PRINCIPIA LXV (2018): 113–143
PL-ISSN 0867-5392
DOI 10.4467/20843887PI.18.005.9888

Adam Dyrda

Truisms, Heuristics and the Concept of Law

Truizmy, heurystyki i pojęcie prawa

Summary

Analyses of the concept of law rely on certain self-evident truths: truisms (platitudes) about law that people generally share and which reflect their common understanding of this important social concept. General legal theories are products of such analyses. In this paper I argue that every reference to truisms in the context of legal theory building should also take into account inferential processes by which truisms themselves are coined, namely different types of heuristics about law and related phenomena. Since both truisms and heuristics are unstructured, often inconsistent, and even fallible, conceptual analyses are the main means of transforming such "raw" evidence into rationally structured legal theories.

Keywords: conceptual analysis, truisms, platitudes, general jurisprudence, heuristics, law, Scott Shapiro

Streszczenie

Analizy pojęcia prawa odwołują się do szczególnego rodzaju oczywistych prawd: tzw. truizmów o prawie, które wypowiadają członkowie danej społeczności, a które odzwierciedlają ich wspólne rozumienie tego ważnego pojęcia społecznego. Ogólne teorie prawa powstają w wyniku prowadzenia tego rodzaju analiz. W tym artykule argumentuję, że każde odpowiedzialne odwołanie się do truizmów w kontekście budowy teorii prawa powinno także uwzględniać procesy rozumowania, które doprowadzają do wykształcenia się truizmów w danej populacji, a są nimi rozmaite rodzaje heurystyk na temat prawa i powiązanych z nim zjawisk społecznych. Z uwagi na to, że zarówno same truizmy, jak i heurystyki nie mają jednolitej struktu-

ry i bywają niespójne, analizy pojęciowe stanowią główne sposoby przekształcenia tego „surowego" materiału dowodowego w racjonalnie uporządkowane teorie prawa.

Słowa kluczowe: analiza pojęciowa, truizmy, ogólna teoria prawa, heurystyki, prawo, Scott Shapiro

1. The pragmatic character of conceptual analysis

Many contemporary legal philosophers who work within the field of general jurisprudence engage in conceptual analyses of fundamental legal concepts. Their most general concern pertains to the very concept of law. Those legal philosophers seem to apply the descriptive method of analysis that is quite traditional in its merit, and only modern in its form, such as Canberra-style conceptual analysis (or some methodologically weakened version of it; Shapiro 2011). Usually, this kind of analysis – as pursued in its modest version – is supposed to "tell us what to say in less fundamental terms given an account of the world stated in more fundamental terms" (Jackson 1998, 44).[1] As such, the analysis is supposed to "resolve and explain what is complex in more simple terms" (Himma 2015, 74). Thus, it seems that such modern understanding of conceptual analysis strongly relies on a traditional, "decompositional" type of analysis.[2] This method still seems to be a viable position in legal theory, notwithstanding the force of the pragmatic critique of the analytic-synthetic distinction and

[1] Frank Jackson describes conceptual analysis also as "the very business of addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary" (Jackson 1998, 28).

[2] It seems obvious that Jackson's analysis, which seeks to increase the understanding of our concept usage by reducing complex concepts to sets of more fundamental concepts, is "decompositional"; the main idea is to speak to people "in their own language" (Harper 2012, 235–256).

the prominence of arguments characteristic of the so-called naturalistic turn. In fact, as B. Leiter observes, legal philosophy "proceeds via conceptual analysis and intuition-pumping as though nothing had transpired in philosophy in the last forty years" (Leiter 2001, 142–146; cf. Taekema, van Klink, and de Been 2016, 12).

In this respect, the revived method of analysis is still used to analyze the "Fregean" concepts that fulfil the criteria of compositionality and refer to logically consistent, independently existing contents ("senses" or "thoughts"). The method of analysis is supposed to "unpack" or "grasp" these contents. Unquestionably, however, such a method cannot be used to analyze more psychologically-determined concepts which, by their very nature, do not fulfill such criteria.[3] It is a matter of philosophical controversy whether Fregean concepts exist and thus can be analyzed in a traditional way by philosophers who are fully competent users of language (Goldman 2007, 1–26). The analysis of such concepts would strongly depend on a certain linguistic ability, often referred to as "mastery of the concept," which is a kind of fully rational ability to provide an *accurate* and *complete* description of the concept's internal structure.

Still, even if such concepts exist, there may be other types of concepts. In that case, the other standing controversy would be whether concept-terms that we are actually interested in are Fregean concepts or not. A mistake in answering that question may lead to related mistakes concerning the choice of

[3] In my view important social and institutional concepts are, at least partly, psychologically determined, so the classical method of analysis cannot be used to "unpack" them. Their conceptual core is fixed by social, common beliefs (folk theories) comprised of truisms that depend on certain probabilistic arguments. As such, they do not possess a well--structured conceptual core like Fregean concepts. What makes psychological concepts less complete and logically structured and thus, not compositional would entail discussion that lies beyond the scope of this paper.

the appropriate method of analysis itself (including mistaking one type of analysis for another).[4]

Many concept-terms do refer only to contents (conceptual cores) that exist in fragmentary and ephemeral forms, in which they usually cannot be used in discursive, logically-coined arguments. As such, these concepts need refining and further methodological treatment that may be mistakenly taken to be a decompositional analysis. Truisms that set up the foundation of a concept's reference are, in the case of "law," manifold and inconsistent, and thus allow for many alternative, equally appropriate "cores" of the concept. In the latter case, the establishment of conceptual content, as a target of "conceptual analysis," is a matter of choosing certain sets of truisms about law, describing related, but fallible *heuristics* that people generally apply when they think about the concept-terms in question in real-life situations and by these means "explicating" (i.e. making more *explicit*) the discussed concept. Certainly, the analysis of the former type, which is the analysis *qua* description of the established content, and the analysis of the latter type, which is – as I argue – the analysis that aims at *establishing* such content on the basis of (necessarily) fragmentary evidence, are two different types of analysis.

