurisprudential theory that would encompass all of those central instances by specifying the key features which they share, he would then be in a position to judge whether the theory also encompasses any number of marginal instances of legal systems.

Central or standard instances of legal systems are central in two closely connected ways. First, the classification of any such instance as a legal system is clear-cut. Each such instance is a paradigm, in that its status as a legal system would be unproblematically recognized by anyone who can competently differentiate between things that are legal systems and things that are not. In this first sense, then, the centrality of an instance of a legal system resides in the straightforwardness of its status as such.

Second, central or standard instances of legal systems are central in that any marginal instances of such systems are comprehended under the concept of law (or the concept of a legal system) by virtue of their relations to the central or standard instances. Hart adverted to a number of different types of relations that can obtain between central and peripheral instances of various phenomena, but he contended that the most important such relations for the concept of law are resemblances of function and content. He affirmed that marginal instances of legal systems – for example, international law and the rudimentary systems of governance in very small and simple societies – are included within the scope of the concept of law because their functions and contents resemble those of the national legal systems which are straightforwardly within that scope. In Hart's view, resemblances of function and content are the cement that holds together the extension of the concept of law as they compensate for the absence of any distinctive set of properties that could correctly be ascribed to absolutely everything comprised by that extension.[4] Because the resemblances are to the central or standard instances of legal systems, those instances are collectively the pivot on which the complex unity of the concept of law depends.

Until the final chapter of *The Concept of Law*, Hart concentrated on the features of the central instances of legal systems. Until that closing chapter, he touched only occasionally upon the marginal instances of such systems. As has already been suggested, he shaped the main components of his theory to fit the central instances of legal systems without trying to ensure (or deny) that those components would also fit the marginal instances. Thus, when he presented the fundamental tenets of his theory, he did so with reference to paradigmatic legal systems rather than with reference to all legal systems. Readers who keep this point in mind can thereby avoid confusion at certain junctures as they peruse Hart's text. Most notably, this point should be kept in mind by anyone when reading the sixth chapter of that text. There, as we shall see later, Hart formulated "two minimum conditions necessary and sufficient for the existence of a legal system" (116). Rather perplexingly, the quoted wording appears to smack of the definitional approach which Hart disparaged in his opening chapter and in subsequent portions of his book. However, if we recognize that he was specifying necessary and sufficient conditions for the existence of a central or standard instance of a legal system – rather than for the existence of absolutely anything that would count as a legal system – we can grasp that the quoted wording is fully reconcilable with his shunning of a

definitional approach. Even where Hart neglected to make explicit his employment of a central-instance method, that method suffuses *The Concept of Law*.

4 A philosophical scope

Although Hart put together the constituents of his jurisprudential theory to fit the central instances of legal systems (while only later determining whether those constituents also encompass the marginal instances), his theory is in another respect sweepingly broad. It comprehends all central instances of legal systems rather than only the legal system of this or that particular jurisdiction, and indeed it comprehends all central instances of legal systems that could credibly exist rather than only those that do exist. It is a philosophical theory that covers not only all actualities but also all credible possibilities.

By devising a theory that transcends particular jurisdictions, Hart pursued a project that differed markedly from the theorizing which he associated with his nemesis Ronald Dworkin. Hart took Dworkin to be propounding a model of law (or a model of adjudication) focused solely on the American and English legal systems. Whatever may be the merits of Dworkin's model as an account of Anglo-American law and adjudication, Hart contended, it is jurisdiction-specific rather than jurisdiction-transcendent. Hart quoted Dworkin's assertion that a theory of law should be "addressed to a particular legal culture" (Dworkin 1986, 102, quoted in Hart 1994, 240). Such a theory is "interpretive of a particular stage of a historically developing practice" (Dworkin 1986, 102). Hart pointedly dissociated himself from the parochialism of Dworkin's jurisprudential approach, as he emphasized that his own theorizing was "not tied to any particular legal system or legal culture" (239).

