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Konceptualna jurisprudencija

Uvod u konceptualnu analizu i metodologiju u pravnoj teoriji

U ovom radu nastojim da čitaoce uvedem u problemsku oblast konceptualne analize pravnih pojmova (ili »konceptualne jurisprudencije«) i njene metodologije. Pokušavam da, na prilično bazičnom nivou, objasnim šta je konceptualna analiza, na koji način se ona obavlja (to jest, njenu odgovarajuću metodologiju) i zašto je ona važna za teoriju prava. Takođe nastojim i da objasnim na koji način je konceptualna analiza povezana sa drugim oblastima filozofije, kao što su metafizika i epistemologija. Zatim, objašnjavam poduhvat u koji se konceptualna jurisprudencija upušta – da opiše ona svojstva po kojima se (1) stvari koje jesu pravo razlikuju od stvari koje nisu pravo, koja svojstva (2) prvopomenute stvari čine pravom. Pritom sam to objašnjenje ilustrovao, nadam se, jasnim primerima. Takođe sam dao objašnjenje i procenu tri različita metodološka pristupa. Na kraju sam razmotrio praktički značaj konceptualne jurisprudencije. | Ovaj je prijevod izvorno objavljen u knjizi Bojan Spaić i Damir Banović (ur.), *Savremeni problemi pravne i političke filozofije* (Šahinpašić: Sarajevo 2016).

Ključne reči: teorija konceptualna analiza, konceptualna metodologija, priroda prava, metafizika prava, praktični značaj, koncepti

1 UVOD

Najznačajniji poduhvat opšte ili konceptualne jurisprudencije, to jest, konceptualne analize prava, jeste davanje filozofski preciznih objašnjenja raznih pojmova koji zauzimaju istaknuto mesto u raspravama o pravu. To znači da se konceptualna analiza bavi objašnjavanjem prirode prava i drugih važnih aspekata pravne prakse. Dok se kod mnogih reči, kao što je reč »šah«, ne prepoznaju pojmovi koji se čine dovoljno značajnim da bi zaslužili dublju filozofsku analizu, to nije slučaj sa pojmom prava. Prakse koje se nazivaju »pravnim« ili se odnose na »pravo« značajne su, kako u moralnom smislu, tako i u smislu praktičke razboritosti; ljudi odlaze u zatvor, plaćaju novčane kazne, plaćaju odštetu za povrede izazvane pravno nedozvoljenim ponašanjem, pa čak bivaju i pogubljeni zbog toga što su prekršili pravo. Stvar je jasnog praktičkog značaja da osiguramo da naši postupci zadovolje stroge norme političkog morala, ali

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mi ne možemo znati koje se norme na nas odnose a da pritom ne posedujemo odgovarajuće razumevanja pojma prava.

U ovom radu nastojim da ponudim prijemčiv, ali i sveobuhvatan uvod u konceptualnu teoriju prava. U tu svrhu ovaj rad će razmatrati prirodu i metodologiju konceptualne analize, odnos konceptualne analize prema metafizici i epistemologiji, kao i praktički značaj konceptualne analize.

2 TIPOVI TEORIJSKOG PROMIŠLJANJA O PRAVU

Teorijsko promišljanje o pravu pokriva spektar različitih tema. U većini slučajeva, teorijsko promišljanje o pravu predstavlja nastojanje da se utvrdi sadržaj relevantnog prava u vezi sa pitanjima u kojima na obe strane postoje podjednako dobri argumenti; autori takvih radova nastoje da dođu do zaključaka kojima bi se pravnici praktičari i sudije rukovodili prilikom donošenja odluka. U pravnim časopisima možemo naći članke u kojima autori brane tvrdnju o tome šta bi u nekom konkretnom pitanju trebalo smatrati pravom, a da se pritom ne rukovode moralnim ili razlozima praktičke razboritosti. Nalazimo i one čiji autori opravdavaju određene oblasti prava; tako što utvrđuju osnovne principe koji određuju sadržaj specifičnijih normi; ili tako što pojašnjavaju značenje određenih termina. Postoje, međutim, i oni koji se bave objašnjenjem prirode određenih pravnih praksi.

Bez obzira na taj širok spektar interesovanja za pitanja u vezi sa pravom, teorijska promišljanja se grubo mogu podeliti u tri kategorije. *Empirijska pravna teorija* se uobičajeno bavi utvrđivanjem ili objašnjavanjem određenih odlika ili svojstava postojećih pravnih sistema; takva teorija je, u najmanju ruku, deskriptivna po svom karakteru i usredsređena je na *kontingentna* svojstva pravnih sistema koji se proučavaju (to jest, svojstva koja oni mogu ali ne moraju da imaju). Autori koji se bavi empirijskom pravnom teorijom, mogli bi, recimo, da se bave utvrđivanjem ili objašnjavanjem sadržaja pravnih normi kojima se reguliše tajnost podataka u SAD-u. Isto tako, mogli bi da objašnjavaju ciljeve izvesne pravne prakse u Kolumbiji.

Nasuprot tome, *normativna pravna teorija* se uglavnom bavi utvrđivanjem svojstava koje pravne norme ili institucije, posmatrane sa aspekta političke moralnosti, treba da imaju, odnosno, moraju da imaju da bi se smatrale moralno legitimnim. Pravni teoretičar normativista mogao bi, recimo, da tvrdi da bi pravo, iz perspektive supstantivne moralne teorije, trebalo da štiti tajnost podataka na različite utvrđene načine. Normativisti se po pravilu bave pitanjima moralne legitimnosti – šta se, sa aspekta političke moralnosti, može smatrati opravdanim ograničenjem ponašanja građana koje država sprovodi na osnovu generalnog ovlašćenja da obezbeđuje javni poredak.

Opšta ili *konceptualna* jurisprudencija bavi se onim što se naziva »konceptualnom analizom« najvažnijih pravnih pojmova; to znači da se konceptualna jurisprudencija bavi objašnjavanjem najvažnijih pojmova naše pravne prakse, kao i njihovim međusobnim odnosima. Konceptualna jurisprudencija naročito nastoji da objasni pojmove prava, važenja i pravnog sistema i stoga nastoji da razjasni logičke odnose između tih pojmova i drugih pojmova koji mogu doći u vezu sa njima, kao što su pojmovi moralnosti, autoriteta, pravnih i društvenih obaveza, itd. Konceptualna jurisprudencija će objašnjavati sadržaj svakog pojma i nalaziti mu mesto unutar opšteg pojmovnog okvira kojim se rukovodi, kako naša jezička praksa u vezi sa relevantnim pojmovima-rečima, tako i sama naša pravna praksa.

Cilj ovog rada biće da objasni konceptualnu jurisprudenciju/analizu i različite metodologije za koje se veruje da utvrđuju principe koji imaju najviše izgleda da iznedre jednu uspešnu konceptualnu analizu. Osim toga, ovaj rad izneće i letimičnu ocenu raznih metodologija koje se smatraju odgovarajućim za konceptualnu analizu.

3 KAKO RAZUMETI KONCEPTUALNU ANALIZU

3.1 Šta je to uopšte pojam?

Konceptualna analiza je analiza pojmova; međutim, nameće se jedno teško pitanje: šta je tačno pojam? Značenje reči pojam je donekle zagonetno i nedovoljno razjašnjeno ali, u najmanju ruku, deluje jasno da pojmovi jesu ili korespondiraju sa mentalnim elementima koji su nam potrebni da bismo razmišljali o relevantnim stvarima. Na primer, ne možemo razmišljati, a još manje *govoriti*, o elektronima, a da pritom ne posedujemo ili ne razumemo pojam elektrona.

Iako bi ta tvrdnja mogla da deluje prilično nesporno, ona nam, ipak, manje govori o tome šta je pojam nego što nam se na prvi pogled može učiniti. Ona nam, recimo, ne govori ništa o prirodi pojma; o načinu na koji se pojmovi stiču; niti o tome u kojoj meri su oni prihvaćeni od strane pripadnika jedne zajednice. Jasno je, ipak, da je neophodno da posedujemo ili razumemo pojam neke stvari da bismo bili u stanju da razmišljamo ili govorimo o toj stvari čiji pojam jeste pojam te stvari.[1]

1 Ovde moramo biti oprezni. Nije sasvim jasno koja je to stvar čiji pojam jeste pojam. Na primer, ekstenzija termina »pravni sistem« predstavlja klasu svih stvari za koje je ispravno reći da predstavljaju pravne sisteme; shodno tome, ekstenzija ili referencija termina, odnosi se na neki skup – a ne na neki opšti jedinstveni pravni sistem. Intenzija, naravno, predstavlja ideju ili sadržaj izražen terminom »pravni sistem«. Trebalo bi razumeti da govorimo na donekle metaforičan način kada govorimo o stvari za koju postoji odgovarajući pojam. Ako postoji nešto što jeste pravo *kao takvo* ili neženja *kao takav*, nije jasno (bar nije meni) kakva je to vrsta stvari, osim da ona nije isto što i ekstenzija ili intenzija odgovarajućeg pojma-termina.

Postoje različita mišljenja o tome šta su pojmovi: 1) pojmovi su psihološka stanja koja predstavljaju ideje ili stvari; 2) pojmovi su sposobnosti posebne vrste – tačnije, sposobnost da se napravi razlika između jedne vrste stvari čiji pojam jeste pojam i druge vrste stvari čiji, drugačiji, pojam jeste pojam (to što posedujemo pojmove »drvo« i »žbun« govori o tome da smo sposobni da napravimo razliku između drveća i žbunja); i 3) pojam predstavlja značenje ili »smisao« reči.

Očigledno je da od odgovora na pitanje šta je to pojam zavisi kakva će biti metodologija konceptualne analize. Na primer, ako su pojmovi mentalna stanja kojima se nešto predstavlja, odgovarajuća analiza bilo kog pojma morala bi da kaže nešto o sadržaju te predstave, kao i o prirodi dotičnog stanja (a to bi moglo da bude neko složeno stanje, koje sadrži verovanja i sklonosti raznih vrsta).

Bez obzira na to šta bi pojmovi mogli da budu, oni su blisko povezani sa jezikom. Ljudi koriste *jezik* kako bi izrazili pojmove. Može da se desi da mi nemamo reč za svaki pojam koji posedujemo. Međutim, imamo veliki broj reči kojima možemo izraziti, označiti, odrediti, imenovati pojmove: mi koristimo reč »ljubav« kada razmišljamo ili govorimo o ljubavi, reč »pravo« kada razmišljamo ili govorimo o pravu, i tako dalje. Mi koristimo pojam-termin kojim se označava određeni pojam kako bismo govorili o stvarima koje potpadaju pod dotični pojam.

Naša sposobnost da sa drugima razgovaramo o nečemu čiji pojam jeste pojam (recimo, prava) govori nešto o odnosu između sadržaja pojma i naše upotrebe pojma-termina koji se na njega odnosi. S razlogom možemo smatrati da mi posedujemo neku predjezičku sposobnost da razvijemo pojmove i da razvijemo izvesne pojmove mnogo pre nego što naučimo reči koje se na njih odnose; bez takve sposobnosti, ne bismo mogli da naučimo neki jezik. Međutim, sadržaj naših pojmova u velikoj meri zavisi od jezičke prakse koja se odnosi na reči povezane sa njima, jer mi ne možemo na isti način da shvatamo kako da upotrebimo neku reč, a da pri tom na isti način ne shvatamo i centralni sadržaj pojma.[2] Ako vi i ja posedujemo sasvim različite pojmove prava, mi nećemo moći da razumemo šta onaj drugi govori kada upotrebljava pojam-termin »pravo«.

Iako bi bilo korisno imati podrobnije objašnjenje ovih specifičnih »stvari«, mi, ipak, možemo da se donekle metaforično izražavamo bez neželjenih posledica sve dok imamo na umu da se ne izražavamo sasvim precizno. Takva vrsta izražavanja, međutim, može da bude korisna za raspravu o raznim temama kojima se ovaj rad bavi. Ako nam se to, ipak, čini problematičnim, možemo smatrati da te stvari predstavljaju bilo koji primerak relevantne ekstenzije, pod uslovom da imamo na umu da nas taj određeni primerak interesuje samo utoliko što potpada pod dotični pojam.

2 Ja sam agnostik u pogledu toga kako nastaje takva praksa ili kako bi ona trebalo da se okarakteriše, osim da se za nju tvrdi da (1) predstavlja društvenu praksu koja nastaje i održava se delimično zato što je zajednička za članove jedne zajednice i da (2) suštinski elementi te prakse stvaraju norme koje imaju preskriptivnu snagu za članove date zajednice. Na primer, moglo bi se smatrati da se za našu praksu vezanu za upotrebu reči »neženja« ne može reći ništa više

Tvrdnja da su pojmovi povezani sa jezičkom praksom ne podrazumeva i to da pojmovi *jesu* jezički entiteti; a naročito ne podrazumeva da pojmovi predstavljaju značenja. Ništa u tvrdnji da je sadržaj naših pojmova oblikovan sadržajem jezičke prakse ne podrazumeva da pojmovi predstavljaju značenja, a ne mentalne predstave ili sposobnosti. Pojam vode koji ja posedujem mogao bi jednostavno da se odnosi na moju sposobnost da napravim razliku između stvari koje jesu voda i onih koje to nisu, čak i kada se ta sposobnost menja pod uticajem načina na koji ljudi oko mene upotrebljavaju termin »voda«.

3.2 Tradicionalna konceptualna analiza kao objašnjenje fregeovskog smisla

Tradicionalna metodologija konceptualne analize polazi od pretpostavke da su pojmovi utemeljeni u značenju ili u fregeovskom smislu (Fregean senses). Konceptualna analiza nastoji da nam ispriča priču, zasnovanu na uobičajenim intuicijama o fregeovskom smislu pojma-termina, o nečemu što potpada pod relevantni pojam. Ta priča, utemeljena, kao što jeste, u mišljenjima o značenju termina, ima pretenziju da opiše samu *prirodu* stvari čiji pojam jeste pojam.

Sagledavanje jednog relativno neproblematičnog pojma moglo bi nam pomoći da pokažemo kako je konceptualna analiza tradicionalno težila da utvrdi prirodu neke vrste stvari putem filozofskog objašnjenja značenja relevantnog pojma-termina. Razmotrimo pojam neženje. Ako ostavimo po strani ono što je manje bitno za uobičajeno značenje reči neženja, onda opravdano možemo smatrati da se za svako X može reći da X predstavlja neženju ako i samo ako je X neoženjen odrastao muškarac. Ako je tačna, ta analiza pojma nudi spisak svojstava u kojem ne samo da se pravi razlika između neženja i ne-neženja, već se i objašnjava zašto nešto što je neženja potpada pod tu kategoriju. To jest, analiza pojma utvrđuje ona svojstva koja objašnjavaju zašto je nešto neženja u sledećem smislu: instancijacija svojstava biti neoženjen, biti odrastao i biti muškarac *konstituiše* sve ono što bi moglo da ih instancira kao neženju. Sve dotle dok je biti neoženjen pojmovna odlika svojstva biti neženja, a imajući u vidu značenje pojma-termina »neženja«, biti neoženjen predstavlja deo same prirode svojstva biti neženja.