The classical method of analysis may be successfully compared to detective work. In his recent book, *Legality*, S. Shapiro wrote:

> Conceptual analysis can easily be thought of as a kind of detective work. Imagine that someone is murdered. The detective will first look for evidence at the crime scene, collecting

[4] One may simply think that (s)he conducts a descriptive, decompositional analysis, where, in fact, it would be a creative, intuitive activity. Recently, such a mistake has often been ascribed to legal positivists (who, like Hart, think that they provide a descriptive account of law) by normatively-oriented theorists (like R. Dworkin or S. Perry) who argue that what positivists provide, in fact, is a conceptual construction rather than a description.

> as many clues as she can. She will study those clues hoping that the evidence, coupled with her knowledge of the world and human psychology, will help eliminate many of the suspects and lead her to the identity of the killer.
> In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely, to elucidate the identity of the entity that falls under the concept in question. The major difference between the philosopher and the police detective is that the evidence that the latter collects and analyses concerns true states of affairs whereas the former is primarily interested in *truistic ones*. The philosophical clues, in other words, are not merely true, but self-evidently so.
> The key to conceptual analysis, then, is the gathering of *truisms* about a given entity. […]
> Again, truisms are the clues that help us determine the identity of the object in question. Although it is not necessary that our answer satisfy every single truism, we must try to come up with a theory that accounts for as many of them as possible. For if our account flouts too many of them, we will have changed the subject and will no longer be giving an account of the intended entity but of something else entirely. (Shapiro 2011, 5)

In this paper, I would like to draw some conclusions regarding treating the general concept of law as a concept that does not fulfil the compositionality criteria. As such, the concept of law cannot be analyzed in a traditional way by philosophers *qua* detectives. Although the departure point is still similar to a detective's selection of evidence, the nature of the result is quite different: Whereas a detective tries to identify the wrongdoer and describe the causes and motives that led him/her to commit a crime (and in this way, describe *facts*), a legal philosopher is more like a craftsman or artisan who tries to produce a socially useful tool: a legal theory. The additional problem is, however, that the evidence itself is gathered in a somewhat eccentric way: It relies on general intuitions about law that are sometimes produced by the use of different types of heuristics. Heuristics are here understood in a more sophisticat-

ed way, namely as processes of rapid categorization performed in typical, real-life situations in which people have to answer a general philosophical question, but somewhat indirectly. The point is that boiling down the "detective's primary job" to collecting self-evident (truistic) evidence would be meaningless if it was supposed to ignore the typical ways of thinking that make people assent to such truisms. In short, I think that legal theorists – in their general inquiries – should not only start from assented "truths" (truisms as sentences), but should also rely on the classificatory modes of thought (heuristics) that produced them.[5]

To a large extent, my thesis may be interpreted as an extension of a general critique of conceptual analysis produced by experimental philosophers and evolutionary psychologists to the field of jurisprudence. Experimentalists argue, first, that intuitions about cases are not stable and reliable grounds for exhaustive analysis, and second, that the best philosophical explanation of our philosophical intuitions makes no reference to facts, but rather only to individual psychological concepts (Stich 1975, 397–418; cf. Goldman 2007 and Harper 2012).[6]

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[5] If ordinary people are asked the general question "what is law?," they often have a problem in giving a rapid answer. Laypeople do not have any ready-made answers to that type of question. If such a question is asked, they try to answer it by indicating some example of a "typical" law (legal act, norm, etc.), some generally shared truth about law (what people generally say about law), and by means of certain heuristics, they produce other, presumably evident truths regarding law. For example, when asked "what is law?," a layperson may imagine the Polish legal system as a typical system of law (in some simplified understanding of "systemacity"), and by means of heuristics, may answer questions about its characteristics ("Does that system have judges? – Yes, it does"; "Does that system have a hierarchical structure? – Yes, it does," etc.).

[6] Harper writes: "Given that we are only justified in believing in those entities which are part of the best explanation of our evidence, we are only justified by our intuitions in believing in concepts and not in facts," and he calls this kind of objection "the explanationist objection" (ibidem).

Experimentalist legal thinkers assume that there are no independently existing Fregean concepts regarding "law," the content of which can be uniquely analyzed, and moreover, that there is no description that can be deemed entirely true or false, because no relevant truth-maker exists.

That, however, does not necessarily mean that "traditional" analyses of such concepts are not valuable, even if, to a large extent, they are actually profoundly creative activities. According to A. Harper, analyses may have an "oblique epistemic value" as they "necessitate a directed and systematic creativity which reliably produce[s] ideas of a potentially fruitful structure: they are universal, unifying, simple theories" (Harper 2012, 237). The *obliqueness* of philosophical analysis is demonstrated by the fact that analysis "accumulates in a direction other than the primary goal": It may not lead to any plausible (or even true) *description* of the conceptual content, but nonetheless, it may produce interesting and useful results in related fields such as meta-ethics or methodology (ibidem). Although Harper generally defends the relevance of traditional conceptual analysis in the context of the naturalistic framework, I am rather inclined to oppose that claim – at least locally, i.e. in the field of general jurisprudence – but, at the same time, I am eager to defend his contention regarding the oblique value of analyses, understood as creative activities that may be structured according to certain norms of theory-construction. These norms shall, however, be understood as common, rational and consistent applications of heuristic rules in contexts in which the analyzed concepts play a pivotal role.[7] Otherwise,

[7] We can speak of two types of intuitions: (1) simple intuitions about primary conceptual content, usually referred to as *truisms* or *platitudes* regarding the concept-term in question (static intuitions), and (2) derivative or inferential intuitions, which are the common ways of thinking or conceptualising these concept-terms in certain contexts (dynamic intuitions, heuristic's results).

the analyses may not be recognized as analyses regarding the concept-terms to which they supposedly refer.