In addition to transcending the boundaries among particular jurisdictions, Hart's exposition of the nature of law transcends the divide between the actual and the potential. With his delineation of the necessary and sufficient conditions for the existence of any central or standard instance of a legal system, Hart was not developing a theory that might somehow be falsified by the emergence of a new paradigmatic legal system in the future. If any system of governance SG arises without some feature identified by Hart as a necessary condition for the existence of a central instance of a legal system, and if Hart's theory is correct, then the conclusion

follows that SG is not such an instance (though of course it might be a marginal instance). His account of law is insusceptible in this manner to empirical falsification, precisely because the properties encapsulated by that account are essential features in any central instances of legal systems that might exist henceforward as well as in any central instances that have existed heretofore. Hart propounded a philosophical theory rather than a social-scientific or historical theory.

To be sure, the distinction between philosophical enquiries and social-scientific enquiries is not always clear-cut. As John Gardner has warrantedly opined, the explorations of social institutions undertaken by philosophers are not radically different from the most abstract ruminations undertaken by sociologists such as Max Weber and Emile Durkheim (2012, 277–9). Still, although the division between social philosophy and social science is blurred at its edges, there remains on the whole a pregnant difference between the empirical generalizations of social-scientific investigation and the conceptual theses of philosophical contemplation and analysis. At a high level of abstraction, those latter theses delimit the boundaries for the classification of any empirical findings. Whereas empirical generalizations are always susceptible to falsification or circumscription by new findings that reveal those generalizations to be untenable or excessively sweeping, the conceptual theses propounded by philosophers are not similarly susceptible to empirical falsification or circumscription – though of course they are susceptible to falsification or circumscription by philosophical reasoning which exposes some missteps or other inadequacies in the arguments that undergird those theses. This insusceptibility to empirical falsification stems from the fact that a philosophical explication of some phenomenon specifies the conditions on the basis of which anything either does count or does not count as an instance of that phenomenon. If some new findings are not in accordance with those conditions, then *ipso facto* the findings have not unearthed any instances of the phenomenon in question and have thus not supplied any grounds for concluding that the philosophical explication of that phenomenon is fallacious or inordinately broad. (A caveat should be entered here. Philosophers do sometimes successfully argue against the theories of their opponents by adverting to empirical entities or occurrences that are at odds with those theories. However, such rebuttals would be just as effective if the entities or occurrences adduced against the impugned theories were merely thought-experiments rather than things that have emerged in the actual world. After all, the

point of any such rebuttal is to establish that a targeted theory has overlooked or mishandled some credible possibility; quite irrelevant for that purpose is the question whether the credible possibility has materialized as an actuality in the world or not. Hence, notwithstanding that one's invocation of some empirical entity or occurrence in one's challenge to a philosophical theory may superficially appear to be an empirical refutation of the theory, it is in fact – if successful – a refutation through philosophical reasoning.)

Like Hart's central-instance method, the philosophical character of his theorizing should be kept persistently in mind by readers of *The Concept of Law*. During the several decades since the book was first published, quite a few readers have mistakenly presumed that Hart therein embarked upon an anthropological enquiry into the origins of legal systems. His fairly frequent comments about transitions from pre-legal societies to legal systems of governance have fostered this confusion about the orientation of his jurisprudential project. As we shall see later, his references to such transitions are especially misleading in the fifth chapter of his text. There Hart sought to illuminate the nature and significance of the legal norms which he (somewhat unhelpfully) designated as "secondary." For that purpose, as we shall see, he contrasted a situation marked by the absence of secondary laws and a situation marked by the presence of such laws. His drawing of that contrast has quite often been perceived as an excursion into anthropological speculation whereby he was advancing a hypothesis about the ways in which legal systems of governance have evolved from pre-legal beginnings. Were his critics correct in perceiving his project as anthropological, they would also be correct in condemning that project as dubiously conjectural – since Hart did not undertake any empirical studies that might substantiate the hypothesis just mentioned. In fact, however, the discussion of secondary legal norms in *The Concept of Law* is not an instance of anthropology or of any other social-scientific theorizing. Instead, Hart engaged there in a philosophical endeavor to highlight and elucidate the important functions performed by those secondary norms. He did so by prescinding from all the effects of secondary norms and by then pondering how the patterns of intercourse among human beings would falter without those effects. His prescinding from those effects was an abstract thought-experiment, rather than a depiction of a society that ever has existed or ever could exist. By imagining the absence of secondary norms, Hart rightly presumed, we can vividly grasp the far-reaching import of such norms in every credibly possible society. He undertook a philosophical quest for