Trebalo bi naglasiti da ovde nije reč o ideji da instancijacija tih svojstava *prouzrokuje* nešto što ih instancira kao neženju; kakvo god da je objašnjenje zašto je nešto neženja, ono će takođe biti i objašnjenje zašto je nešto neoženjen, odrastao i muškarac – a to potonje objašnjenje razlikovaće se od osobe do osobe

osim da ona obuhvata razne obrasce upotrebe koje dele članovi jedne zajednice. Druga opcija je mišljenje da ova praksa predstavlja konvenciju. U oba slučaja, ta praksa je društvena po svom karakteru i izražava zajedničku normu prema kojoj je upotreba reči »neženja« ispravna samo ako se odnosi na muškarca: onaj ko upotrebljava reč »neženja« a priča o psu, nesumnjivo, greši.

jer će se u kauzalnom objašnjenju navoditi kontingentna svojstva i faktori. »Šta je to što Džima čini neženjom?« je potpuno različito pitanje od pitanja »Zašto je Džim neženja?«; u najmanju ruku, odgovor na drugo pitanje mogao bi da podrazumeva posedovanje informacija lične prirode o Džimu, dok odgovor na prvo pitanje to svakako ne bi.

Konstituisanje nije isto što i prouzrokovanje. Pokretljiva masa vodene pare je ono što nešto čini (*constitute*) oblakom; ali nije uzrok tome da nešto bude oblak. Upravo je posedovanje ovih svojstava ono što određuje da je pokretljiva masa vodene pare oblak; nešto je oblak *na osnovu* toga što je pokretljiva masa vodene pare. Konstituisanje nije neka pojava koji se odvija u vremenu, i to je, delimično, ono što razlikuje konstituisanje od prouzrokovanja, koje jeste pojava koja se odigrava u vremenu. Zašto je određeni skup molekula vode oblak ili pokretljiva masa vodene pare jeste pitanje koje zahteva drugačiju vrstu objašnjenja i analize. Ono zahteva objašnjenje koje je u najvećoj meri empirijsko po svojoj prirodi, u kojem se moraju navesti zakoni prirode i pojave koje se dešavaju u vremenu. Njima se izražavaju uzročnoposledične veze antecedenata i rezultata koji su deo objašnjenja zašto se taj određeni skup molekula vode pretvorio u tu određenu pokretljivu masu vodene pare, to jest u pomenuti oblak. Konceptualna analiza se ne bavi kauzalnim objašnjenjima, već svojstvima koja nešto čine takvim da to nešto potpada pod neki pojam-termin, kao što su »neženja«, »oblak« ili »pravo«.

Ponekad se može čuti mišljenje da tradicionalna konceptualna analiza (TKA), budući da joj je cilj da utvrdi značenja putem uobičajenih intuicija o primeni relevantnog pojma-termina, ne pruža mnogo više od definicije navedene u rečniku. Brajan Lajter (2003: 45), recimo, tvrdi da TKA nije ništa više do »glorifikovana leksikografija«:

> Konceptualnu analizu, onako kako je Džekson vidi, postaje teško razlikovati od banalne deskriptivne sociologije neke agencije za istraživanje javnog mnjenja *Gallup Poll* tipa. I zaista, Džekson izričito kaže da se on zalaže za to da se, kada je to neophodno, »urade ozbiljna istraživanja javnog mnjenja o reakcijama ljudi na različite slučajeve«! Time se, međutim, brišu jasne granice između konceptualne analize i leksikografije: jer nije li cilj leksikografije da statistički proprati uobičajenu upotrebu reči ili pojmova, tačnije obrazac upotrebe koji bi dobro osmišljeno istraživanje javnog mnjenja otkrilo?

To je pogrešno. TKA možda polazi od nečega što liči na leksikografiju, budući da je *utemeljena* u značenju, ali ona je mnogo više od toga. TKA ide dalje od jednostavnog utrđivanja zajedničkih gledišta; to je, naravno, posao leksikografa koji beleži empirijske obrasce upotrebe reči. Konceptualna analiza nastoji da teorijski sagleda ova gledišta tako što utvrđuje dublja filozofska ubeđenja od kojih ona polaze, kao i opštije principe koji ih objašnjavaju. Iako nije sasvim sigurno da ona predstavlja distinktivan filozofski poduhvat, ta vrsta analize, ipak,

umnogome prevazilazi empirijski zadatak utvrđivanja zajedničkih intuicija ili centralnih svojstava naše jezičke prakse.

Takav zaključak se lako može izvesti ako uradimo sledeće: jednostavno uporedimo ono što leksikografi imaju da kažu za reč »pravo« sa onim što Hart ima da kaže kada objašnjava pojam prava. Evo kako leksikografi oksfordskog rečnika *The Oxford American Dictionary* definišu »law« (pravo ili zakon):

> *law* | imenica 1 (često *the law*): sistem pravila koji jedna država ili zajednica priznaje kao sredstvo regulisanja postupaka svojih pripadnika i može da primeni putem propisivanja kazni: *they were taken to court for breaking the law* (našli su se na sudu jer su prekršili pravo ili zakon) | *a licence is required by law* (pravo zahteva posedovanje dozvole) | [pridev] *law inforcement* (primena prava ili zakona).
>
> - pojedinačno pravilo kao deo takvog sistema: *an initiative to tighten up the laws on pornography* (inicijativa da se pooštre pravila o pornografiji).
> - takvi sistemi kao predmet proučavanja ili kao osnova pravničke profesije: *he was still practicing law* (on se i dalje bavio pravom) | [pridev] *a law firm* (advokatska firma). Uporedi sa *jurisprudence* (jurisprudencija).
> - ono za šta se smatra da ima obavezujuću snagu ili dejstvo formalnog sistema pravila: *what he said was law* (to što je on rekao je pravo ili zakon).

Pogledajmo sada koliko toga što je razmotreno u Hartovoj teoriji se ne spominje u leksičkoj definiciji. Prvo, u njoj se uopšte ne spominju brojna pitanja koja su bila u središtu Hartove analize: društvena praksa, pravilo priznanja, sekundarna i primarna pravila, važenje prava, itd. Drugo, leksikograf je svoj zadatak obavio u nekoliko redova, dok je Hartu trebalo više od 200 stranica da u svom delu *The Concept of Law* iznese analizu pojma prava. Čak i ako Hart polazi od zajedničkih stanovišta o značenju »prava«, trebalo bi da bude jasno da on takođe radi i nešto što je potpuno drugačije od onoga što rade leksikografi – i pritom mnogo dublje zalazi u ono što pravo, kao takvo, zaista jeste.

S tim u vezi, biće nam od koristi da se vratimo na pojam neženje. Prema leksičkoj definiciji, neženja je neoženjen odrastao muškarac; svojstvima biti neoženjen, biti odrastao i biti muškarac iscrpljena je priroda neženje, prema ovoj definiciji. Nažalost, ta analiza neženje ostavlja otvorenim važna pitanja – pitanja na koja rečnik ne može dati odgovor, zato što je rečnička definicija upravo ta koja ne govori ništa o tim pitanjima. Na primer, nije jasno da li je Papa neženja. Veliki broj ljudi smatra da Papa nije neženja, iako je on neoženjen, odrastao i muškarac. Isto tako, veliki broj ljudi nerado koristi termin »neženja« da opiše homoseksualca koji živi u društvu u kojem se zakonski ne priznaje bračna jednakost. To nam sugeriše da rečnička definicija mora biti dopunjena, barem jednim dodatnim uslovom: ono što je neophodan uslov da se bude neženja jeste da se bude na odgovarajući način »podoban« za ulazak u brak; problem u oba gorepomenuta slučaja jeste to što nijedna od dve pomenute osobe nije na pravi način podobna za ulazak u brak da bi bila smatrana neženjom. Naravno, da bi

analiza bila kompletna, potrebno je, između ostalog, dati odgovarajuću analizu pojma »podoban«. U svakom slučaju, taj primer bi trebalo jasno da pokaže da TKA, u najmanju ruku, *ima pretenzije* da ode dalje od površinskih značenja koja nudi leksikografija.

4 ODNOS IZMEĐU KONCEPTUALNE ANALIZE I EPISTEMOLOGIJE: TRADICIONALNO GLEDIŠTE

4.1 Tradicionalno gledište

Prema tradicionalnom gledištu epistemologije o konceptualnoj analizi, konceptualne tvrdnje se opravdavaju metodologijom zasnovanoj na apriornoj spoznaji. Iako je istina da bez empirijskog istraživanja nije moguće utvrditi najvažniji sadržaj obrazaca upotrebe koji povezuju reči i pojmove, prema ovom gledištu nikakvo dalje iskustvo nije potrebno da bi se opravdale istinske konceptualne tvrdnje. Čim bude primećeno da ljudi upotrebljavaju reč »neženja« samo da bi označili neoženjenog muškarca, nikakvo dalje iskustvo neće biti potrebno da bi se opravdala tvrdnja da nijedna žena nije neženja. Ta tvrdnja je opravdana kao validna logička dedukcija iz konceptualnih tvrdnji da su samo muškarci neženje i da nijedna žena nije muškarac.

Neće se, naravno, uvek desiti da svaki čisto deduktivan argument bude tako neproblematičan kao oni koji su opisani u prethodnom pasusu. To postaje jasno svakome ko pročita Hartovo delo *The Concept of Law* ili Razovo delo *The Authority of Law* ili onome ko se ozbiljno bavi matematikom. Stotine godina bile su potrebne da se pronađe dokaz za Fermaovu poslednju teoremu; a rad u kojem je iznet taj dokaz napisan je na više od sto stranica – i bio je nešto što nijedan laik ne bi ni u snu mogao da razume.

Naravno, TKA podrazumeva nešto više od donošenja zaključaka na osnovu najvažnijih obrazaca jezičke upotrebe. Govoreći o pojmu slobodne volje, Frenk Džekson (1998: 31) opisuje jedan drugi metodološki element:

> Ono što mi želimo da razmotrimo jeste pitanje da li slobodna radnja *u skladu sa našom uobičajenom koncepcijom* ili nečim dovoljno bliskim našoj uobičajenoj koncepciji, postoji i da li je kompatibilna sa determinizmom, i da li će intencionalna stanja *u skladu sa našom uobičajenom koncepcijom* ili nečim njoj dovoljno bliskim preživeti ono što kognitivna nauka bude otkrila o funkcionisanju mozga... Ali, kako da ustanovimo šta je to naša uobičajena koncepcija? Prema mom mišljenju, odgovor jedino možemo dati ako se pozovemo na ono što nam se čini najočiglednijim i najvažnijim o slobodnoj radnji, determinizmu, verovanju ili bilo čemu drugom, a što otkrijemo putem svojih intuicija o mogućim slučajevima.

TKA nastoji da utvrdi pojmovni sadržaj koji nadilazi najočiglednije, i stoga »paradigmatične« odlike naših zajedničkih praksi, tako što razmatra intuicije o

mogućim slučajevima. Iako su dotične intuicije uobičajene, u smislu da ih deli veliki broj ljudi, one često jasno predočavaju odlike naših praksi kojih obični govornici možda nisu svesni sve dok ne počnu da razmatraju takve slučajeve. Na primer, većina govornika će verovatno shvatati da naš pojam prava ne podrazumeva da pravo mora da bude u skladu sa moralom[3] sve dok ne budu upitani da li su nacisti imali pravni sistem ili da li su Džim Krou (Jim Crow) zakoni bili zakoni. Takvi slučajevi nam pomažu da podrobnije proučimo sadržaj naših zajedničkih praksi, utvrđujući pri tom karakteristike pojma koje će morati da se objasne teorijskim putem.

Prema tradicionalnoj koncepciji, relevantne intuicije imaju čisto deksriptivan karakter i ne uključuju moralne intuicije o tome šta je ispravno, a šta pogrešno, šta je dobro, a šta loše. Prema ovom gledištu, mi se prilikom utvrđivanja sadržaja nekog pojma ne rukovodimo moralnim principima,[4] čak ni onda kada se pojmovi koriste za procenu ponašanja. Na primer, prilikom procenjivanja dveju predloženih analiza pojma prava irelevantno je da li je jedna analiza moralno bolja od druge – iako bi moralni standardi očito trebalo da imaju ulogu pri odlučivanju o tome koje norme bi trebalo pretvoriti u pravne. TKA je čisto deskriptivna i opšta, u smislu da se te intuicije odnose na sve moguće slučajeve.[5]

A šta ako se ljudi ne slažu po pitanju relevantnih intuicija? Postoji par različitih načina da se takvo neslaganje izgladi putem »neambicioznog« pristupa tradicionalnoj konceptualnoj analizi koji smatra da se konceptualna analiza bavi utvrđivanjem značenja pojma-termina *onako kao šta ga koristi određena zajednica govornika*.[6] Prvo, mogli bismo da zauzmemo stav, o kojem će više reči biti u sledećem pododeljku, da takvo neslaganje predstavlja znak nekog dubljeg neslaganja koje ukazuje na pripadnost dvema zajednicama koje ne dele isti pojam. Neambiciozan pristup, čini se, pretpostavlja da je konceptualna analiza podesna samo ako je reč o zajednici govornika kojima su relevantne intuicije i društvene prakse zajedničke. Drugo, mogli bismo da zauzmemo stav da do intuitivnog neslaganja može doći i u zajednici govornika koji dele zajednički

3 Ne postoje značajna neslaganja među pravnim teoretičarima, pravnim praktičarima, pa čak ni među laicima kada je reč o ovom pitanju. Uistinu, većina teoretičara prirodnog prava koji pripadaju tomističkoj tradiciji negira da je Akvinski tvrdio da nepravedne norme ne mogu biti pravo.

4 Postoje dve vrste normi koje mogu biti bitne za analiziranje nekog pojma: epistemičke norme, kao što je norma koja nalaže doslednost, i moralne norme, uključujući i one koje upravljaju našim ponašanjem. Da li bi epistemičke norme trebalo da igraju ulogu u teorijskim razmatranjima jeste pitanje koje ne izaziva kontroverze. Vidi Coleman 2001.

5 Veliki broj teoretičara, uključujući i Ronalda Dvorkina, veruje da nije moguće dati čisto deskriptivnu analizu evaluativnih pojmova, kao što je pravo. Vidi, npr. Dworkin 1986.

6 Kao što je Raz (1994: 216–217) zaključio, konceptualna analiza se bavi *našim* pojmovima, pošto su ti pojmovi izgrađeni putem *naših* društvenih praksi – pri čemu se termin »naš« odnosi na pripadnike određene zajednice govornika, to jest na *nas*.

pojam, ali da je tada takvo neslaganje znak da je naše razumevanje tog pojma nepozdano u pogledu važnih pitanja.

Džekson pravi razliku između »ambiciozne« koncepcije konceptualne analize i neambiciozne koncepcije, tvrdeći da bi tradicionalnu konceptualnu analizu trebalo smatrati neambicioznom. Prema ambicioznoj koncepciji, konceptualna analiza nam pruža uvid u to kakav je svet; to znači da bi nam analiza sadržaja našeg pojma prava, recimo, dala uvid u suštinsku prirodu prava, *onakvu kakva ona zaista jeste, nezavisno od naše jezičke prakse i konceptualnih okvira*. Prema neambicioznoj koncepciji, konceptualna analiza nam jedino »govori šta da kažemo za svet u manje fundamentalnim terminima, imajući u vidu izvesnu koncepciju sveta datu u fundamentalnijim terminima« (Jackson 1998: 44) – pri čemu su fundamentalni termini oni termini koji se definišu putem praksi relevantne zajednice govornika.