Thus, relying on certain pragmatic assumptions with respect to the nature of analysis and theory-building, I think that *at best* – in the case of "law" – the analysis in general jurisprudence, in which I am mostly interested, is in a substantial part *constructive* and not merely reconstructive. The analysis of the concept (e.g. of law) is not a matter of simply giving an accurate description of the conceptual content *embedded* in the actual linguistic usage of a (certain) community, but is rather a creative construction of a particular *concept* in virtue of it. To use a popular phrase, the content of the concept of law exists *in virtue of* (and thus, is *grounded in*) generally shared truisms and generally applied heuristics about law, but it is not reducible to them. Eventually, any analysis is supposed to provide a *better* understanding of the analyzed phenomena, but what that *better* means seems to be an open question. I suppose that analysis improves our understanding of a concept by developing, testing and reshaping it for practical purposes, and for this reason, analyzing is itself a practical activity. Analyses are a practical means for making our concept-terms more useful in institutional practice that is linguistic in character.

In my view, different *general* theories of law (that aim to describe the content of the concept of law) are not accounts of how language is *actually used*, complemented by one, proper theory of the object implied by them, but are rather accounts of how language *should* (or even *ought* to) *be used*, at least in cases that are not typically thought of by laypeople and lawyers, and ultimately – how the characteristics of the object (given in certain details) should be *construed*.

Theory-building is not an activity to which no general standards apply. In particular, it is not true that "anything goes" in legal theorizing. There are at least two elements that limit the creativity of a theoretician: (1) commonly shared intuitions,

beliefs, etc. about law, which serve as theoretical "evidence," a departure point for theory building; evidence, as usual, may merely underdetermine the theoretical description; and (2) generally accepted methods of theory-construction that serve as a tool for transforming evidence into theory. Although the law is a mind-dependent artifact, and for this reason, general legal theories are usually supposed to describe what is called "our understanding of social institution," our (self)understanding – fortunately or not – is not a strong enough foundation, or a departure point, for such a detailed description. From the *quantitative* point of view, there is simply too much evidence on which legal theorists build their theories, including commonly shared "law-related propositions" or "law-related thoughts," which are the premises or conclusions of the law--related heuristics that we – people living in different societies – perform every day. There is too much evidence, because the truisms that represent these propositions (or thoughts) do not constitute a consistent set: Many of them do contradict each other (at least in some interpretations), and to build a theory, one has to choose. People usually rely on these truisms in their common heuristics without any deeper reflection upon the possible relations between them. Truisms are like premises in a simple reasoning, which almost never lead to a thoroughly uncontroversial conclusion. The more sophisticated, reflective and theory-laden the reasoning is, and the further it goes, the more controversial the possible output becomes. And we talk here merely about most of the heuristics that are triggered by the question "What is law?," i.e. a question of the type asked to students in their first classes in law school. For this reason, a theoretician is overwhelmed with evidence that (s)he, like a judge, has to evaluate freely and come to a verdict about which part of it (s)he should believe (and which he should not).

From the qualitative point of view, all this evidence is surely not enough: Truisms, together with fallible heuris-

tics, do not and never will tell the whole story about law (the so-called *folk theory of law* is not a "theory" in a technical sense).[8] For this reason, there arises a paradox "of legal theorizing". M. Dubowska and I described it elsewhere in the following way:

> […] one can develop many competing theories of law on the basis of one set of truisms. However, the more detailed the theory is, the more it must focus on certain truisms and defy other truisms. The way one "reflectively thinks" about certain theoretical matters forces him/her to prefer some truisms over other ones. In such circumstances, the theoretical virtue of being coherent and nit-picking (with respect to certain theoretical details) makes a developed theory less truistic and more controversial. By conducting his/her theoretical enterprise, a theoretician moves farther and farther away from a generally shared (truistic) set of propositions about the law. By its very nature, every legal theory is controversial. This "paradox of (legal) theorizing" is a theoretical analogue of the so-called "paradox of analysis" indicated 75 years ago by C.H. Langford. According to Langford, an analysis of a certain (supposedly analytical) sentence can be either correct or informative (but it cannot be both). We think that legal theories cannot be both trivial and informative, because if they are trivial, they do not develop, but merely repeat, all the truisms about the law, and if they are informative, they are inherently controversial (because they deem some of the truisms to be false, or, at least, reinterpret them in a nonstandard way). (Dubowska and Dyrda 2018, 55–56)

2. Truisms, generalizations and heuristics

Truisms about law are supposed to express common intuitions regarding law. These intuitions are, however, context dependent, because they are developed in the context of the pre-existing social structure: various existing social institutions

[8] With respect to the idea of "folk theory," see for example Dyrda 2017, chapter 2 and the references provided therein.

and interconnected rules. It is hardly possible for a person alienated from society, who never existed in it or "played by social rules" ("Mowgli"), to be able to produce any relevant intuitions regarding these (societal) institutions, including law (by some type of pure *a priori* reasoning). We may thus assume that truisms reveal the intuitions of people who are typical participants in society (they are "normal" social agents). One should note, however, that even in this case, the evidential weight and plausibility of these truisms as adequate "evidence" are dubious for at least two reasons. Consider first the reliability of the intuitions themselves. There is a strong disagreement between philosophers with respect to their evidential status. Some, such as S. Kripke, argue that they are the best possible evidence one may ever have (Kripke 1980, 42; cf. Goldman 2007, 2). But many philosophers seriously question the assumption that intuitions may have any evidential weight.[9] Apart from that objection, we may make a moderate assumption that intuitions about social institutions and artifacts, such as law, shared by most active participants of societies, are generally reliable. Then, however, arises the second problem regarding the relation between intuitions and the truisms that are supposed to represent them. Truisms are linguistic expressions of intuitions, and because language may not be able to express the full content of our thoughts, the meaning of truisms may certainly be narrower than the content of the intuitions that are supposed to be expressed by them. Moreover, individuals may commit themselves to assenting to the same truisms, in spite of having actually somewhat different beliefs and intuitions. This means that people having slightly different psychological concepts and connected intuitions may assent to the same sentences *qua* truisms.