clarification, rather than an anthropological quest for origins or causes. We shall return to this point in Chapter 3.

5 Variations across societies

Although Hart strove to craft a theory that would embrace all central instances of legal systems (both the central instances that actually exist and those that could ever credibly exist), one conspicuous feature of his theorizing is an emphasis on the variations among legal systems across jurisdictions. That emphasis was perhaps most prominent in his legal-positivist insistence on the contingency of any substantive connections between law and morality. As will be explored in my penultimate chapter, Hart ventured to confute a multiplicity of claims by natural-law theorists about ostensibly necessary ties between law and morality. In so doing, he repeatedly drew attention to the divergences among legal systems in their moral worthiness or unworthiness – and in the degree to which moral considerations figure as bases for legal judgments and as factors that motivate officials and citizens to abide by legal norms. When legal positivists such as Hart affirm the separability of law and morality, they are affirming that the moral bearings of systems of law are variable in these sundry respects.

Another aspect (a partly related aspect) of Hart's emphasis on the diversity of the central instances of legal systems will become apparent in Chapter 4. Important though his reflections on legal reasoning and interpretation are, Hart did not provide any detailed guidance on how legal reasoning does proceed or on how it should proceed. Yet he did not thereby fail to accomplish something which he set out to achieve. On the contrary, his disinclination to furnish such detailed guidance was largely due to his recognition that the techniques of legal reasoning and interpretation vary significantly across jurisdictions. Notwithstanding some fundamental and crucial similarities among the techniques that prevail in different societies, their specifics often diverge markedly from one society to another. Hart was attuned to such divergences and was thus extremely doubtful that a jurisdiction-transcendent account of the nature of law can usefully supply a template of the ways in which laws are construed and applied by legal officials.[5] Largely because he distanced himself from Dworkin by holding that a theory of the nature of law can and should be jurisdiction-transcendent, he was loath to join Dworkin in unfolding an elaborate model of adjudication which might

accurately encapsulate the practices in some jurisdictions but which would not capture well at all the practices in other jurisdictions.

Hart also accentuated the obvious variability of the contents of laws across societies. To be sure, as my penultimate chapter will recount, Hart in his meditations on the "minimum content of natural law" did maintain that some elementary prohibitions on very serious misconduct have to be included among the laws in every system of governance that is to endure for any extended period of time. However, as we shall behold, he left ample room for differences of substance across societies even in relation to the basic prohibitions that are highlighted by his minimum-content-of-natural-law argument. (Some of those differences of substance are morally potent.) *A fortiori*, he left ample room for differences of substance across societies in relation to countless laws other than those prohibitions. Indeed, the overwhelming likelihood that such differences will obtain is a corollary of the insistence by legal positivists that laws in any society exist as such only through the law-establishing activities of human beings. Because the activities that give rise to laws are themselves so heterogeneous across jurisdictions, the contents of the laws that eventuate from those activities are likewise highly variable from one jurisdiction to the next.

In sum, while Hart sought to limn the fundamental structures and procedures of any central instances of legal systems, he simultaneously laid stress on a welter of far-reaching dissimilarities among such systems. Indeed, the very features which he perspicaciously singled out as common to all central instances of legal systems are promotive of those dissimilarities, for the basic structures and procedures of legal systems can be instantiated in multitudinously diverse ways. The substance which fills their forms is inevitably shaped by the contingencies of history and geography and culture. Hart was not only cognizant of the diversity bred by those contingencies, but was furthermore insistent on it as he highlighted the dispositiveness of human actions and decisions and attitudes in determining what counts as the law in any particular society.