Ideja o prelasku sa fundamentalnijih termina na one manje fundamentalne odražava zdravorazumski stav prema kojem *analiza* predstavlja pokušaj da se ono što je složeno objasni jednostavnijim terminima. Reč je o ideji prema kojoj kada analiziramo neki pojam, mi ga zapravo razlažemo na jednostavnije sastavne delove tako da izložimo njegovu logičku strukturu i damo objašnjenje njegovog sadržaja koje prevazilazi, ali i sadrži u sebi, uobičajeno leksičko značenje pojma – što je, istorijski gledano, ideja koja se vrlo često javlja. Iako su teoretičari često dopunjavali i modifikovali analizu »analize«, osnovni elementi tog pojma su, bez obzira na to, ostajali uglavnom nepromenjeni.[7]

Ovde je važno istaći da neambiciozna konceptualna analiza za svoje polazište uzima koncepciju sveta »datu u fundamentalnijim terminima«. Ta koncepcija, međutim, mora da bude *nečija* koncepcija; a to je, kao što smo videli, *zajednička* koncepcija utemeljena u *zajedničkim* intuicijama, i shodno tome predstavlja *našu* koncepciju relevantne stvari čiji pojam jeste pojam. Stoga TKA pretpostavlja određenu priču o stvarima – i to onu *našu* priču – i nema pretenzije da opiše svet kakav on jeste, nezavisno od naših priča o stvarima.

Džekson ne govori mnogo o ulozi jezičke prakse u utvrđivanju sadržaja naših pojmova. Iako je možda tačno da svi mogući koncepti egzistiraju u logičkom prostoru zajedno sa ostalim apstraktnim objektima, sadržaj *naših* pojmova je, bar delimično, *fiksiran* našom jezičkom praksom. I zaista, kao što kritičari tradicionalne konceptualne analize tvrde, ako bismo simbol »voda« koristili da označimo nešto drugo, a ne bistru tečnost na koju se on odnosi kada se upotrebljava, onda to da je voda H_2O ne bi bilo konceptualna istina – iako bi, nesumnjivo, postojala neka konceptualna istina koja odgovara odnosu između nekog termina i H_2O. Pojmovi bi mogli da predstavljaju apstraktne objekte koji ne zavise od naših društvenih aktivnosti o kojima postoje objektivne istine koje

7 Beaney 1996; vidi takođe Blackburn 1996.

su potpuno nezavisne od uma, ali *jezik* predstavlja društvenu tvorevinu koja je utemeljena u društvenoj praksi; a to koje pojmove će naše reči izdvojiti ili izraziti delimično se definiše sadržajem te prakse.

Time se sugeriše da objašnjenja tradicionalne metodologije *deskriptivne* konceptualne analize nisu sasvim tačna. Iako filozofi često opravdavaju konceptualne tvrdnje pozivanjem na »uobičajene intuicije«, relevantne intuicije predstavljaju zajedničke poglede koji odražavaju centralnu praksu u vezi sa korišćenjem termina. Ako je, kao što Džekson (1998: 33) tvrdi, »posao oslanjanja na intuicije o mogućim slučajevima jednostavno deo sveobuhvatnog posla razjašnjavanja pojmova putem utvrđivanja načina na koji subjekti klasifikuju mogućnosti«, onda će zajednička gledišta *o jeziku* usloviti relevantne intuicije zato što način na koji subjekti klasifikuju mogućnosti zavisi od centralne prakse koja se odnosi na korišćenje reči. Mi klasifikujemo stvari tako što koristimo reči, koje, sa svoje strane, prema tradicionalnom gledištu, izražavaju ili označavaju pojmove. Analiziranje sadržaja pojma, prema tom gledištu, zahteva utvrđivanje zajedničke prakse koja se tiče relevantne reči.[8]

Neka od relevantnih gledišta mogla bi da budu ne-jezička po svom karakteru i da izražavaju široko rasprostranjeno uverenje o od-uma-nezavisnim svojstvima realnosti koja želimo da označimo. Međutim, u takvim slučajevima, te nejezičke »intuicije« o svetu će, najverovatnije, da odigraju značajnu ulogu u definisanju suštinskih odlika naše prakse u vezi sa pojmom-terminom. Na primer, deo objašnjenja koje će nam reći zašto koristimo termin »voda« da označimo samo bistre tečnosti sa hemijskom strukturom H_2O jeste naučno otkriće da voda jeste H_2O; to nejezičko sagledavanje pomaže nam da objasnimo zašto svi redom koristimo termin »voda« da označimo samo H_2O. Sadržaj pojmova prirodnog sveta često se menja sa pojavom novih naučnih otkrića, zato što naučna otkrića često mogu da donesu promene u pogledu načina na koji upotrebljavamo relevantne pojmove-termine. Konvencije u pogledu upotrebe neke reči, odnosno definicije reči, mogu vremenom da se menjaju, što se često i dešava.

Međutim, relevantna gledišta se obično oblikuju našom centralnom jezičkom praksom u vezi sa upotrebom relevantnog termina. Moja intuicija, recimo, govori da su sve neženje odrasli muškarci, zato što, empirijski gledano, niko ne koristi termin »neženja« da označi dečake ili žene, a ne zato što imam neku, ne-jezičku intuiciju o prirodi neženja. Naša zajednička praksa se sustiče u tački u kojoj se samo za muškarce kaže da su »neženje« – a moje intuitivno mišljenje

8 Kao što Hart (1994/2013: 7) kaže: »Mnoge značajne razlike između različitih tipova društvenih situacija ili odnosa, koje ne vidimo neposredno, mogu se učiniti vidljivim ispitivanjem standardne upotrebe relevantnih izraza i načina na koji oni zavise od socijalnog konteksta. U ovoj oblasti saznanja, posebno je tačna izreka profesora Džona Longšo Ostina (J. L. Austin) da se koristimo 'izoštrenom svešću o rečima da bismo izoštrili naše opažanje fenomena'«.

da su samo muškarci neženje izražava tu zajedničku jezičku praksu i njome je oblikovano.

Stoga TKA sadrži u sebi nesumnjivo empirijski element.[9] Koja gledišta jedna zajednica deli stvar je kontingentnosti koja se ne može utvrditi bez empirijskog opažanja. Iako je tačno da jedan od pouzdanih načina da se obavi empirijski posao jeste, kao što Džekson tvrdi, da se sprovede istraživanje javnog mnjenja, to obično nije neophodno. Ta »kabinetska« sociologija u kojoj prednjače filozofi (koji obično ne uviđaju da se bave sociologijom) dovoljno je pouzdana sve dotle dok neko pripada proučavanoj jezičkoj zajednici.

4.2 Dva metodološka izazova tradicionalnom gledištu: normativna i naturalizovana jurisprudencija

Gledišta koja su opisana u prethodnom pododeljku nisu više neupitna među filozofima. Prvo, sama ideja da je *a priori* znanje moguće postala je predmet rasprave među epistemolozima sklonim reduktivnom empirizmu. Drugo, što je i važnije za našu temu, pretpostavke na kojima počiva tradicionalno gledište konceptualne analize dovode se u pitanje u određenim metodološkim raspravama među teoretičarima koji se bave konceptualnom jurisprudencijom, u pogledu odgovarajuće metodologije za procenjivanje konceptualnih tvrdnji – a naročito, konceptualnih tvrdnji koje se odnose na pravo.

Postoje tri različite metodologije koje se mogu primeniti u konceptualnoj analizi. TKA, kao što smo videli, usvaja deskriptivnu metodologiju, a to znači da se konceptualne tvrdnje opravdavaju samo putem faktički deskriptivnih tvrdnji o sadržaju relevantnih društvenih praksi (koje obično uključuju i jezičku praksu); TKA se takođe rukovodi epistemičkim normama o rezonovanju i konstrukciji dobre teorije, kao što su norme kojima se propisuju doslednost, koherentnost, usaglašenost dokaza iz različitih izvora (konsilencija), itd.; ali prema tradicionalnoj konceptualnoj analizi, moralne norme nisu od važnosti za procenjivanje ili razvijanje analize sadržaja nekog pojma. TKA polazi od naših uobičajenih društvenih praksi i nastoji da donese zaključke o dubljim implikacijama tih praksi, uzimajući ih za svoje polazište u skladu sa gorepomenutim epistemičkim normama.

Iako je TKA »deskriptivna« u smislu da se konceptualne tvrdnje moraju opravdavati pozivanjem na određene društvene prakse, te se stoga može učini-

9 Frederik Šauer (2006: 860–861) iznosi upravo sledeći zaključak: »Poput svojih kolega filozofa tog vremena [Hart] je revnosno proučavao uobičajenu upotrebu tražeći distinkcije koje unutar nje postoje i temeljno je analizirao i definisao termine koji se koriste za označavanje pravnih pojmova ... Konceptualna analiza, kao što je to Hart sigurno uvideo, neminovno počiva, bar delimično, na empirijskom opažanju, a ta empirijska utemeljenost konceptualne analize mogla bi takođe implicitno da daje potporu njegovoj tvrdnji da se bavi deskriptivnom sociologijom.«

ti da ona obuhvata i empirijsku epistemologiju, sadržaj relevantnih društvenih praksi utemeljen je u centralnom značenju relevantnog pojma-termina koje je navodno zajedničko za pripadnike odgovarajuće zajednice u odgovarajućim praksama – a koje formira uobičajene intuicije o kojima je bilo reči u prethodnom pododeljku. Polazeći od te osnove, zagovornici tradicionalne konceptualne analize smatraju da se dalje tvrdnje – kojima se proširuje sadržaj pojma izvan njegovog centralnog značenja u odgovarajućoj zajednici govornika – ako se uopšte mogu opravdati, opravdavaju *a priori*. Stoga, TKA izričito tvrdi da su konceptualne tvrdnje *apriorne* po svom karakteru.

TKA takođe polazi od pretpostavke da su konceptualne tvrdnje *analitičke* po svom karakteru, u smislu da njihova podobnost da budu vrednovane kao istinite zavisi isključivo od sadržaja značenja relevantnih reči. Ono što je karakteristično za analitičke tvrdnje jeste to što za njih moraju da postoje neki generatori istinitosti – to jest, mora da se utvrdi koji su to faktori koji određuju da li je tvrdnja tačna ili pogrešna – intuitivno rečeno, radi se o ideji da je tvrdnja analitička ako i samo ako se njena podobnost da bude vrednovana kao istinita utvrđuje u potpunosti putem značenja relevantnih termina. TKA nastoji da izbaci na površinu dublja konceptualna uverenja koja su sadržana u određenim paradigmatično analitičkim izjavama, kao što je, recimo: pravo je norma. Da li su sve logičke implikacije jedne analitičke izjave takođe analitičke zanimljivo je pitanje, budući da odgovor na to pitanje zavisi od toga da li smatramo da je pojam analitičnosti isključivo semantički po svom karakteru ili smatramo da analitičnost u sebi sadrži neki nejasan epistemički pojam samoočiglednosti ili lako uočljive analitičnosti. U oba slučaja, kao što ćemo videti, TKA smatra da su tvrdnje kojima se osvetljava sadržaj pojma nužno tačne – bez obzira na to da li su sve relevantne implikacije analitičke tvrdnje i same analitičke.

Tradicionalna konceptualna analiza našla se pred dva značajna izazova. Prvo, V.V.O. Kvajn (W.V.O. Quine) tvrdi da se za pojam analitičnosti, od kojeg zavisi TKA, ne može dati objašnjenje koje bi bilo dovoljno čvrsto da bude osnov metodologije koja se vezuje za tradicionalnu konceptualnu analizu. Prema Kvajnovom mišljenju, problem da se analitičnost definiše u kategorijama »tačno«/«netačno« samo na osnovu značenja termina ogleda se u tome što je pojam »značenja« previše »nejasan«. Međutim, i ma koji drugi kriterijum za objašnjenje analitičnosti takođe je osuđen na neuspeh, jer će i njemu, koliko i samom pojmu analitičnosti, biti potrebno dodatno pojašnjenje. Razmotrimo, recimo, ideju da se analitičnost može objasniti preko sinonimnosti: prema toj ideji, tvrdnja je analitička ako i samo ako je subjekatski izraz sinonim za predikatski izraz. Problem sa tim, smatra Kvajn, je to što je pojmu sinonimnosti isto toliko potrebno filozofsko objašnjenje koliko i pojmu analitičnosti i ne može se smatrati adekvatnim objašnjenjem potonjeg pojma. Sve dotle dok sva moguća objašnjenja analitičnosti ispoljavaju istu tu manu, sva ona biće »cirkularna«, a

time i pogrešno upotrebljena kao uporište mišljenju da filozofija ima distinktivnu metodologiju, čiji je predstavnik TKA.

Iako imaju značajan uticaj u pravnoj filozofiji, ti argumenti više nemaju takav uticaj u drugim oblastima – najverovatnije zbog toga što su podložni mnogim prihvatljivim kritikama. I zaista, u nekim aspektima, ti argumenti odmah deluju problematično. Da je tvrdnja da je pojam nejasan, sama po sebi, dovoljna da se opravda njegovo isključivanje iz filozofske rasprave, morali bismo da isključimo pojmove kao što su broj ili kvarkovi, koje je teško objasniti na jasan intuitivan način. Dalje, da je nedostupnost necirkularnog objašnjenja nekog pojma dovoljna da se opravda njegovo isključivanje iz filozofske rasprave, mnogi značajni filozofski pojmovi bili bi isključeni: postoje neki matematički pojmovi (kao što je pojam skupa, koji se definiše preko očiglednih sinonima: »grupa« i »zbirka«) i moralni pojmovi (kao što je pojam dobra) za koje se ne može dati nikakvo necirkularno objašnjenje.[10]

Drugi izazov sa kojim se TKA susreće jeste tvrdnja da je oslanjanje metodologije na intuicije problematično zato što se intuicije razlikuju od jedne do druge kulture i stoga su suviše nepouzdane kao utemeljenje filozofskog objašnjenja bilo čega. Nema, međutim, ničeg iznenađujućeg ili problematičnog u vezi sa tim. Pojmovni okviri se definušu jezikom, a jezik predstavlja društveni artefakt koji se razlikuje od jedne do druge kulture; sve dotle dok jedna reč ne može da se savršeno prevede na drugi jezik, neće se nizati ni intuicije o relevantnom pojmu-terminu. To, međutim, prestaje da bude problem čim se shvati da imamo posla sa truizmom – da TKA nastoji da objasni *naše* pojmove – pojmove koje deli jedna zajednica, što je pretpostavka koja bi, kao što smo videli, trebalo da se pripiše Džeksonovom neambicioznom pristupu tradicionalnoj konceptualnoj analizi.