[9] See also Cappelen 2012, where the reliability of intuitions in philosophy is thoroughly questioned; and Gizbert-Studnicki, Dyrda, and Grabowski 2016, 152, for the list of the relevant literature.

As I argued elsewhere, truisms can be plausibly understood as expressed generic generalizations to which most participants in society assent (cf. Dyrda 2017, 302–312). Following M. Johnston and S.-J. Leslie, I argued that concepts should be understood as individuals' interpretations of "concepts-as-terms-in-use," which are a type of psychological concept (i.e. mental representations that play an essential role in people's general classificatory and deliberative activities; cf. Weinberg, Nichols and Stich 2001, 429–460; cf. Goldman 2007, 3). In this account, the knowledge regarding the use of concepts is practical. To know how to use a concept-term in this sense does not mean to know, and/or to be able to know, all the necessary and sufficient criteria for the concept-term's application. What suffices is general "knowledge," comprised of some effective, practical criteria for selecting the most prominent types of the concept-terms' designates or characteristics (via which one identifies the designates). Usually, while performing their classificatory activities, people rely on the characteristics of the object in question that appear typical (this is the so-called typicality effect; cf. Rosch 1973, 328; Rosch 1978, 27–48). There are at least two theories that explain this simple fact: the theory of prototypes and the theory--theory of concepts. According to the first one, we determine the prototype-concepts by a statistical or quasi-statistical assessment of the probability of there being a designate having certain prototypical features. The famous definitions of man: "man is a featherless biped" (Plato) or "man is a political animal [*zoon politicon*]" (Aristotle), likewise the common definition of a dog as a "quadrupled barking caudate mammal" rely on such generalizations and may be easily falsified by providing (rare) instances of men or dogs who do not possess such typical characteristics. Usually, the context and interests of people determine which observational features they treat as salient or typical enough as to make them play such a substantial role in their classificatory activities. In the second theory,

our classificatory activities depend heavily on the pre-existing webs-of-beliefs that people share.[10]

According to M. Johnston and S.-J. Leslie, the best theory explaining the nature of our classificatory-conceptual activities is a hybrid theory combining these two (cf. Johnston and Leslie 2012, 123). The explanation that these two theories together give seems to be a psychological counterpart of the pragmatic, behavioristic approach to language meaning presented by W.V. Quine. The relevant connection between the two theories seems obvious: The prototype-theory stays in close connection to Quine's theory of observation-sentences (which are as theory-lacking as possible), and the theory-theory stays in close connection to Quine's theory of stimulus synonyms (as dependent on shared theoretical commitments, regarding collateral information, and thus, as theory-laden as possible). I do not want to get into the details of these pragmatic theories of observation sentences and stimulus synonymy here, because they have been exhaustively discussed in the literature for more than 50 years (cf. Quine 1960).

Our psychological ability to categorize determines our other ability – to generalize. Traditional theories of concepts claim that every generalization is a categorical judgement, whereas the prototype theory claims that all generalizations are statistical-probability judgements. Furthermore, the holistic theory-theory account assumes that generalizations are theory--laden truisms. Experimental, psychological research confirms that most common types of generalizations are not categorical judgements, but are rather *generic* ones (cf. Leslie and Lerner 2016). The truisms "Books are paperbacks" or "Mosquitoes spread malaria" are examples of such *generic* generalizations. They play a fundamental role in using concepts and language learning by applying various types of heuristics. The truth of generic generalizations is insensitive to counterexamples.

[10] With respect to the theory-theory of concepts see Carey 2009.

That feature distinguishes them from categorical generalizations which are deemed false by any counterexample. Generic generalizations are not definitely quantified[11]: People do not use them to express their judgements about all instances of a discussed object, but only about some significant set of them. The truth-profile of categorical generalizations is a relatively simple one in comparison to the highly sophisticated truth--profiles of the generic ones (Johnston and Leslie 2012, 125).

We may assume that most truisms expressed by laypeople are of a generic, rather than a categorical nature. They do not aim to provide the characteristics that all designates of the concept-term share, but rather, they want to produce some useful characteristics of the object (class of objects). The usefulness or practicality of such generalizations is easily revealed in typical circumstances, i.e. the ones that are similar to those in which the generic characteristics were developed. The generic generalization that "Mosquitoes spread malaria" is a useful truth about mosquitoes if one is put into the context of a tropical climate. Only in such contexts – which may be the actual ones or only experiments in the imagination, etc. – is one triggered to infer some further conclusions about what to think and what course of action to take.[12] As such, generaliza-

[11] As non-quantified sentences such truisms cannot be judged true or false. When quantified universally, they are in fact usually false (not all books are paperbacks, some of them are hardbacks; not all mosquitos spread malaria, only some of them, namely Asian female night-biting Anopheles mosquitoes spread malaria). When quantified existentially, they are true. However, once people quantify them definitely, they cease to be a comfortable and simple means for heuristic thinking.