6 A descriptive-explanatory methodology

A key to understanding Hart's theory of law is to recognize that his objectives in designing the theory were descriptive-explanatory rather than moral. Unlike Dworkin, Hart did not set out to vindicate legal institutions morally by ascribing to them some especially

worthy point or purpose which they subserve. He of course did not deny that legal institutions can perform morally worthy and vital roles, but his aim was to shed light on the workings and contours of those institutions rather than to justify them morally. Among the many junctures at which Hart articulated that aim clearly is the end of his opening chapter in *The Concept of Law*, where he stated that he was endeavoring to "advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena" (17). He echoed that sentiment throughout the text, as when he declared that he was concentrating on certain phenomena in his theory "because of their explanatory power in elucidating the concepts that constitute the framework of legal thought" (81). Similar pronouncements abound in *The Concept of Law*, not least in the book's Postscript where Hart sustainedly retorted to Dworkin. There Hart affirmed that he sought "to give an explanatory and clarifying account of law as a complex social and political institution" (239). He pointedly added: "My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law" (240, emphasis in original). Thus, Hart parted ways with Dworkin not only on the matter of the suitable scope of jurisprudential theorizing, but also on the question whether such theorizing is endowed with a moral mission or not.

6.1 Theoretical-explanatory virtues

For an account of law that is directed at elucidation and explanation rather than at commendation or censure, the strengths and shortcomings of the account are to be gauged by reference to theoretical-explanatory values rather than by reference to moral values. Among the main theoretical-explanatory virtues for which philosophers strive are clarity, precision, parsimony, adequacy, consilience, breadth, and depth. (Parsimony consists in the avoidance of superfluous hypotheses. Adequacy consists in covering all or nearly all the phenomena which a theory aspires to explain, instead of omitting or distorting substantial swaths of those phenomena. Consilience

consists in the reinforcement of one's conclusions through one's reaching them from a number of different angles or via a number of different methods.)

Hart commended each of these theoretical-explanatory virtues, and he essayed to achieve them in his own work. For example, he famously wrote that the American jurist Oliver Wendell Holmes "was sometimes clearly wrong; but … when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence." Hart continued: "Clarity I know is said not to be enough; this may be true, but there are still questions in jurisprudence where the issues are confused because they are discussed in a style which Holmes would have spurned for its obscurity" (1983, 49). In light of his high esteem for the clarity of Holmes's prose and analyses, it is not surprising that Hart strove for clarity in his own philosophizing. Throughout *The Concept of Law*, Hart characterized his project as an effort to elucidate the properties of legal systems and the concepts of legal thought. At the outset of his book, he indicated the obscurity which he was trying to overcome. That obscurity had arisen from the exaggeratedness and tendentiousness of the theses propounded by many of his predecessors in legal philosophy, including Holmes. As Hart commented on the endeavors of those predecessors, which were at once illuminating and obfuscatory: "They throw a light which makes us see much in law that lay hidden; but the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole" (2).

Hart similarly pursued the other cardinal theoretical-explanatory virtues in his ruminations on law. Let us consider one further instance: the virtue of adequacy. As will be seen in my next chapter, Hart forcefully complained that John Austin's model of law omits or grossly distorts most of the phenomena which any adequate account of law would encompass accurately in its explanatory schema. Austin's theory altogether disregards power-conferring laws, for example, and it egregiously distorts the bearings of sundry other phenomena such as custom-derived laws. Because of the numerous lacunae and misrepresentations in Austin's theory, its attempt to expound the fundaments of legal systems with "the simple idea[s] of orders, habits, and obedience, cannot be adequate for the analysis of law" (77). Hart allowed that Austin's writings generally partake of the virtue of clarity to a high degree, but he persuasively contended that they fall woefully short in the extent to which they partake of some of the other theoretical-explanatory virtues such as adequacy.