Bez obzira na to što se dovode u pitanje dobre strane tih argumenata, oni su ipak imali ogroman značaj u raspravama o metodologiji konceptualne jurisprudencije. Naročito ako se zna da su ti argumenti doveli do poziva za zaokretom ka »naturalizovanoj jurisprudenciji«. Lajter, najistaknutiji zagovornik naturalizovane jurisprudencije, tvrdi da bi zbog tih argumenta trebalo odbaciti TKA u korist metodologije koja sledi naučnu metodologiju i koja, stoga, ima empirijski karakter. Takva metodologija mora da odbaci sve pojmove koje Kvajn odbacuje u svom radu »Two Dogmas«, uključujući i modalne pojmove, kao što su nužnost i mogućnost. To podrazumeva odbacivanje ideje da su istinite konceptualne tvrdnje nužno istinite i da se mogu saznati na aprioran način. S obzirom na to da bi trebalo smatrati da filozofska metodologija »sledi nauku«, te da je stoga empirijska po svojoj prirodi, konceptualne tvrdnje su kontingentno istinite, ako su uopšte i istinite.

10 Vidi Grice & Strawson 1956.

Osim problema vezanih za argumente koji se smatraju temeljem naturalizovane jurisprudencije, postoje još neki problemi u vezi sa naturalizovanom jurisprudencijom. Niko nije na prilično jasan način formulisao kako bi naturalizovana jurisprudencija trebalo da se dalje razvija u pogledu analiziranja pojmova. Postoje mnoga pitanja o pravu na koja naturalizovana metodologija može da odgovori – a to su sva ona empirijska pitanja o pravu na koja se mogu dati utvrđeni i utvrdivi odgovori. Ali, kako bi naturalizovana metodologija mogla da se iskoristi u službi konceptualne analize ni najmanje nije jasno – svakako, niko nije bio kadar da je objasni sa temeljitošću i elegancijom sa kojima Frenk Džekson opisuje metodologiju tradicionalne konceptualne analize. U tom smislu, uistinu nije nerazumno smatrati da naturalizovana jurisprudencija nije ništa više do skeptička teorija konceptualne jurisprudencije, koja zapravo tvrdi da je konceptualna jurisprudencija nemoguća – baš kao što je Kvajn verovao da je svojim odbacivanjem modaliteta učinio metafiziku nemogućom. Ovde nije reč o metodologiji »zamene«, u smislu da mi jednostavno zamenjujemo tradicionalnu konceptualnu analizu naturalizovanom metodologijom, a nastavljamo da radimo istu stvar. Naturalizovana metodologija toliko menja prirodu konceptualnog istraživanja da više nije jasno da li relevantno istraživanje potpomognuto tom metodologijom treba da bude okarakterisano kao »konceptualno« istraživanje.

Naravno, uvek možemo prihvatiti te implikacije, kao i druge implikacije Kvajnove analize u vezi sa filozofsko-teorijskim razmatranjima brojeva, moralnih pojmova i drugih pojmova za koje se ne može dati necirkularno objašnjenje; ne postoji ništa što je nalik gorepomenutom, očito ubedljivom kontraargumentu. Postoji, međutim, i dalje snažna intuicija da ima nešto vredno u vezi sa tradicionalnom konceptualnom analizom, za koju se kaže da počiva na analitičkim tvrdnjama i izražava nužne istine o relevantnoj stvari. Uistinu, tradicionalna konceptualna analiza, metafizika, epistemologija i normativne teorije morala i dalje imaju istaknuto mesto u filozofiji, uprkos kvajnovskom izazovu. I zaista, prema nedavnom istraživanju, 64,9% filozofa prihvata analitičko-sintetičku distinkciju, dok je samo 27,1% odbacuje.[11]

Drugi metodološki izazov kojim se dovodi u pitanje dominacija tradicionalne konceptualne analize jeste *normativna jurisprudencija*. Normativna jurisprudencija je po pravilu zasnovana na odbacivanju gledišta prema kojem objasniti šta je pravo (kao takvo) nije isto što i objasniti šta bi pravo trebalo da bude. Pritom, gledište koje se odbacuje podrazumeva da bi konceptualna metodologija trebalo da bude čisto deskriptivna.[12] Zanimljivo je to što Hart (1994/2013: 268), čini se, iznosi tvrdnju koja je u suprotnosti sa gotovo svim ostalim što je

11 Bourget & Chalmers 2014.

12 O toj liniji argumentacije u prilog normativne jurisprudencije, vidi opširnije u Dickson 2001: pogl. 1, deo A.

govorio o metodologiji – da se konceptualna teorija prava katkad može ispravno proceniti na osnovu normativnih razmatranja koja prevazilaze pravila kojima se rukovodimo prilikom razboritog rasuđivanja i argumentovanja:

> Pojam prava koji dopušta razlikovanje nevaženja prava od njegove nemoralnosti, omogućava nam da vidimo složenost i raznovrsnost ovih odvojenih pitanja; dok nas, međutim, uži pojam prava koji ne priznaje pravno važenje nepravednih pravila, čini slepim za to.

Ne bi trebalo pripisivati neki veći značaj ovom argumentu, pošto Hart jasno smatra da je konceptualna metodologija deskriptivna po svom karakteru; međutim, važno je uvideti da gorenavedno zapažanje nije u skladu sa Hartovim jasnim uverenjima, utoliko što je pozivanje na praktičke implikacije prilikom opravdavanja konceptualne teorije irelevantno sa stanovišta čisto deskriptivnog pristupa konceptualnoj metodologiji. Striktno govoreći, pribegavanje takvom razmatranju pretpostavlja istinu jedne moguće teze normativne metodologije – naime, da bi adekvatno objašnjenje pojma prava trebalo da donese neku društvenu korist, te da stoga adekvatnost konceptualne teorije prava zavisi od praktičkih društvenih implikacija njenog usvajanja.

Pobornici normativne jurisprudencije najčešće tvrde da se pojam prava ne može na adekvatan način objasniti ako se u obzir ne uzmu moralne norme koje definišu šta bi trebalo da bude sadržaj ili svrha prava. Pravo, kao takvo, se stoga delimično definiše preko moralne vrednosti njegove svrhe, sadržaja ili prakse. Prema tom stanovištu, kao što to Diksonova (2001: 7) primećuje, »zadatak opisivanja prava 'kakvo jeste' nužno je i neodvojivo povezan sa načinom na koji neko razume kakvo pravo, u moralnom smislu, treba da bude, tako da se ta dva poduhvata ne mogu odvojiti jedan od drugog«.

Svaka od ovih tvrdnji o značaju praktičkih normi (koje se nalaze izvan normi racionalnosti) ima značajne implikacije po metodologiju. Normativna metodologija je slična tradicionalnoj konceptualnoj analizi po tome što polazište konceptualne analize nalazi u široko prihvaćenim shvatanjima u vezi sa relevantnom društvenom praksom i paradigmama obuhvaćenim relevantnim pojmom-terminom. Ono po čemu se normativna metodologija, ipak, razlikuje od tradicionalne konceptualne analize, jeste odbacivanje tradicionalnog gledišta prema kojem uobičajena shvatanja prakse i paradigmi predstavljaju isključivo merilo za testiranje teorije; umesto toga, precizna analiza pravnih pojmova mora da odgovori i na supstantivne moralne norme koje propisuju ili šta sadržaj ovih pojmova *treba* da bude ili kakve društvene posledice jedna konceptualna teorija prava *treba* da ima.[13]

Ali zašto bismo mislili da se odgovor na pitanje šta je pravo kao takvo ne može dati bez odgovora na pitanje šta bi pravo, sa aspekta morala, trebalo da

13 Među istaknutim pobornicima normativne metodologije i njihovim delima nalaze se Stephen Perry (2001) i Jeremy Waldron (2001).

bude? Jedna grupa argumenata – i to, možda, onih najuticajnijih – polazi od pretpostavke da se normativni pojmovi (to jest, pojmovi sa normativnim sadržajem, kao što je onaj obuhvaćen terminom »dobro«) moraju ponekad analizirati tako da se usklade sa nekim relevantnim skupom moralnih normi. S obzirom na to da neko recimo, može smatrati da je konceptualna funkcija prava stvaranje uslova za pravdu, pojam prava je delimično normativan po svom sadržaju, a to bi značilo da analiza prava mora da bude u skladu sa određenim moralnim normama.

Ronald Dvorkin nudi jednu od najznačajnijih odbrana ideje da je sam pojam prava delimično normativan po svom karakteru i da zahteva objašnjenje putem normativne metodologije. Prema Dvorkinovom mišljenju, određeni pojmovi su »interpretativni« po svom karakteru i kao takvi se moraju analizirati u okvirima neke relevantne klase supstantivnih normi. Dvorkin nastoji da pokaže da je pojam prava interpretativan i da stoga zahteva normativnu metodologiju tako što ukazuje na analogiju između pojma prava i pojma učtivosti, pri čemu on ovaj drugi pojam smatra paradigmatičnim primerom interpretativnih pojmova. Dvorkinova (1986: 47) postojana argumentacija vodi ga do zaključka da učtivost predstavlja interpretativni pojam:

> Zamislite sledeći istorijski razvoj jednog imaginarnog društva. U određenim društvenim prilikama, njegovi pripadnici poštuju određeni skup pravila, koje nazivaju »pravilima učtivosti«.. Izvesno vreme, ova praksa predstavlja tabu: pravila jednostavno postoje i ne dovode se u pitanje, niti se menjaju. Ali, onda se sve to, možda polako, menja. Svaki pripadnik razvija složen »interpretativan« stav prema pravilima učtivosti, stav koji se sastoji iz dva elementa. Prvi element jeste pretpostavka da učtivost kao praksa ne samo da postoji, već ima i vrednost, da ona služi nekom interesu ili svrsi ili da se njome sprovodi neki princip – ukratko, da ima neki smisao – koji se može izdvojiti nezavisno od jednostavnog opisivanja pravila koja čine tu praksu. Drugi element je dalja pretpostavka da pravila učtivosti – ponašanje koje ono propisuje ili stavovi koje ono nalaže – nisu nužno ili isključivo ono što su oduvek bila, tako da se striktna pravila moraju shvatati ili primenjivati ili proširiti ili izmeniti ili ograničiti u svetlu tog smisla. Čim taj interpretativni stav bude ukorenjen, institucija učtivosti prestaje da bude mehanička; ona više nije nekritičko uvažavanje runskog poretka. Ljudi sada pokušavaju da pripišu *značenje* instituciji – da ga uvide.

Dvorkin nastavlja sa povlačenjem analogije između normi prava i normi učtivosti kako bi potkrepio svoj stav da je pojam prava interpretativan – to jest, da je prava priroda pojma prava interpretativna, a ne predinterpretativna, kao što to pozitivisti smatraju. Stoga on zaključuje da analiza pojma prava mora da zavisi od određenih moralnih normi koje definišu njegovu normativnu svrhu.

Dvorkinovoj argumentaciji bi se mogli uputiti brojni prigovori. Prvo, nije jasno da li je Dvorkin uspeo da pokaže da pojam učtivosti ima interpretativni sadržaj koji nalaže korišćenje normativne metodologije. Iako je možda tačno da učtivost, u konceptualnom smislu, teži da ostvari neku vrstu svrhe ili vred-

nosti, to ne znači da se sadržaj *pojma* učtivosti ne može objasniti bez pozivanja na *moralne* norme – čak i ako je vrednost kojoj učtivost teži *moralna* vrednost. Svrha učtivosti se najverovatnije definiše putem društvene prakse koja se može posmatrati kao sredstvo za utvrđivanje te svrhe. *Supstantivne norme* učtivosti, svakako da moraju odražavati tu konceptualnu svrhu učtivosti; to što znamo koja je svrha učtivosti pomaže nam da utvrdimo šta bi trebalo da budu norme učtivosti. Međutim, celu stvar ćemo verovatno vratiti korak unazad ako budemo smatrali da se norme učtivosti moraju uzimati u obzir prilikom utvrđivanja šta jeste sadržaj pojma – a da se pritom ne utvrđuje i svrha učtivosti. Nije jasno kako bismo norme učtivosti uopšte mogli i utvrditi i razlikovati od drugih vrsta normi, a da pri tom ne shvatamo konceptualnu svrhu učtivosti. Uistinu, norme učtivosti su to što jesu zato što, ukoliko se poštuju, one omogućavaju subjektu da uskladi svoje ponašanje na način kojim se postiže svrha učtivosti; čini se da svrha učtivosti služi kao merilo ispravnosti dotičnih normi. Ako je to tačno, onda sadržaj svrhe određuje sadržaj normi; sadržaj normi ne određuje sadržaj svrhe, kao što se to u prigovoru pretpostavlja.

Drugo, što je još važnije, jednostavno nije jasno da li se pojam koji ima normativan sadržaj može na odgovarajući način objasniti samo putem metodologije koja uključuje moralne norme. Pojam moralnosti, recimo, ima normativan sadržaj: kada se reči »moralno« i »nemoralno« koriste uz opis nekog postupka, one izražavaju vrednosti koje daju razlog za delovanje. To što je X nemoralno predstavlja dobar razlog da se X ne čini. Vilijam Frankena, međutim, daje prihvatljivu analizu sadržaja pojma moralnosti, a da pri tom ne pribegava moralno normativnoj metodologiji, već se, umesto toga, oslanja na tradicionalnu konceptualnu analizu. O toj teoriji govori sledeći pasus:

> Svi oni koji koriste »moralnost« na normativan način smatraju da se »moralnost« odnosi na kodeks ponašanja koji važi za sve one koji ga mogu razumeti i koji svoje ponašanje mogu uskladiti sa njim. U normativnom smislu, moralni nalozi bi uvek trebalo da budu isključujući, to jest niko nikada ne bi trebalo da prekrši moralnu zabranu ili zahtev iz razloga koji nisu moralne prirode (Gert 2011).

Ova analiza plod je čisto empirijskog sagledavanja načina na koji ljudi koriste relevantne pojmove-termine, što je, naravno, samo stvar pronalaženja implikacija zajedničkih obrazaca uobičajene upotrebe među relevantnom klasom govornika. Stoga, nije jasno da li se može izvesti zaključak da je normativna konceptualna metodologija podesna za pojmove sa normativnim sadržajem.

Tačno je, naravno, da konceptualna jurisprudencija ne može da postoji bez donošenja određenih vrsta vrednosnih sudova koji zavise od normi koje ne pripadaju normama razboritog rasuđivanja i argumentovanja. Ne možete započeti analizu pojma prava ako niste u stanju da izdvojite odlike prava koje su teorijski važne. Moglo bi, recimo, da bude tačno da sve sudije nose sudske toge, ali to nije odlika prava koja je u dovoljnoj meri značajna za pravo da bi bila upotreb-

ljena za objašnjenje pojma prava. Konceptualna jurisprudencija stoga mora, kao što to Diksonova (2001: 51–57) ističe, da bude »posredno evaluativna«, u smislu da nalaže pribegavanje normama koje nam omogućavaju da razlikujemo važne zajedničke odlike prava od nevažnih zajedničkih odlika prava; međutim, uspešan metodološki pristup pravu ne mora da bude »neposredno evaluativan« u smislu da nalaže pribegavanje moralnim normama koje govore o tome kakav bi trebalo da bude sadržaj prava ili relevantnih društvenih praksi.

