

Preface

Analytical jurisprudence became popular almost instantly in 1961 with the publication of H.L.A. Hart's *The Concept of Law*, but as readers familiar with this classic text know all too well, Hart included no sustained discussion of the particular method he employed to arrive at some of the most distinctive claims discussed in contemporary legal theory today. Many have supposed that Hart was simply engaged in conceptual analysis, a common philosophical technique of discerning necessary and sufficient conditions of some concept by *a priori* reflection on possible instances to see where our linguistic intuitions lie. On the basis of this method, we learn about the concept of law by making explicit what is already implicit in our knowledge of law. No new experience or neutrality-compromising interests are invited or required.

It might have been possible for legal philosophers working during Hart's time to follow him in assuming rather than explaining the use and goals of analytical jurisprudence, but this is no longer possible for the current generation. The association of analytical jurisprudence with conceptual analysis of law, and the persistent attack on conceptual analysis both within and outside legal philosophy, have forced analytical legal theorists to make plain the nature of their method, and investigate any connections it might (or might not) have with familiar forms of conceptual analysis. This book offers some initial steps towards this objective. I aim to demonstrate that the challenges often levelled against analytical jurisprudence, and especially its perceived use of conceptual analysis, help to show – perhaps surprisingly – that conceptual theories of law such as Hart's are *not* in fact best understood as the results of *conceptual analysis*, but instead of *constructive conceptual explanation* of law. While conceptual analysis concerns itself with elucidating or making explicit what is already implicit in some particular culture's self-understanding of law, constructive conceptual explanation attempts to correct, revise or improve on what might be mistaken, distorting or parochial in that self-understanding when tested against observable social reality. More precisely, I shall argue that it must be acknowledged to a much greater degree than ever before that (a) conceptual theories are and should be responsive to shifts in the phenomena of law and social reality, (b) philosophical assessment

of conceptual claims about law has a crucial critical dimension, and (c) conceptual explanation of law can and does often proceed by means of identification of necessary as well as contingent features and relations of law. These acknowledgements should not be seen as lamentable signs that the time of analytical jurisprudence has come to an end. Quite the opposite. Constructive conceptual explanation is inescapable, valuable and still properly philosophical in many ways. Further, responsiveness to facts, the constructive aspect of conceptual explanation, and recognition of contingent features and relations show a hitherto unnoticed but powerful potential for continuity between conceptual explanation, moral evaluation and social scientific investigation of law, three diverse methodological approaches whose competition has too often been assessed as a kind of winner-take-all contest rather than an opportunity for mutual learning and interaction. While winner-take-all debates can be exciting and ambitious, they can also be misleading and downright counter-productive. Instead, the account of continuity I shall develop in this book offers the chance for conceptual theorizing of law not just to survive but to thrive again. The key will be to situate rather than isolate the role of conceptual theory in legal theory.