[12] This may be easily shown by means of construing different examples of implicatures. For example, there will be a practical difference as to the function of the sentence "Mosquitoes spread malaria" if the following took place in tropical (where mosquitoes spread malaria) and continental climates (where they do not): "– I'm going for a walk to the forest. I need some fresh air! – Wait, don't you know that mosquitoes spread malaria?" (for other examples provided see Johnston and Leslie 2012).

tions of this kind play an essential role in the heuristics leading to rapid, practical classificatory decisions.

By heuristics, I mean – as it is usually described – commonly applied reflective activities that are aimed at problem-solving. They are mental programs that produce a judgement quickly, relying in the process on very limited information.[13] Defined as such "decision rules," heuristics usually have a high practical success rate in certain, fixed contexts of action, but are nonetheless prone to error. They are a rather pragmatic means of dealing with the problems of real life that rely on a certain (ancestral) track-record of actions performed in a certain environment – and in this sense, they stay in close connection to the pragmatic ideas of "reflective thinking," "testing," "trial and error," etc.[14] One might also describe heuristics as modes of thinking that, while providing generalizations, depend on particular instances (and thus are, at least to some extent, inductive in nature). However, because the mode of generalizing is not thoroughly logically (deductively) structured, inferential errors may appear. On the other hand, even logically well-structured heuristics may lead to "errors" regarding the characteristics of the object upon which one reflects. The very idea of "error" here is, however, dependent on some external and more detailed theory of an object to which the heuristics practically apply. So, to say that people make mistakes in their heuristics requires some external criterion: the *true* description of the object they do not possess in the first place (as the premises of the reasoning).

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[13] "Decision rules are mechanisms, programs with a causal structure. They were designed to produce fitness-promoting outcomes in the environments that selected for their structure." (Cosmides and Tooby 2006, 193).

[14] As L. Cosmides and J. Tooby write: "[A] growing body of evidence supports the view that the human mind was tailored by natural selection to develop certain social and moral heuristics: decision rules that quickly produce social and moral judgments, based on limited information." (Cosmides and Tooby 2006, 182).

Notwithstanding, heuristics are common methods of thinking and classifying, and for this reason they are an interesting object of study for legal theoreticians and analysts who aim at providing a general theory of law on the basis of commonly shared sets of "truths" about law. For it seems quite reasonable to discriminate between two kinds of such truths: (1) shared, *prima facie* recognized truisms about law, and (2) truths that are derivable by some means of commonly accepted method of reflection upon these truisms – at this point heuristics may come into play. Both kinds of truisms, together with relevant contextual or collateral information, allow one to make a classificatory decision. By means of generic generalization, stating the fact that objects having the features F and G are Q, one infers that because something has this feature, it must be Q. The need to make a decision triggers a heuristic process that yields a featured result. The decisions usually made in *legal* contexts are basically regarding the question of whether some object is law or not. By means of heuristics, the decision is almost *intuitively* or *automatically* made.[15] The result – the decision – may still be independent from any theoretically developed, consistent account of what law is, because the intuitive process of reasoning was based on something pre-theoretical. But the decision itself, once it has been inferred in the process, is a significant result of a classificatory activity, a result having many practical consequences both in the legal and moral spheres (which, I assume, may be interdependent). Both moral and other legal intuitions – or even well-established beliefs – may manifest themselves as inconsistent with, or even contradictory to, the inferred classificatory decision. For this reason, one may have a strong feeling of oddness with respect to the result (decision). In other words, the experience of the result may be a *recalcitrant experience*, which would be odd at least be-

[15] The rationalisation of this procedure is often called an "operational interpretation" of law.

cause the decision was based on intuitive truths (beliefs) in the first place. In such circumstances, the only way in which the decision-maker can deal with that difficult, almost *existential* situation with respect to his/her own intuitions and beliefs is to work the *prima facie* inconsistent beliefs into a manageable structure.[16] At this point, a more thorough reflection comes into play in which the agent tries to provide a deeper explanation of the decision, tries to justify the verdict, and by these means – remove the feeling of oddness or doubt. But sometimes, the deeper reflection may reveal the well-foundedness of our recalcitrant experience by providing reasons that defy the very premises of our initial heuristic reasoning. Sometimes, the premises of the reasoning and our doubts about the conclusions cannot be reconciled, and then one must make a choice to provide a consistent account: to decide which intuitions should be taken seriously and which should not. That is how, I suppose, general legal theories are born.

It follows that legal theories are theoretical rationalizations of decisions that are made on the basis of the results of a rapid process of heuristic reasoning. They appear when doubts arise regarding a course of action taken – I would say that these theories are the children of the universal need for philosophizing (critical thinking), which is indeed a practical need. Laymen, officials and judges all make their decisions relying on intuitions and more or less contextualized assumptions about how institutions work, but still, they do not have a full account in the first place. The best students of law, who have acquiesced to all the detailed theories of civil or penal law may still not, and usually do not, recognize – due to a lack of reflection and criticism in the learning process in the first place – the multiplicity and gravity of the possible philosophical assumptions (mainly metaphysical, epistemological and ethical) regarding

[16] This is basically what the proponents of so-called holistic pragmatism stress (White 2004, 6).

their object of interest, along with all the further consequences such assumptions yield. The simple Socratic question "What is (civil) law?" causes embarrassment because there is no one accurate, ready-made answer to such a question that one can find in (civil) law manuals. The best lawyers are rather reluctant to provide such a general answer. In that context, the demand for the average person to provide such an answer is an exorbitance, if not a humiliation.