O tome govori Hart (1987: 39) na sledeći način:

> Analiza koja moralnim tvrdnjama i uverenjima dodeljuje ulogu konstitutivnih elemenata društvenih fenomena, mora i sama, kada se usredsređuje na te, a ne na neke druge odlike, biti rukovođena nekim kriterijumima značajnosti, od kojih će glavni biti eksplanatorna moć onoga što njegova analiza izdvoji. Tako će se njegova analiza rukovoditi procenama, često kontroverznim, o tome šta je važno i stoga će odslikavati takve meta-teorijske vrednosti i neće biti neutralna u pogledu svih vrednosti. Ništa, međutim, ne postoji što bi pokazalo da ta analiza nije deskriptivna, već normativna i opravdavajuća.[14]

Shodno tome, Hart pravi razliku između posrednog evaluativnog pristupa u skladu sa epistemičkim normama, koje omogućavaju da se izdvoje odlike od teorijskog značaja, i normativnog pristupa koji teži da opravda neke od različitih praksi i struktura koje određuju relevantne pojmove koji se proučavaju.

5 ODNOS KONCEPTUALNE ANALIZE I METAFIZIKE

Prema tradicionalnoj konceptualnoj analizi, analiza jednog pojma otkriva prirodu ili suštinu stvari na koju upućuje odgovarajući pojam-reč. Stoga, cilj konceptualne analize prava jeste da da nam saopšti nešto o prirodi ili suštini prava; to znači da bi ona trebalo da nam kaže nešto, ne samo o svim *postojećim* pravnim sistemima, već o svim *konceptualno mogućim* pravnim sistemima. Shvaćena na taj način, konceptualna analiza prava sastavljena je od niza konceptualno (ili metafizički) nužnih istina i stoga potpada pod kategoriju metafizičkog teorijskog promišljanja – baš kao što i analiza pojma slobodne volje potpada pod metafiziku. Hart je skretao pažnju na to da konceptualna analiza može da započne od reči, ali da je važno da se shvati da će adekvatno objašnjenje pojma uključivati istine koje daleko prevazilaze konvencije kojima se uspostavljaju centralna značenja tih reči. Poduhvat analiziranja sadržaja pravnih pojmova jeste poduhvat istraživanja metafizike prava, u kojem se njegova priroda objašnjava preko tvrdnji koje su *nužno* istinite – što je zaštitni znak metafizičkog istraživanja.[15]

14 Među onima koji prihvataju ovu razliku nalaze se, npr. Coleman 2001, Marmor 2001, Waluchow 1994, Dickson 2001 i Finnis 1980.

15 Ovde je važno da zapazimo bitnu razliku između neambicioznog i ambicioznog pristupa kon-

Metafizički karakter konceptualne analize, onako kako se ona tradicionalno shvata, logički je povezan sa gledištem da je epistemologija konceptualne analize *apriorna* po svom karakteru. Empirijsko opažanje je od suštinskog značaja prevashodno za utvrđivanje samo kontingentnih, čulno opazivih svojstava određenih stvari. Na primer, potrebno nam je empirijsko opažanje da bismo saznali da u jednoj kesici sa kamenjem ima četiri kamena, ali ne čini se da je, sa stanovišta uobičajene intuicije, ono potrebno da bismo znali da je 2 + 2 = 4; bilo bi besmisleno kada bismo išli naokolo i pokušavali da potvrdimo istinitost ove aritmetičke tvrdnje putem niza pokušaja u kojima stavljamo dva, pa zatim druga dva kamena zajedno, a potom utvrđujemo i beležimo dobijeni rezultat. Nama je potrebno empirijsko opažanje da bismo saznali da se u kesici nalaze dva kamena, jer bi to moglo da bude i pogrešno; za razliku od toga, mi znamo da je 2 + 2 = 4 shvatajući nekako (funkcionisanje *a priori* sposobnosti, ako takva uopšte i postoji, prilično je zagonetno sa stanovišta epistemološke teorije) da to ne bi moglo da bude pogrešno.

S obzirom na to da suštinska svojstva prava poseduje svaki mogući pravni sistem, a ne samo postojeći pravni sistemi koje možemo da opažamo svojim čulima, empirijsko opažanje nema značaj za konceptualnu analizu – izuzev što je ono nužno za dovoljno dobro razumevanje pojma-termina, koje nam omogućava da izdvojimo paradigmatične primerke stvari na koje se on odnosi. Stoga je za tako shvaćenu konceptualnu analizu potrebna *a priori* metodologija.

Isto tako se smatra da je metafizički karakter konceptualne analize, shvaćene na tradicionalan način, logički povezan sa gledištem da se dublji sadržaj nekog pojma može izvesti iz nekog skupa relativno očiglednih analitičkih istina o stvari koja je obuhvaćena pojmom. Ako je tvrdnja *T* istinita isključivo na osnovu značenja reči koje su upotrebljene da se ona iznese, onda negiranje tvrdnje *T* predstavlja kontradikciju. Pošto je kontradikcija nemoguća, *T* je nužno istinita i stoga metafizička po svom karakteru, budući da se metafizika bavi pitanjima u vezi sa prirodom stvari. Sadržaj pojma će, onda, biti rasvetljen nizom tvrdnji koje su nužno istinite i izvedene iz analitičkih istina koje čine polazište tradicionalne konceptualne analize.[16] TKA, da ponovimo, polazi od pretpostavke da je konceptualna analiza metafizička po svom karakteru.

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ceptualnoj analizi. S obzirom na to da je neambiciozan pristup izričito utemeljen u kontingentnim društvenim praksama, poput onih koje definišu jezik zajednice, konceptualne istine su nužne *u odnosu na taj skup određenih polazišta*; mi svetu pripisujemo određenu metafizičku strukturu putem konceptualnih tvrdnji koje proizilaze iz društvenih praksi koje stvaramo. S druge strane, budući da ambiciozan pristup teži da utvrdi istine koje ne zavise od ljudske prakse, konceptualne istine će jednostavno bile nužno istinite – i bez obzira na bilo kakav određeni konceptualni okvir koji ljudi pripisuju svetu putem jezičke ili druge društvene prakse.

16 Interesantno je pitanje da li su, pod pretpostavkom da se polazište tradicionalne konceptualne analize sastoji isključivo iz analitičkih istina, i implikacije skupa koji sadrži samo analitičke istine nužno analitičke po svom karakteru. Ako se za bilo koju tvrdnju može reći da je analitička po svom karakteru, to je svakako tvrdnja da se pravo sastoji iz normi. Međutim, tvrdnja da

Kao što je već rečeno, postoje dva metodološka izazova koji dovode u pitanje tradicionalnu konceptualnu analizu – normativna jurisprudencija i naturalizovana jurisprudencija – a one se ne slažu po pitanju toga da li je konceptualna analiza metafizička po svom karakteru. Normativna jurisprudencija, da se podsetimo, smatra da analiza pojma prava mora biti u skladu sa određenim relevantnim moralnim normama, baš kao što mora biti u skladu i sa određenim normama racionalnog diskursa. Iako normativna jurisprudencija ne podrazumeva meta-etički stav da je moralnost objektivna (»moralni objektivizam«), većina teoretičara naklonjenih normativnoj metodologiji takođe se drži moralnog objektivizma.[17] S obzirom na to da moralni objektivizam, kao što se obično smatra, podrazumeva da su moralne norme nužno istinite, ako su uopšte i istinite, primenjivanje moralno normativne metodologije na konceptualnu analizu će isto tako rasvetliti sadržaj relevantnog pojma u terminima nužnih istina koje izražavaju prirodu relevantne stvari. Normativna metodologija, stoga, podrazumeva da konceptualne istine imaju metafizički karakter.

Ono što je mnogo nejasnije jeste da li normativna metodologija polazi od pretpostavke da su konceptualne tvrdnje analitičke, kao što to TKA čini. Problem koji se ovde javlja u vezi je sa prirodom moralnih tvrdnji. Pod pretpostavkom da je moralnost objektivna, što je tipično za normativne pravne filozofe, moralne tvrdnje bi mogle da budu nužno istinite, ali svakako ne po osnovu toga što su analitičke tvrdnje; ne čini se da je po definiciji tačno da je ubijanje ljudi pogrešno. Neko bi, naravno, mogao da zauzme stav da je sadržaj pojma prava moralizovan, u smislu da su relevantne moralne tvrdnje ugrađene u definiciju prava, ali to je duboko i teško pitanje kojim se ovde ne možemo na odgovarajući način baviti. Čak i u tom slučaju, čini se da je svakako jasno da normativna jurisprudencija pretpostavlja da je konceptualna analiza prava metafizička po svom karakteru.

S druge strane, naturalizovana jurisprudencija, kao što se odmah može videti, negira osnovne pretpostavke tradicionalne konceptualne analize u vezi sa

uslovi za postojanje jednog pravnog sistema uključuju društveno pravilo priznanja koje praktikuju zvaničnici nije očigledno analitička – čak i ako ona, po prirodi stvari, zapravo predstavlja nužnu istinu o pravnim sistemima – i izvedena je nekako iz tvrdnje da se pravo sastoji iz normi. Uistinu, s pravom bi se moglo postaviti pitanje da li se polazište – čak i ako se radi o tradicionalnoj konceptualnoj analizi – sastoji isključivo iz analitičkih istina. Opažanja kojima nastojimo da izdvojimo »paradigmatična« obeležja prava i pravnih sistema nisu, čini se, obuhvaćena definicijama prava. Pre će biti da je reč o tome da čim imamo pred-teorijsko razumevanje prava, koje se delimično formira definicijama, utvrđivanje paradigmi bar delimično biva formirano vrednosnim sudovima koji prave razliku između bitnih nužnih odlika prava i onih nebitnih. Ti sudovi, po svemu sudeći, predstavljaju sintetičke nužne istine.

17 Moralni objektivizam je gledište prema kojem se istinitost moralnih tvrdnji utvrđuje putem od-uma-nezavisnih kriterijuma, tj. kriterijuma koji ne uključuju preferencije, uverenja, prakse ili želje bilo kog pojedinca ili grupe. Svaki teoretičar prirodnog prava je pristalica moralnog objektivizma. Isto tako, Ronald Dvorkin je pobornik moralnog objektivizma i neko ko se zalaže za normativnu metodologiju. Vidi, npr. Dworkin 1996.

karakterom konceptualne analize. Prvo, s obzirom na to da je naturalizovana jurispurdencija utemeljena u Kvajnovom odbacivanju analitičko-sintetičke distinkcije, ona, takođe, odbacuje ideju da je konceptualna analiza makar i delimično utemeljena u analitičkim tvrdnjama – pošto, na kraju krajeva, ne postoje takve stvari koje se mogu legitimno definisati. Dalje, s obzirom na to da je naturalizovana metodologija utemeljena na Kvajnovom argumentu, naturalizovana jurisprudencija sledi Kvajna u njegovom odbacivanju filozofske legitimnosti modaliteta nužnosti i mogućnosti. Konačno, s obzirom na to da naturalizovana jurisprudencija smatra da je metodologija konceptualne analize utemeljena u empirijskim tvrdnjama i da sledi naučnu metodologiju, konceptualne tvrdnje biće kontingentne po svom karakteru; na kraju krajeva, prema tradicionalnim gledištima, nisu nam potrebna empirijska opažanja da bismo sagledali karakteristike svih mogućih svetova. Naturalizovana jurisprudencija, stoga, osporava tvrdnju da je konceptualna analiza metafizički poduhvat čiji je rezultat teorija sastavljena od nužnih istina, koje izražavaju prirodu relevantne stvari koja se proučava.

6 KONCEPTUALNA ANALIZA PRAVA: KONCEPTUALNA JURISPRUDENCIJA

Najvažnija odlika konceptualne analize prava, shvaćene na tradicionalan način, jeste metafizička teza da u svakom konceptualno mogućem pravnom sistemu, postoje određena svojstva koja nešto *čine* (*constitute*) pravom. Stoga bi, recimo, konceptualna teorija prava uključila spisak svojstava koja ono što ih poseduje čini pravnim sistemom (»pravo« kao institucionalni sistem normi), kao i spisak svojstava koja ono što ih poseduje čini pravnom normom nekog pravnog sistema (»pravo« kao pojedinačne norme). Instancijancija relevantnih svojstava čini sistem/normu pravnim sistemom/normom u istom onom smislu u kojem svojstvo neoženjenosti čini nekog čoveka neženjom. Svaki onaj institucionalni sistem normi koji instancira odgovarajuća svojstva, iz tog razloga, jeste pravni sistem; svaki onaj sistem koji to ne čini, nije, iz tog razloga, pravni sistem. Isto tako, svaka norma koja instancira odgovarajuća svojstva jeste, iz tog razloga, pravna norma nekog pravnog sistema; svaka ona norma koja ne instancira odgovarajuća svojstva nije, iz tog razloga, pravna norma nekog pravnog sistema.

Konceptualne teorije prava imaju neke interesantne implikacije koje nam omogućavaju da detaljnije proučimo sadržaj određenih zakona i pravnih sistema. Svaka od glavnih konceptualnih teorija prava – pozitivizam, prirodnopravna teorija i Dvorkinov interpretativizam – polazi od pretpostavke da pravo, bar delimično, predstavlja proizvod kontingentne društvene prakse, uključujući i onu koja se odnosi na zakonodavstvo i sudstvo. To znači da sadržaj pravnih normi, uključujući i one koje definišu granice jednog pravnog sistema kojem te norme pripadaju, može da varira od jednog do drugog pravnog sistema. Jedna

od posledica te ideje jeste to da u svakom konceptualno mogućem pravnom sistemu postoji skup normi koje utvrđuju postojanje i strukturu pravnog sistema i obezbeđuju kriterijume na osnovu kojih se jedna norma smatra *važećim* pravom datog sistema. Ako je *S* pravni sistem, a *P* predstavlja iskaz koji opisuje svojstva koja jednu normu čine pravnom[18], onda *P* formuliše nužne i dovoljne kriterijume »pravne validnosti« u *S*-u u sledećem smislu: za svaku normu *n, n* predstavlja pravo u *S*-u u vremenu *t* ako i samo ako *n* instancira *P* u *t*-u.[19] To se može iskazati i na sledeći način:

> *Teza o diferencijaciji:* U svakom konceptualno mogućem pravnom sistemu *S*, postoji skup *KV* (kriterijumi važenja – »criteria of validity«) takav da za svaku normu *n, n* predstavlja pravo u *S-u* u vremenu *t* ako i samo ako *n* ispunjava kriterijume iz skupa *KV* u *t*-u.

Teza o diferencijaciji otuda tvrdi da svaki pravni sistem sadrži uslove pripadanja (*membership conditions*) kojim se definišu kriterijumi važenja za taj sistem – s tim što se smatra da se ti kriterijumi razlikuju od jednog do drugog sistema utoliko što se relevantne društvene prakse razlikuju.

Važno je shvatiti da teza o diferencijaciji, tradicionalno shvaćena, predstavlja metafizičku tezu – a ne epistemološku tezu.[20] Teza o diferencijaciji ne pretpostavlja niti implicira bilo kakve tvrdnje o obimu u kojem se kriterijumi važenja mogu utvrditi ili primeniti u bilo kojem mogućem pravnom sistemu. Uistinu, teza o diferencijaciji je, sama po sebi, logički konzistentna sa različitim tvrdnjama o tome koliko toga možemo znati o sadržaju prava – i kad je reč o pravnim normama kojima se uspostavljaju kriterijumi važenja i kad je reč o pravnim normama koje predstavljaju pravo zato što su važeće prema kriterijumima važenja. Tačno je, naravno, da (1) sadržaj svih pravnih normi u krajnjoj liniji zavisi, u velikoj meri, od društvenih procesa koji se empirijski mogu opaziti i da (2) norme sistema moraju biti razumljive kako bi bile dovoljno efikasne da konstituišu pravni sistem. Tačno je takođe i da teza o diferencijaciji, kao i tvrdnje (1) i (2) podrazumevaju da mi možemo doći do izvesnog znanja o sadržaju prava u određenom pravnom sistemu tako što ćemo u dovoljnoj meri posmatrati prakse koje dovode do kriterijuma važenja i aktivnosti zvaničnika koje su u skladu sa ovim kriterijumima. Međutim, pogrešno je smatrati da osnovne teze konceptualne teorije prava, koja uključuje i tezu o diferencijaciji, impliciraju

18 Iskaz *P* bi, naravno, mogao da izražava ili veoma složeni spisak svojstava koji uključuje disjunkciju ili konjunkciju. Stoga, sve dotle dok pravo predstavlja kompozitni (*cluster*) pojam ili pojam »porodične sličnosti« (*family resemblance*), iskaz u kojem se iznose uslovi obuhvataće sijaset disjunkcija sjedinjenih sa konjunkcijama, koje izražavaju razne stepene sličnosti dovoljne da se jednoj normi dodeli status prava.

19 Da upotrebimo Hartove (1994: 103) reči: »Reći da je dato pravilo važeće znači priznati da je ono prošlo sve testove predviđene u pravilu priznanja *i da je na taj način ono* pravilo sistema.«

20 Tvrdnja da teza o diferencijaciji nije epistemička teza tačna je i unutar naturalizovane metodologije.

da kriterijumi važenja u bilo kom ili svakom pravnom sistemu predstavljaju i epistemički test koji rešava pitanje šta je to merodavno pravo u svakom zamislivom sporu. To gledište je jednom pogrešno pripisano pozitivizmu – kao tzv. teza o pedigreu (*Pedigree Thesis*) – tokom rane faze rasprave između Dvorkina i pozitivista. Međutim, nju je pogrešno pripisivati bilo kojoj od glavnih konceptualnih teorija prava. Kakav god stav o tome zauzimali teoretičari prava, on mora biti utemeljen u nekim drugim uverenjima.

Ipak, razumno je smatrati da ni formulisane teze o kriterijumima važenja ne bi mogle da obezbede proceduru odlučivanja o tome šta je merodavno pravo. Kao što to Ronald Dvorkin uverljivo pokazuje u svom delu *Taking Rights Seriously*, apelaciona sudska praksa tiče se donošenja odluka u slučajevima koji su teški, što znači da su argumenti kojima se podupiru slučajevi obe suprotstavljene strane podjednako ubedljivi. U takvim slučajevima sudijama je veoma teško da donesu odluke. Iako neko može da, poput Raza, smatra da do teških slučajeva dolazi zato što postoji praznina u pravu u vezi sa pitanjima koja se u njima postavljaju, ponekad, čak i pod pretpostavkom da je Razovo mišljenje tačno, nije lako utvrditi šta je to što jedan slučaj čini teškim. Najblaže rečeno, teško da se u složenim pravnim sistemima, poput onih koje imaju savremene države, mogu naći procedure za donošenje takvih odluka.

Dalje, teza o diferencijaciji ne govori ništa o prirodi ili moralnom karakteru prava u bilo kom određenom pravnom sistemu. Pravno važeći sadržaj bi mogao – a ne mora – nužno da bude ograničen moralnim principima ili inherentno interpretativnim karakterom prava. Pošto je teza o diferencijaciji agnostička u pogledu tih tvrdnji, ona je u skladu sa klasičnom teorijom prirodnog prava, pravnim pozitivizmom i Dvorkinovim konstruktivnim tumačenjem, te stoga ne može biti tačka razlikovanja pozitivizma i drugih konceptualnih teorija prava. Do sada je to bila zajednička pretpostavka svih zastupnika konceptualne teorije.

Da li kriterijumi prava mogu da se *u potpunosti utvrde* u svakom pravnom sistemu moglo bi da se dovede u pitanje, ali opšta jurisprudencija ne bi mogla da se zasnuje a da ne pretpostavlja da postoji izvesna razlika između prava i neprava. Poslednjepomenuta razlika je toliko fundamentalna za opštu jurisprudenciju i toliko intuitivno plauzibilna da bi nam bio potreban veoma dobar razlog da opravdamo njeno odbacivanje. Teza o diferencijaciji jednostavno govori da se pravne norme razlikuju od drugih normi u svakom društvu sa pravnim sistemom. Posao svake konceptualne teorije prava – to jest, konceptualne jurisprudencije uopšte – jeste da objasni koja su to svojstva po kojima se te norme koje jesu pravo razlikuju od normi koje nisu pravo i koja ove prve čine *pravnim normama*.

7 KONCEPTUALNA ANALIZA: TEORIJSKI I PRAKTIČKI ZNAČAJ

Moglo bi se s pravom postaviti pitanje da li konceptualna jurisprudencija ima ikakav praktički značaj u rešavanju suštinskih problema u vezi sa pitanjem šta jeste ili šta bi trebalo da bude sadržaj određenog prava. Veliki broj autora u oblasti prava razvio je neku vrstu averzije, ako ne i neprijateljskog odnosa, prema izrazito apstraktnim interesovanjima konceptualne teorije prava, verujući da je analiza onoga što je pravo po svojoj prirodi isto onoliko normativno inertna koliko i analiza onoga što je neženja po svojoj prirodi. Na prvi pogled, čini se da razumevanje pojma neženje nema nikakve implikacije koje bi dale odgovor na praktička pitanja koja se mogu javiti u vezi sa tim kako bi neženja trebalo da se ponaša ili bi trebalo da bude tretiran. Teorijska definicija »neženje« jednostavno, po svojoj prirodi, izgleda suviše apstraktno opisna da bi iznedrila bilo kakve interesantne praktičke zaključke.[21]

Ispostaviće se da su pojedini istaknuti autori podržavali upravo ovu tezu, kada je reč o poduhvatu konceptualne jurisprudencije. Ričard Posner, recimo, značajan deo prvog od svojih predavanja pod nazivom *Clarendon Law Lectures*, koja su održana na Oksfordu 1995. godine, posvećuje tvrdnji da je konceptualna jurisprudencija »jalova, nepovezana i pravi primer osiromašenja tradicionalne pravne teorije«.[22] Pasus koji sledi jasno ilustruje omalovažavanje sa kojim on posmatra konceptualnu jurisprudenciju:

> Nemam ništa protiv filozofskih spekulacija. Međutim, bilo bi fino da one urode nekakvim plodom; *nešto* bi moralo da zavisi od odgovora na pitanje »Šta je pravo?« da bi ljudima koji bi mogli da svoje vreme utroše na druge društveno korisne načine bilo smisleno da ga postave. Ništa ne zavisi od tog odgovora (Posner 1996: 3).

Uistinu, Posner (1996: 3) ide tako daleko da tvrdi da »glavni zadatak analitičke jurisprudencije jeste, ili bi bar trebalo da bude, ne da pruži odgovor na pitanje »Šta je pravo?«, već da pokaže da ono i ne treba da bude postavljeno, jer se tako samo komplikuju stvari«.

Kao što se iz rasprave o »neženji« sa početka ovog odeljka moglo videti, Posnerova zapažanja nisu sasvim kontraintuitivna, ali čini se da ona predstavljaju najveći izazov čisto deskriptivnim pristupima konceptualnoj analizi, kao

21 Pojedini autori precenjuju praktičke posledice konceptualne teorije prava. Pojedini autori, neosnovano, veruju da pozitivizam podrazumeva pravni formalizam, teoriju presuđivanja koja je dugo bila opovrgavana. Pošto karakter prakse presuđivanja u bilo kom pravnom sistemu zavisi, prema mišljenju pozitivista, od sadržaja njegovog pravila priznanja, a sadržaj pravila priznanja se razlikuje od jednog do drugog pravnog sistema, pozitivizam ne podrazumeva nikakvu određenu teoriju presuđivanja. Iako pozitivizam dopušta mogućnost pravnog sistema u kojem se sudsko donošenje odluka rukovodi pravilima formalizma, on takođe dopušta i mogućnost da se sudsko donošenje odluka rukovodi dvorkinovskim pravilima.

22 Posner 1996.

što su TKA i naturalizovana jurisprudencija. Na kraju krajeva, postoji jedan opšti problem da se normativne praktičke tvrdnje izvedu iz skupa koji se isključivo sastoji iz čisto deskriptivnih tvrdnji; ako čisto deskriptivne tvrdnje o tome šta je pravo u logičkom smislu ne zavise od normativnih tvrdnji o tome šta bi pravo trebalo da bude, kao što to pretpostavljaju TKA i naturalizovana jurisprudencija, onda se ove poslednjepomenute tvrdnje, bez daljnjeg, ne mogu izvesti iz prvopomenutih tvrdnji. Bez obzira na to, važno je da shvatimo da pobornici normativne metodologije, kao što smo videli, eksplicitno negiraju tvrdnju da su to šta je pravo i šta bi pravo trebalo da bude logički nepovezane stvari. Da li je to negiranje dovoljno da se normativni pristupi izoluju od Posnerove kritike nije sasvim jasno; međutim, postoji dovoljno razlike između normativnih i deskriptivnih pristupa da bi se opravdao izvestan oprez pri razmišljanju da bi kriticizam te vrste mogao da počisti sve metodološke pristupe.

U svakom slučaju, Posnerovo gledište da konceptualna jurisprudencija ne bi trebalo da se praktikuje problematično je čak i ako je on u pravu kada smatra da takva analiza rezultira teorijama koje su u normativnom smislu značajne. Da bi se uvideo taj problem, valjalo bi razmotriti koliko bi Posnerova kritika bila uspešna u nekom drugom kontekstu. Iako je veliki rad na polju čiste matematike utrošen da se stvore tehnologije koje su značajno poboljšale naše živote, jedno od najslavnijih matematičkih dostignuća u skorije vreme nema takvu primenu. Pre nekoliko godina, Endru Vajls sa Univerziteta Prinston osmislio je nešto za šta se veruje da je uspešan dokaz Fermaove poslednje teoreme, koja tvrdi da ne postoje pozitivni celi brojevi x, y, z i $n>2$ takvi da je jednačina $x^n + y^n = z^n$ tačna. Uprkos činjenici da u matematičkoj zajednici niko nužno ne veruje da će to ikada imati neku praktičnu primenu koja će dovesti do poboljšanja čovekovog života, matematičari su utrošili desetine hiljada sati ne bi li pronašli dokaz ili protivdokaz za ovu teoremu.

To se, bar delimično, svakako može objasniti time da razlozi zbog kojih vrednujemo nekakvo znanje nisu instrumentalne prirode. Ponekad je poznavanje teoreme t u instrumentalnom pogledu vredno, u smislu da to znanje obezbeđuje sredstva za postizanje cilja, a to je proizvodnja korisne tehnologije. Mnogo toga u matematičkoj teoriji se očigledno može opravdati putem vrednosti praktične koristi za ljude, ali to nije jedini razlog zbog kojeg bi trebalo ceniti matematička istraživanja. Ako znanje nije uvek intrinsički vredno (to jest, vredno sebe radi, kao cilj sam po sebi), ono ponekad jeste intrinsički vredno. Poznavanje apstraktnih istina kojima se definišu osnovne strukture značajne praktičke vrednosti (kao što je matematika) čini se vrednim sebe radi; uistinu, nije nerazumno smatrati da svo znanje jeste (ili bi trebalo da bude) intrinsički vredno za jedno racionalno biće. Isto to bi važilo i za pojam prava; pod pretpostavkom da analiza pojma prava nema nikakvu praktičku instrumentalnu vred-

nost, plauzibilno je smatrati da razumevanje prirode institucije koja ograničava slobodu autonomnih aktera jeste intrinsički vredno.

Ali, da li je Posner u pravu kada smatra da ništa suštinski ne zavisi od konceptualne analize prava? Postoji, naravno, nešto što se može reći za njegovo gledište. Razmotrimo, na primer, raspravu između Dvorkina i Harta u vezi sa pitanjem sudske diskrecione vlasti. Dvorkin je jednom izjavio da odgovor na pitanje da li je pravično da u jednom teškom slučaju sudije utvrđuju odštetu koja se stavlja na teret optuženog zavisi od toga da li sudijsku odluku treba posmatrati kao nešto što je sadržano u postojećem pravu ili kao stvaranje novog prava; Dvorkin (1967: 31) o tome govori na sledeći način:

> Ako [sudije imaju diskrecionu vlast da donesu odluku u teškim slučajevima tako što stvaraju novo pravo] ... moramo priznati da su porodica ubice u predmetu *Riggs* i proizvođač u predmetu *Henningsen* bili lišeni svoje imovine putem sudske diskrecione ocene primenjene *ex post facto*. To možda neće šokirati mnoge čitaoce – pojam diskrecione vlasti prožima celu pravnu zajednicu – ali to je ilustracija jedne od najzamršenijih enigmi koja nagoni filozofe da se zanimaju za pravnu obavezu. Ako oduzimanje imovine u slučajevima poput navedenih ne može da se opravda pozivanjem na uspostavljenu obavezu, onda se mora naći neko drugo opravdanje, a ništa se ne javlja kao dovoljno dobra zamena.

Takva oduzimanja imovine su moralno nelegitimna zato što je nepravično oduzeti nekoj osobi imovinu prema zakonu koji nije postojao u vreme kada je počinjeno delo za koje se odgovara – ili bar tako argument kaže.

Čini se, međutim, da, kada je reč o tom pitanju, Dvorkinova teorija nije prošla mnogo bolje od Hartovog stava da sudije donose odluke u teškim slučajevima tako što stvaraju novo pravo. Prema Dvorkinovom mišljenju, ono što teške slučajeve razlikuje od drugih slučajeva jeste to što u teškim slučajevima postoji više od jednog mišljenja koje je u skladu sa postojećom institucionalnom istorijom. Stoga, ono što jedno pravno pitanje čini teškim jeste to što nam pravo (shvaćeno tako da uključuje postojeću institucionalnu istoriju) ne daje blagovremeno obaveštenje o tome šta ono nalaže, ako uopšte išta i nalaže.[23] Ako, međutim, pravičnost sprečava oduzimanje imovine od optuženog prema zakonu koji nije postojao kada je učinjeno delo za koje se odgovara, ona takođe sprečava i oduzimanje imovine od optuženog prema zakonu koji ne daje blagovremeno obaveštenje optuženom da dotično postupanje dovodi do takve odgovornosti. Baš kao što je nepravično kazniti dete zato što je prekršilo pravilo koje mu nije saopšteno u terminima za koje bi se opravdano moglo očekivati da će ih ono razumeti, isto tako nije pravično da se neko lice primora da plati odštetu prema zakonu koji na odgovarajući način ne saopštava tom licu da dotično postupanje dovodi do odgovornosti. Da bi se opravdalo utvrđivanje odštete koju neko lice

23 Neki slučajevi su toliko teški da je sudiji potrebna posebna (ili kako Dvorkin kaže »herkulovska«) sposobnost da razazna tačan odgovor na dato pitanje.

treba da plati, nije dovoljno to što ono ima pravnu obavezu; ta obaveza mora biti saopštena u terminima koje kompetentan govornik jezika može razumeti.