There have been, however, people who have concentrated on providing answers to hard questions triggered by doubts regarding certain "ordinary" courses of social action: the first social, political and legal philosophers. Upon seeing that intuitive truisms and heuristics led to controversial results, they tried to develop accounts that could justify and explain these results (whatever they were). And once such accounts were given (as simple as they were), through the use of the same reflective mechanism, they critically assessed and discussed them. The philosophy of law of today is, however, both an exercise in practical philosophy rooted in the need to justify practically meaningful decisions, but also, in significant part, a metaphilosophical enterprise of comparing different theories of law, discussing the ways in which they depend on truisms and heuristics, providing certain explanations of different meta-theoretical legal phenomena (such as theoretical disagreements) and the like. I am not saying that such an account is the only one possible, but it seems to me to be quite convincing.

3. Legal truisms, conceptual underdeterminacy and wise (pragmatic) choices

The naturalized approach to legal theorizing certainly requires taking into account the heuristics that are understood. For if one thinks that the methodology of a conceptual analysis – if there is any – should be grounded in empirical claims and should be continuous with science (as Quine, for example, de-

manded), then both types of truisms, together with the shared modes of thinking applicable to them in "typical contexts," are to be recognized as the most informative, empirical evidence about the ways in which people classify the possibilities in their ordinary lives that a theoretician can get. Moreover, it seems that truisms are not necessary, analytic claims about the *nature* of the discussed thing, but are rather contingent claims revealing how people think about the object in narrowly defined circumstances. There is no one metaphysical conception of law presumed in such uses of language or exercises of thought. Rather, the ordinary conception – or folk theory – of a certain object (here: law) is internally complex and sometimes even logically inconsistent; it is built rather of smaller webs-of-beliefs, "corporate bodies," that almost automatically reveal themselves in thinking about the object on certain occasions. That is why laypeople – like the first-day students of law – have so much trouble with answering the question "What is law?" If they try to do so, they usually refer to some experiential examples, life situations or examples from fiction to back up their further claims about some characteristics of law, i.e. truisms about law. But our main problem is not how people delve into their memory and imagination in order to provide a list of truisms about law. This certainly happens through the use of heuristics of some kind. But this is not our main question nowadays for we are more interested in describing the intellectual way that a theoretician *must* follow in order to build a theory of law.

Of course, one can certainly provide a consistent metaphysical account of the nature of law on the basis of some carefully selected truisms and heuristics, and by denying others that contradict them, and further, by rationally developing them into the detailed characteristics of the object. That is how some accounts of law have certainly been built. Such accounts are, however, at least to the extent to which they deny certain ordinary ways of thinking about the object, artificial

and controversial, even though they have the oblique value of providing some theory of law (a philosophical "work of art") and are "informative" for this reason. But it is hardly convincing to say that the information here is itself information about the *nature of a thing* (at which an immodest type of analysis is aimed), the way people *do classify* things (at which a modest type of analysis is aimed), rather than simply information about the method one *should pursue to provide one of many possible rational descriptions* of the object.

The heuristic-based approach to analyzing concepts may surely be applied wherever there is no possibility of providing a traditional, descriptive analysis. The task of the psychologically-oriented philosopher is described by M. Johnston and S.-J. Leslie as follows:

> To put it in the broadest possible terms, psychologists seem most interested in discovering our criteria or ways of telling when a given individual has a property or falls within a specified kind, and our criteria or ways of telling which inferences about members of a kind are the ones to make. But it will not be in general true that our ways of telling that something falls under a complex concept F&G is a joint application of our ways of telling whether something falls under the concept F and our ways of telling whether something falls under the concept G. Moreover, there is massive individual variation in our ways of telling whether something falls under the concept F; we may only be able to look it up in a book, you may have written the book and conducted the complex experiments needed to determine that it is F, and yet – so the substantial theory has it – all of us can share the same concept F. (Johnston and Leslie 2012, 119)

It seems to me that the so-called *folk theory of law* consists of varying types of intuitions about what law is, what good law is, what the function of law is, etc. A provisional list of platitudes (truisms) revealing these intuitions is provided by S. Shapiro, who writes:

> In assembling a list of truisms about law, the legal philosopher must include truisms about basic legal institutions ("All legal systems have judges," "Courts interpret the law," "One of the functions of courts is to resolve disputes," "Every legal system has institutions for changing the law"); legal norms ("Some laws are rules," "Some laws impose obligations," "Laws can apply to those who created them," "Laws are always members of legal systems"); legal authority ("Legal authority is conferred by legal rules," "Legal authorities have the power to obligate even when their judgments are wrong," "In every legal system, some person or institution has supreme authority to make certain laws"); motivation ("Simply knowing that the law requires one to act in a certain way does not motivate one to act in that way," "It is possible to obey the law even though one does not think that one is morally obligated to do so," "One can be a legal official even though one is alienated from one's job"); objectivity ("There are right answers to some legal questions," "Courts sometimes make mistakes when interpreting the law," "Some people know more about the law than others") and so on. (Shapiro 2011, 15)

Legal truisms and different types of related heuristics are common ways of classifying the most obvious possibilities. They exhaust the picture of what is conceptually *self-evident*. Still, we must keep in mind that such truths are self-evident only *prima facie* and become self-evident in cases of the *recalcitrant experiences* I mentioned earlier.

The problem is that we usually have many possible tools and devices that serve as theory-building tools, and we may make many different types of methodological decisions through the process: Apart from methodological judgements regarding *metatheoretical* or *epistemic* values such as consistency, simplicity, etc., we might make *more substantial* judgements regarding moral values. Moreover, some value judgements may well be supported by certain truisms and heuristics regarding the law itself as performed in certain contexts of decision--making processes.