Naravno, daleko od toga da ovi primeri mogu da posluže kao osnova za neke konačne zaključke. Oni, međutim, daju povoda za razmišljanje, poput onog Posnerovog, da ne možemo rešiti suštinske probleme prava i morala tako što ćemo jednostavno pojmove vrteti u krug.[24] Pojmovi-reči se koriste da grupišu postupke, događaje i entitete i stoga sve što oni rade jeste izdvajanje određenih klasa postupaka, događaja i entiteta. Jasno je da ne možemo da rešimo nikakve interesantne moralne probleme tako što ćemo samo izmeniti svoje konceptualne karakterizacije nekog postupka, događaja ili entiteta. Da li je udaranje nekoga u lice moralno pogrešno ne može da zavisi od toga da li bi to trebalo okarakterisati kao »napad« ili kao »poljubac«; ako se to ispravno karakteriše kao »poljubac«, onda bismo morali da preispitamo svoje moralne stavove o dopustivosti ljubljenja. Koje supstantivne normativne kvalitete imaju određeni postupci ili događaji ne može da zavisi od toga na koji način se oni, kroz našu jezičku praksu, grupišu sa drugim postupcima ili događajima.

Posner, međutim, ne uspeva da shvati da to nije jedini način na koji bi analiza pravnih pojmova mogla da promeni naše živote. Zagovornici konceptualne analize koji imaju potrebu da opravdaju svoje stavove pozivanjem na društveno korisne posledice obično to čine tako što ukazuju na njene epistemičke koristi. Govoreći o vrednosti konceptualne analize na polju metafizike, Frenk Džekson (1998: 30) kaže:

> Iako se metafizika bavi time kakav je svet, *pitanja* koja mi postavljamo kada se bavimo metafizikom uokvirena su u jeziku i stoga treba da obratimo pažnju na ono što korisnici jezika žele da saopšte rečima koje koriste da postave svoja pitanja. Kada lovci na glave idu u potragu oni traže osobu, a ne foto robota. Ali oni neće daleko stići ako ne obrate pažnju na reprezentativna svojstva data na foto robotu osobe koja se traži. Ta svojstva im daju njihovu metu ili, ako hoćete, definišu predmet njihove potrage. Isto tako, metafizičari neće daleko stići sa pitanjima kao što su: Da li postoje *K*-ovi? Da li su *K*-ovi išta više od *J*-ova? I da li je *K* način na koji je svet u potpunosti određen *J*-om način na koji svet zaista postoji? ako ne postoji neka koncepcija o tome šta se računa kao *K*, a šta kao *J*.

Prema uticajnom Džeksonovom stanovištu, suština konceptualne analize nije u tome da ona sadrži rešenja za važne suštinske probleme prava, etike ili politike. Pre se radi o tome da nam konceptualna analiza pomaže da rešimo te probleme tako što nam pomaže da ih uvidimo i jasnije formulišemo. Tu, apsolutno važnu poentu, Kolman (2001: 13) iskazuje sledećim rečima: »Konceptualna analiza suštinski predstavlja filozofski poduhvat: njen cilj je da nam pomogne da pažljivije razmišljamo«.

24 Cf. Murphy 2001.

Čak i u tom slučaju, pitanje da li i na koji način su teorije konceptualne jurisprudencije vredne jeste jedno važno pitanje. Uvek je korisno znati da li određena oblast teorijskog promišljanja, osim što uvećava obim ljudskog znanja, donosi čovečanstvu i bilo kakve praktične koristi. Trenutno se suviše malo toga nudi na tom polju da bismo mogli da izvedemo bilo kakav opšti zaključak.

S engleskog jezika prevela
Vanja Jovanović.

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Conceptual Jurisprudence

An Introduction to Conceptual Analysis and Methodology in Legal Theory

This essay attempts to provide an accessible introduction to the topic area of conceptual analysis of legal concepts (or "conceptual jurisprudence") and its methodology. I attempt to explain, at a fairly foundational level, what conceptual analysis is, how it is done (i.e. its appropriate methodology) and why it is important in theorizing about the law. I also attempt to explain how conceptual analysis is related to other areas in philosophy, such as metaphysics and epistemology. Next, I explain the enterprise of conceptual jurisprudence, as concerned to provide an account of those properties that (1) distinguish things that are law from things that are not law which (2) constitute the former things as law, illustrating this explanation with what I hope are intuitive examples. Three different methodological approaches are also explained and evaluated. Finally, the practical importance of conceptual jurisprudence is discussed.

Key words: conceptual analysis, conceptual methodology, the nature of law, metaphysics of law, practical significance, concepts

1 INTRODUCTION

The defining project of general or conceptual jurisprudence – i.e., the conceptual analysis of law – is to provide philosophically rigorous explications of various concepts that figure prominently in discourse about law. That is, conceptual jurisprudence is concerned with giving an explication of the nature of law and other important legal practices. While many words, such as "chess," do not pick out concepts that seem important enough to merit a deep philosophical analysis, this is not true of the concept of law. The practices characterized as "legal" or involving "law" are of great moral and prudential significance; persons are incarcerated, fined, required to pay compensation for injuries caused by legally culpable behavior, and even executed for violating the law. It is a matter of clear practical importance that we ensure our practices satisfy rigorous norms of political morality, and we cannot understand what norms apply without an adequate understanding of the concept of law.

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This essay seeks to provide an accessible, but fairly comprehensive, introduction to conceptual theorizing about law. To this end, the essay will discuss the nature and methodology of conceptual analysis, the relationships of conceptual analysis to metaphysics and to epistemology, and the practical significance of conceptual analysis.

2 TYPES OF THEORIZING ABOUT LAW

Theorizing about law covers a range of topics. Most theorizing in law probably seeks to ascertain the content of relevant law on issues where the reasons fall fairly evenly on both sides; such articles strive for results that can be used by lawyers and judges to guide their deliberations. Some law review articles are concerned with defending a claim about what the law should, for non-moral practical or moral reasons, be on a particular issue. Others are concerned with justifying certain areas of law; with identifying the foundational principles that purport to determine the content of more specific norms; or with clarifying the meaning of certain terms. Yet others are concerned with explaining the nature of certain legal practices.

Despite this wide variety of interests on matters related to law, theorizing about law can usefully be divided into three rough categories. *Empirical legal theory* is usually concerned with identifying or explaining certain features or properties of existing legal systems; such theory is, at least, descriptive in character and focuses on *contingent* properties (i.e. properties that something does, in fact, possess but might not have possessed it) of the legal systems under study. An empirical legal theorist, for example, might be concerned with identifying or explaining the content of legal norms that purport to govern information privacy in the U.S. Similarly, she might be concerned with explaining the function that some set of legal practices in Colombia purports to serve.

In contrast, *normative legal theory* is largely concerned with determining the properties that legal norms or institutions, as a matter of political morality, ought to have or, otherwise put, must have to be morally legitimate. A normative legal theorist, for example, might argue that law, as a matter of substantive moral theory, should protect information privacy in a number of specified ways. Normative legal theorists are typically concerned with issues of moral legitimacy – what restrictions on citizen behavior may, as a matter of political morality, justifiably be enforced by the police power of the state.

General, or *conceptual*, jurisprudence is concerned with giving what is called a "conceptual analysis" of core legal concepts; that is, conceptual jurisprudence is concerned with explicating the core concepts of our legal practices, including the interrelations among them. In particular, conceptual jurisprudence seeks

to explicate the concepts of law, validity, and legal system and thereby seeks to clarify the logical relationships between these concepts and other concepts potentially related to them, such as the concepts of morality, authority, legal and social obligation, etc. A theory in conceptual jurisprudence will explicate the content of each concept and locate them among a general conceptual framework that guides both our linguistic practices regarding the relevant concept-words and our legal practices themselves.

This essay will be concerned with explaining conceptual jurisprudence/analysis and the various methodologies that have been proposed as identifying the principles that are most likely to result in a successful piece of conceptual analysis. In addition, this essay will provide a cursory evaluation of the various methodologies proposed for conceptual analysis.

3 UNDERSTANDING CONCEPTUAL ANALYSIS

3.1 What is a Concept, Anyway?

Conceptual analysis is the analysis of concepts; and this raises a difficult question: what, exactly, is a concept? The notion of a concept is somewhat mysterious and not well understood, but it seems clear, at the very least, that concepts are, or correspond with, mental elements needed to think about things of the relevant sort. For example, it is not possible to think, much less *talk*, about electrons without having or grasping the concept of an electron.

Although this claim much might seem uncontroversial, it tells us less about what a concept is than might initially appear. It doesn't tell us, for example, anything about the nature of a concept; the way in which concepts are acquired; or the extent to which they are shared among members of a community. But it is clear that the possession or apprehension of a concept is a necessary condition for being able to think or talk about the thing of which the concept is the concept of that thing.[1]

1 Some caution is required here. It is not exactly clear what is the thing of which the concept is a concept. For example, the extensional meaning of the term "legal system" is the class of all things that are properly characterized as being legal systems; accordingly, the extensional meaning, or referent, of the term refers to a set – and not to some general unitary legal system. The intensional meaning, of course, is the idea or content expressed by the term "legal system." It should be understood that we are speaking somewhat metaphorically when we talk about the thing of which something is a concept. If there is a thing that is law *as such* or a bachelor *as such*, it is not clear (at least, not to me) what kind of thing it is, beyond its not being identical with either the extensional or intensional meanings of the relevant concept-term. But while it would be helpful to have a more developed account of those special "things," we can speak somewhat metaphorically without undesirable consequences as long as we keep in mind that we are speaking a bit loosely. Such talk, however, is quite useful in discussing the various topics with which this essay is concerned. But if one is still a bit uncomfortable, one can think of

There are different views about what concepts are: (1) concepts are psychological states representing ideas or things; (2) concepts are abilities of a special kind – namely, the ability to discriminate one kind of thing of which a concept is a concept from another kind of thing of which another concept is a concept (having the concepts of tree and bush simply is a matter of being able to distinguish trees from bushes); and (3) concepts are meanings or "senses" of words.

Obviously, the methodology of conceptual analysis must be responsive to what a concept is. For example, if concepts are representational mental states, a proper analysis of any concept would require saying something about the content of the representation as well as about the nature of the relevant state (which might be a compound state involving beliefs and dispositions of various kinds).

Regardless of what concepts turn out to be, they are intimately associated with language. People use *language* to express concepts. We may not have a word associated with every concept we have. But we have a large number of words to express, refer to, convey, or pick out concepts: we use "love" to think or talk about love; "law" to think or talk about law, and so on. We use a concept-term that picks out a particular concept to talk about things that fall under the concept.

Our ability to talk to each other about something a concept is a concept of (say, law) says something about the relationship between the content of a concept and our use of the associated concept-term. It is reasonable to think that we have some pre-linguistic capacity to develop concepts and develop some concepts long before we learn the associated word; without such a capacity, we could not learn a language. But the contents of our concepts are highly responsive to the linguistic practices involving the associated words because we cannot share an understanding of how to use a word without sharing a grasp of the core content of a concept.[2] If you and I have radically different concepts of law, we will not be able to understand what each other is saying when using the concept-term "law."

these things as being any member of the relevant extension provided that we remember that we are interested in that particular member insofar as it falls under the concept.

2 I am agnostic with respect to how these practices arise or should be characterized beyond claiming that (1) they are social practices that arise and are maintained in part because they are shared across a community and that (2) core elements of this practice yield norms that have prescriptive force among members of the relevant community. For example, one might think nothing more specific regarding our practices for using "bachelor" than that they comprise various patterns of usage shared among a community. Alternatively, one might think these practices constitute conventions. Either way, the practices are social in character and express a shared norm that "bachelor" is properly used only of men: it is uncontroversial that someone who uses "bachelor" to talk about a dog has made a mistake.

The claim that concepts are associated with linguistic practices does not imply that concepts *are* linguistic entities; in particular, it does not imply that concepts are meanings. There is nothing in the claim that the content of our concepts is shaped by the content of linguistic practices that would entail that concepts are meanings, rather than mental representations or abilities. My concept of water might simply be an ability to distinguish things that are water from things that are not, even if that ability is responsive to how people around me use the term "water."

3.2 Traditional Conceptual Analysis as Explicating Fregean Senses

The traditional methodology for doing conceptual analysis presupposes that concepts are grounded in meanings or Fregean senses. Conceptual analysis attempts to provide a story, grounded in ordinary intuitions about the Fregean sense of the concept-term, about something that falls under the relevant concept. This story, grounded as it is in views about the meanings of the terms, purports to describe the very *nature* of the thing the concept is a concept of.

It would be helpful to consider a comparatively unproblematic concept to illustrate how conceptual analysis has traditionally sought to identify the nature of a kind of thing through a philosophical explication of the meaning of the relevant concept-term. Consider the concept of a bachelor. Putting aside some minor concerns about the ordinary meaning of bachelor, it is reasonable to think that, for any X, X is a bachelor if and only if X is an unmarried adult male. If correct, this analysis of the concept provides a list of properties that not only distinguishes bachelors from non-bachelors but also explains why something that is a bachelor falls under that category. That is to say, the analysis of the concept identifies those properties that explain why something is a bachelor in the following sense: the instantiation of the properties of being unmarried, adult, and male *constitute* anything that instantiates them as a bachelor. Insofar as being unmarried is a conceptual feature of being a bachelor, given the meaning of the concept-term "bachelor," being unmarried is part of the very nature of being a bachelor.

Here it should be noted that the idea here is not that instantiation of these properties *causes* something that instantiates them to be a bachelor; whatever it explains why something is a bachelor will also explain why something is unmarried, adult, and male – and the latter explanation will differ from one person to another as the causal explanation will make reference to contingent properties and factors. "What makes Jim a bachelor?" is a very different question from "Why is Jim a bachelor?"; at a minimum, answering the latter might require knowledge of personal information about Jim, while answering the former surely does not.

Constitution is a different notion than causation. Being a floating mass of water vapor *constitutes* something as a cloud; it does not cause something to be a cloud. It is the possession of these properties that determine a floating mass of water vapor's status as a cloud; it is a cloud *in virtue of* being a floating mass of water vapor. Constitution is not an event that occurs in time, and this is, in part, what distinguishes constitution from causation, which is an event that occurs in time. Why a particular collection of water molecules is a cloud or a floating mass of water vapor requires a different kind of explanation and analysis. It requires an explanation that is largely empirical in nature, requiring reference to laws of nature and events occurring in time that express the causal antecedents and causal results that go into an explanation of why this particular set of water molecules was transformed into that particular floating mass of water vapor that is the cloud of interest. Conceptual analysis is concerned not with causal explanations, but with the properties that constitute something as falling within the reference of a concept-term, such as "bachelor," "cloud," or "law."