Law is an old social institution and only recently has there been a proliferation of legal theories. Our understanding of law was broadened substantially in the recent century, but still – it seems to be a reflective answer partly triggered by doubts regarding the decisions achieved in the simple process of operative, heuristic reasoning, but also sometimes supported by them. The detailed study of these decisions has always been an introduction to legal philosophy. I think it would not be controversial to claim that there are many plausible legal theories. What we may add (somewhat controversially) is that all recognizable legal theories depend on truisms to some extent. To my mind, legal theories are underdetermined by truisms which serve as the most reliable (although not the only possible) evidence that a theoretician (i.e. someone devoted to theoretical activity) might have. Such a claim fits well with the pragmatist claims regarding the relation between evidence and theories in general. And the mechanism of revising the former assumptions – including the intuitions – that produce decisions that yield recalcitrant feelings is consistent with a naturalized metaphilosophical theory of holistic pragmatism.

After the naturalizing turn in epistemology, all the claims of a conceptual analysis remained revisable as a result of *a posteriori* theory construction in the light of the empirical evidence. This does not, however, mean that the methods and answers of philosophy must be reducible to science, in which case, "a philosophy of science is philosophy enough" – as Quine, for example, demanded. According to M.G. White, our normative beliefs may play an important role in theory (re)construction, at least as far as they are anchored in the "feelings of (moral) obligation" (White 2004, 186–210) that are commonly experienced, and thus play a role similar to shared stimuli. Such feelings may have their representations or reminiscences in certain intuitions that are expressed by truisms. For this reason, many truisms may have a normative or even moral dimension.

The consequence of having both normative and descriptive truisms is that we might develop different theories of law while relying on them: If we rely on rather descriptive truisms, we get more simple theories (such as legal positivism), and if we rely on more substantially value-laden truisms (such as truisms about the moral purpose of law), we can develop more normatively oriented accounts (such as nonpositivist ones). We might also be more skeptical about intuitions and critically assess their reliability; but even then, we have to stick to some evident truths about the functioning of law (like the legal realists, who focused on truisms regarding the law as an instrument of social control and judicial decisions as the only relevant means of that control).

What is more, some truisms, as well as the theories developed on the basis of them, may be interpreted both descriptively or normatively. Consider the truism that "law *may be* immoral," which is a departure point for developing the well-known positivist separation thesis, according to which morality and law simply *are not* conceptually and thus not necessarily interdependent.[17] The point is, however, that the same truisms may be *interpreted either* descriptively or normatively, or both. If we say that law may be immoral, and it is a good thing to describe it that way, we perform a more direct form of evaluation than when we are simply describing some important features of law (its relative independence from morality) in the mode of so-called indirect evaluation.[18] The same truisms may express

[17] According to J. Morauta, a "separation thesis" usually appears in two ways: as an analytic claim about the nature of law – roughly, as some version of the Social Thesis; or as a substantive moral claim about the value of law – roughly, as some version of the No Value Thesis. He also correctly notices that we can discriminate between these two theses and the third thesis, the Neutrality Thesis, according to which analytic claims about the nature of law do not by themselves entail any substantive moral claims about the value of law (Morauta 2004, 111–135).

[18] According to J. Dickson, there are two types of evaluations that may be applied in legal theory: direct and indirect ones (Dickson 2001).

either descriptive or normative (moral) intuitions that are shared in certain kinds of common social practices regarding some institutions. The problem in the context of practices and intuition- (or belief-) dependent concepts is that both modes of evaluation are "direct" in the sense that they identify important moral functions (direct in a strict sense) and identify important features of the object or practice (indirect in a strict sense) by means of some vague generalized assumptions that are implicit in intuitions – namely generic generalizations about the law's function, purpose or characteristics.[19] If there is any room for social self-understanding of the concept of law in the so-called *folk theory of law*, it is in the recognition of these general, generic ways of ascribing descriptive features or moral functions to laws.

Like A. Halpin, I am eager to say that methodology in the social sciences is never neutral (Halpin 2010, 611; cf. Halpin 2006, 67–105). I suppose that it is a consequence of depending on truisms and heuristics that leads some features and functions to be ascribed to the socially-dependent concepts that are either descriptive or normative in character. I also share W. Blackburn's contention that, to a large extent, methodological arguments are "political bids for ascendency within a discipline" (Blackburn 2005, 233). But even if this is so, the more detailed scrutiny regarding the empirical, truistic and heuristic-based origin of certain theories and their methodologies, including comparing the practical merits of different approaches, is something that metaphilosophers of law can do. According to Halpin:

> Even from such a skeptical perspective, there might still be valuable work to be done at a less ambitious level, in investi-

[19] A. Halpin writes: "It would be simpler and more accurate to describe it as a direct evaluation of the practice from a particular theoretical position: it represents what that theoretical perspective sees of value in the practice" (Halpin 2010, 611).

> gating how particular methodological positions relate to the development of legal theory, and in considering whether certain methodological approaches are more likely to yield fruitful results. (Halpin 2010, 607)

I argue that the Platonic, Fregean approach to concepts is dubious, at least in connection to concepts that, by their very nature, play an important social function (such as "law"). Such concepts are not ready-made thoughts that can be discovered through the use of some kind of unique philosophical tool. Rather, the contents of these concepts must be construed on the basis of empirical evidence that the participants in society share (truisms, commonly applied heuristics). Moreover, my approach to theorizing about such concepts is profoundly Aristotelian and practical in the sense described by M. Nussbaum:

> The "What is it?" question, in short, is profoundly practical. In its absence, public life will be governed by "what is usually said in a jumbled fashion," as Aristotle so nicely put this point. […] Aristotle used this Socratic idea of philosophy to argue that philosophy is an important part of the equipment of every person who aims to take an active role in public life. (Nussbaum 2001, 131)

It should be noted that the question "what is it?" is a question that cannot be simply equated with the question "what is said about it?" In the context of analyzing the concepts in general, one should reconcile the distinction between the so-called modest and immodest character of analysis – such a distinction is often made by the proponents of the traditional conceptual approach to analysis (e.g. Jackson 1998, 44). The "immodest" type of analysis aims at revealing the very nature (essence) of the thing, as it exists independently of the way people talk about it. On the other hand, a "modest" analysis reveals only an implicit conception (theory) embed-

ded in different ways in the linguistic practices of a certain society. Thus, the former type of analysis may be seen as an attempt to answer the "what it *really* is?" question, and the second, the "what is said?" question. However, it is quite doubtful whether such a distinction pertains to the socially--established concept-term "law" that refers to a certain social artifact. The existence and the content of law, as well as its concept, are not independent of what people do and say (and thus: "do things with words"). It seems that, at least partly, the question "what is law?" can be answered via answering the question "what is said about law?" However, for the reasons given above, the answer on this level is rather truistic and by no means innovative or interesting. Moreover, the truistic answer to this question also lacks the "pragmatic" dimension, which Nussbaum associated with Aristoteles' answers to such questions. Having this in mind, we might say that in order to provide an interesting and pragmatically useful account of law, one must engage in thinking not merely about what law is (via what is said about law), but also in thinking about what law should be (also – as much as possible – via what is said and thought about law). We can easily see how that normative thesis about – at least a part of – the content of law follows from the underdeterminacy thesis presented above. It is a kind of practical duty to choose useful theories from the whole set of possible theories that are underdetermined by truistic evidence.

Now, the main question is how to do that. Here comes the idea of heuristics and its relation to the more developed and more consistent modes of reflective thinking about "law" and the related concept-terms. The core point is to establish, on the one hand, which theories of law are more practically useful and why, and, on the other, at what point we could refuse to rely on certain truisms and heuristics in our theorizing without depriving our theories of practicality and plausibility.

4. Conclusion: the oblique value of analyses and the promise of the heuristic-based approach

There are two general conclusions. The first one is that an analysis of social or institutional concepts has a certain oblique value that is epistemic in character. The analysis does not fulfil the main aim of traditional analysis, namely describing the pre-established content-thought of the concept-term. It is not descriptive, but rather creative, and as such, it has oblique value: It contributes not towards the main purpose of analysis as traditionally conceived, but rather towards the reliable development of epistemically and metaphysically valuable hypotheses (explanations, theories) in the philosophy of law and other social phenomena. Even if a theoretician thinks that (s)he conducts a descriptive analysis in a traditional sense, the result of theorizing – a theory – remains a valuable thing, even though it is not the only plausible description of the content of the analyzed concept. To the extent that the results of the analyses are simple and well-designed theories, we might think of them as *proposals* for how to use the concept-terms.

Moreover, I believe that the empirically informed study of truisms regarding law, along with a detailed scrutiny of the different types of common heuristics related to them, really could help to defend a methodologically naturalized account of jurisprudence against the accusation that it is "dogmatically" skeptical and hardly a constructive approach. K. Himma describes the problem as follows:

> No one has articulated a reasonably clear statement of how a naturalized jurisprudence should process with respect to analyzing concepts. There are many questions about law a naturalized methodology can answer – indeed, any empirical question about law that has a determinate and determinable answer. But how a naturalized methodology could be deployed in the service of conceptual analysis is far from clear

> – certainly, no one has been able to explicate it with the rigor and elegance that Frank Jackson explicates the methodology of TCA [Traditional Conceptual Analysis – AD]. Indeed, for this reason, it is not unreasonable to think naturalized jurisprudence is nothing more than a skeptical theory of conceptual jurisprudence, asserting, in effect, that conceptual jurisprudence is impossible – just as Quine believed metaphysics was rendered impossible by his rejection of the modalities. This does not seem to be a "replacement" methodology in the sense that we simply substitute naturalized methodology for TCA and keep on doing what is the same thing. Naturalized methodology so transforms the nature of a conceptual inquiry that it is no longer clear that the relevant inquiry supported by this methodology ought to be characterized as a "conceptual" inquiry. (Himma 2015, 78)

My second conclusion with respect to the relation between legal truisms, heuristics about law, and legal theorizing can be presented in the form of five points:

It seems that the different general classificatory modes of thinking about law that are manifested in the processes of legal-decision making are a useful empirical basis for discussing both the structure and relevance of general legal theories.

The truism- and heuristic-based approach seems to be a reliable description of the actual decision-making processes in law. The processes are, however, held in certain contexts, with limited information and time available, and are guided by certain pragmatic goals.

The results of such processes usually demand further scrutiny, justification and/or critique. At this point, legal theorizing comes into play, along with conceptual analysis as its main method.

Conceptual analyses of truism-dependent concepts are devices for achieving certain practical ends, which are – in a contextually limited and often inconsistent way – realized by different types of legal heuristics (in the form of operational decisions).

An interesting metaphilosophical study of law comprises of investigating the various ways in which legal theories rely on different but common types of legal heuristics, and eventually develop them into rationally-structured arguments consisting of certain webs-of-beliefs (theories) that include i.a. metaphysical, epistemic and ethical (both normative and descriptive) claims about law.

As such, legal theories are analyses qua explications of typical (or common) modes of thinking about law.

This paper was written as a result of research project no. 2016/21/D/HS5/03839, financed by the Polish National Science Centre. I would like to thank P. Bystranowski and M. Próchnicki for all their critical comments on the first draft of this paper. I take responsibility for all misapprehensions and mistakes.

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Adam Michał Dyrda
Faculty of Law and Administration
Jagiellonian University in Krakow
dyrdaadam@gmail.com