It is sometimes thought that traditional conceptual analysis (TCA), inasmuch as it seeks to identify meanings through ordinary intuitions about the application of the relevant concept-term, involves little more than providing a dictionary definition. Brian Leiter (2003: 45), for example, argues that TCA is nothing more than "glorified lexicography":

> Conceptual analysis, as Jackson conceives it, becomes hard to distinguish from banal descriptive sociology of the Gallup Poll variety. Indeed, Jackson says explicitly that he advocates, when necessary, "doing serious opinion polls on people's responses to various cases"! But this now seems to blur the line between conceptual analysis and lexicography: for does not lexicography aim to track statistically normal usage of words or concepts, precisely the pattern of usage a well-designed opinion poll would detect.

This is a mistake. TCA might start from something that resembles lexicography, as it is *grounded* in meaning, but it is considerably more than this. TCA goes deeper than just identifying shared views; that, of course, is the job of a lexicographer who records empirical patterns of word-usage. Conceptual analysis attempts to theorize these views by identifying deeper philosophical commitments they imply or presuppose, as well as more general principles that explain them. While this might or might not be a distinctively philosophical enterprise, it goes well beyond the empirical task of identifying shared intuitions or core features of our linguistic practices.

There is an easy way to see this point: simply compare what lexicographers have to say about the word "law" with what Hart has to say by way of explication of the concept of law. Here is how the lexicographers for the *Oxford American Dictionary* have defined law:

> law | noun **1** (often **the law**) the system of rules that a particular country or community recognizes as regulating the actions of its members and may enforce by the imposition of penalties : *they were taken to court for **breaking the law** | a license is required **by law** |* [as adj.] *law enforcement.*
>
> - an individual rule as part of such a system : *an initiative to tighten up the laws on pornography.*
> - such systems as a subject of study or as the basis of the legal profession : *he was still practicing law |* [as adj.] *a law firm.* Compare with **jurisprudence**.
> - a thing regarded as having the binding force or effect of a formal system of rules : *what he said was law.*

Notice how much that Hart's theory addresses that is overlooked by the lexical definition. First, there is no mention here of many pieces central to Hart's analysis: social practices; the rule of recognition; secondary and primary rules; legal validity; etc. Second, the lexicographer's job is accomplished in a few lines, while Hart took more than 200 pages to give an analysis of the concept of law in *The Concept of Law*. If Hart starts from the shared views about the meaning of "law," it should be clear that he is also doing something radically different from what lexicographers are doing – and going much deeper into what law really is, as such.

In this connection, it would be helpful to return to the concept of bachelor. According to the lexical definition, a bachelor is an unmarried adult male; the properties of being unmarried, adult, and male exhaust the nature of a bachelor, on this definition. Unfortunately, this analysis of a bachelor leaves important questions open – questions that cannot be answered by a dictionary, because it is the dictionary definition that is indeterminate with respect to these questions. For example, it is not clear whether the Pope is a bachelor. Many people think, when confronted with the issue, that the Pope is not a bachelor, despite being unmarried, adult, and male. Likewise, many people are reluctant to use the term "bachelor" to describe a gay man who lives in jurisdictions not recognizing marriage equality. This suggests that the dictionary definition must be supplemented by, at least, one additional condition: it is a necessary condition for being a bachelor that one be "eligible" in the appropriate way to get married; the problem with both cases described above is that neither person is eligible in the right way for marriage to be considered a bachelor. Of course, the appropriate analysis of "eligible" is needed, among other things, to complete the analysis, but this example should make it clear that TCA, at the very least, *purports* to go beyond the surface meanings provided by lexicography.

4 THE RELATIONSHIP BETWEEN CONCEPTUAL ANALYSIS AND EPISTEMOLOGY: THE TRADITIONAL VIEW

4.1 The Traditional View Described

The traditional view of the epistemology of conceptual analysis is that the methodology for justifying conceptual claims is *a priori*. While it is true that one cannot identify the core content of the patterns of usage that link words and concepts without empirical experience, no further experience, on this view, is needed to justify true conceptual claims. Once it is observed that people use the word "bachelor" only to refer to unmarried men, no further experience is needed to justify the claim that no woman is a bachelor. This claim is justified as a valid logical deduction from the conceptual claims that only men are bachelors and that no woman is a man.

Not every purely deductive argument, of course, will be as easy as those described in the last paragraph. This will be obvious to anyone who has read Hart's *The Concept of Law* or Raz's *The Authority of Law* or to anyone who has done any serious mathematics. It took hundreds of years to find a proof for Fermat's Last Theorem; and the paper proving it was more than one hundred pages long – and something that no layperson could hope to understand.

Of course, there is more to TCA than simply making inferences from core patterns of linguistic usage. Frank Jackson (1998: 31) describes another methodological element in discussing the concept of free will:

> What we are seeking to address is whether free action *according to our ordinary conception,* or something suitably close to our ordinary conception, exists and is compatible with determinism, and whether intentional states *according to our ordinary conception*, or something suitably close to it, will survive what cognitive science reveals about the operations of the brain /…/ But how should we identify our ordinary conception? The only possible answer, I think, is by appeal to what seems to us most obvious and central about free action, determinism, belief, or whatever, as revealed by our intuitions about possible cases.

TCA attempts to identify conceptual content that goes beyond the most obvious, and hence "paradigmatic," features of our shared practices by considering intuitions about possible cases. While the relevant intuitions are ordinary in the sense of being widely shared, they frequently make explicit features of our practices of which ordinary speakers might not be cognizant until they consider such cases. For example, most speakers will probably not realize that our concept of law does not entail that law must conform to morality[3] until asked whether the Nazis had a legal system or whether the Jim

3 There is little disagreement among legal theorists, legal practitioners, or even laypersons on this issue. Indeed, most natural law theorists in the Thomist tradition deny that Aquinas claimed that unjust norms could not be law.

Crow enactments were laws. Such cases help to flesh out the content of our shared practices in more specificity, identifying features of the concept that will have to be explained theoretically.

On the traditional conception, the relevant intuitions are purely descriptive and do not include moral intuitions about right or wrong, good or bad. Identifying the content of a concept, on this view, is not governed by moral principles,[4] even when the concepts are used to evaluate behavior. For example, it is irrelevant in evaluating two proposed analyses of the concept of law whether one analysis is morally better than another – though moral standards obviously should play a role in deciding what norms should be enacted into law. TCA is purely descriptive and purely general in the sense that these intuitions range over all possible cases.[5]

What if people disagree on the relevant intuitions? There are a couple of different ways to reconcile such disagreement with a "modest" approach to traditional conceptual analysis that understands conceptual analysis as concerned with identifying the meaning of a concept-term *as used by a particular community of speakers*.[6] First, one could take the position, discussed in more detail below in the next subsection, that such disagreement signals a deeper disagreement that indicates membership in two communities that do not share the same concept. A modest approach seems to presuppose that conceptual analysis is appropriate only within a community of speakers that share the relevant intuitions and social practices. Second, one could take the position that intuitive disagreement can take place within a community of speakers sharing the same concept but that such disagreement signals that our understanding of the concept is indeterminate with respect to the pertinent issues.

Jackson distinguishes an "immodest" conception of conceptual analysis from the modest conception, claiming that TCA should be thought of as modest. According to the immodest conception, conceptual analysis gives us insight into what the world is like; that is, an analysis of the content of our concept of law, for example, would give us insight into the essential nature of law *as it really is independent of our linguistic practices and conceptual frameworks.* According to the modest conception, conceptual analysis merely "tells us what to say in less fundamental terms given an account of the world stated in more funda-

4 There are two kinds of norm that might figure into analyzing a concept: epistemic norms, like that requiring consistency, and moral norms, including those that govern states. There is no controversy about whether epistemic norms should play a role in theorizing. See Coleman 2001.

5 Many theorists, including Ronald Dworkin, believe it is not possible to give a purely descriptive analysis of evaluative concepts like law. See, e.g., Dworkin 1986.

6 As Raz has put the point, conceptual analysis is concerned with *our* concepts, as those concepts are constructed by *our* social practices – "our" referring to members of a particular community of speakers, namely *us*. See Raz 1994: 216–217.

mental terms" (Jackson 1998: 44) – the fundamental terms being terms defined by the practices of the relevant community of speakers.

The talk of moving from more to less fundamental terms reflects the commonsense view of *analysis* as attempting to resolve and explain what is complex in more simple terms. The idea is that when we analyze a concept, we break it down into simpler constituents so as to display its logical structure and give an explanation of its content that transcends, but incorporates, its ordinary lexical meaning – an idea that is quite common historically. Although theorists have frequently supplemented and modified the analysis of "analysis," the basic elements of that concept have nonetheless remained largely stable.[7]

But the important point here is that modest conceptual analysis presupposes an account of the world "stated in more fundamental terms" as its starting point. This account, however, must be *someone's* account; and, as we have seen, it is a *shared* account grounded in *shared* intuitions and is, thus, *our* account of the relevant thing of which the concept is a concept. TCA thus presupposes a certain story about things – one that is *our* story – and does not purport to describe the world as it is independently of our stories about things.

Jackson understates the role of linguistic practices in determining the content of our concepts. While it might be true that all possible concepts exist in logical space along with every other abstract object, the content of *our* concepts are at least partly *fixed* by our linguistic practices. Indeed, as critics of TCA concede, if we used the symbol "water" to refer to something other than the clear liquid to which it is used to refer, it would not be a conceptual truth that water is H_20 – though there would undoubtedly be some conceptual truth corresponding to the relationship between some term and H_20. Concepts might be abstract objects independent of our social activities about which there are utterly mind-independent objective truths, but *language* is a social construct grounded in a social practice; and which concepts our words pick out or express is partly defined by the content of those practices.

This suggests that explanations of the traditional methodology for *descriptive* conceptual analysis are not entirely accurate. Although philosophers frequently justify conceptual claims by an appeal to "ordinary intuitions," the relevant intuitions are shared views reflecting the core practices for using the terms. If, as Jackson (1998: 33) maintains, "[t]he business of consulting intuitions about possible cases is simply part of the overall business of elucidating concepts by determining how subjects classify possibilities", then shared views *about language* will condition the relevant intuitions because how subjects classify possibilities depends on the core practices for using the words. We classify things by using words, which in turn, on the traditional view, express, mean, or convey

7 Beaney 1996.

concepts. Analyzing the content of a concept, on this view, requires identifying shared practices concerning the word.[8]

Some of the relevant views might be non-linguistic in character and express some widely accepted belief about a mind-independent feature of reality to which we want to refer. But, in such cases, these non-linguistic "intuitions" about the world will likely play an important role in defining core features of our practices regarding a concept-term. For example, part of what will explain why we use the term "water" to refer to only clear liquids with the chemical structure of H_20 is the scientific discovery that water is H_20; this non-linguistic consideration helps to explain why we have converged on using "water" to apply only to H_20. The content of natural-kind concepts frequently changes in response to scientific discoveries because scientific discoveries can frequently result in changes in the way we use the relevant concept-terms. Conventions for using a word, or the definition of a word, can, and frequently does, change over time.

But the relevant views are usually informed by our core linguistic practices regarding the use of the associated term. I have, for example, the intuition that all bachelors are adult males because, as an empirical matter, no one uses the term "bachelor" to refer to boys or women, and not because I have some non-linguistic intuition about the nature of bachelors. Our shared practices converge on calling only men "bachelors" – and my intuition that only men are bachelors is informed by and expresses those shared linguistic practices.

TCA, then, has an undeniably empirical element.[9] What views are shared among a community is a contingent matter that cannot be determined without empirical observation. While it is true that one reliable way to do the empirical work, as Jackson suggests, is to take an opinion poll, it is not usually necessary. Armchair sociology of the sort at which philosophers excel (usually without realizing that they are doing sociology) is sufficiently reliable as long as one belongs to the linguistic community under consideration.

8 Hart (1994: v) put it: "Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J.L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomenon'".

9 Frederick Schauer makes exactly this point: "Like his philosophical colleagues at the time, [Hart] examined ordinary usage closely for the distinctions it embodied and rigorously analyzed and defined the terms used to mark legal concepts /…/ Conceptual analysis, as Hart surely must have recognized, inevitably rests at least in part on empirical observation, and this empirical foundation of conceptual analysis could also implicitly undergird his claim to be doing descriptive sociology." Schauer 2006: 860–861.

4.2 Two Methodological Challenges to the Traditional View: Normative and Naturalized Jurisprudence

The views described in the last subsection are no longer undisputed among philosophers. First, the very notion that *a priori* knowledge is possible has become controversial among epistemologists embracing a reductive empiricism. Second, and more to the point for our purposes, the underlying assumptions of the traditional view of conceptual analysis have been challenged by certain methodological disputes among theorists in conceptual jurisprudence, regarding the proper methodology for evaluating conceptual claims – in particular, conceptual claims regarding law.

There are three different methodologies for engaging in conceptual analysis. TCA, as we have seen, adopts a descriptive methodology in the sense that conceptual claims are justified by only factually descriptive claims about the content of the relevant social practices (which typically include linguistic practices); TCA is also guided by epistemic norms of good theory construction and reasoning, such as norms requiring consistency, coherence, consilience, etc., but moral norms are irrelevant in assessing or building an analysis of the content of a concept, under TCA. TCA begins from our ordinary social practices and attempts to make inferences about the deeper implications of those practices forming the starting point for TCA in a way that conforms to the epistemic norms mentioned above.

Although TCA is "descriptive" in the sense that conceptual claims must be justified by recourse to certain social practices and might, thus, seem to embrace an empirical epistemology, the content of the relevant social practices are grounded in the presumably shared core meanings of the relevant concept-term by the appropriate community in the appropriate practices – which form the ordinary intuitions described in the preceding subsection's discussion of the traditional views above. From that foundation, further claims fleshing out the content of the concept beyond its core meanings in the appropriate community of speakers are thought justified *a priori*, if justified at all, according to proponents of TCA. TCA, thus, assumes explicitly that conceptual claims are *a priori* in character.

TCA also assumes that conceptual claims are *analytic* in character in the sense that their truth-value depends only on the content of the meanings of the relevant words. The distinguishing feature analytic claims has to do with the truth-makers for such claims – i.e. what factors determine whether the claim is true or false: intuitively expressed, the idea is that a claim is analytic if and only if its truth-value is determined entirely by the meanings of the relevant terms. TCA attempts to dig out the deeper conceptual commitments that are implied by certain paradigmatically analytic statements, such as, for example, a law is

a norm. Whether all the logical implications of an analytic statement are also analytic is interesting issue, as it depends on whether one sees the notion of analyticity as being only semantic in character or whether one sees analyticity as incorporating some vague epistemic notion of being self-evident or easily seen to be analytic. Either way, as will be discussed below, the claims that flesh out the content of a concept are, under TCA, thought to be necessarily true – regardless of whether all the relevant implications of an analytic claim are themselves analytic.

There have been two influential challenges to TCA. First, W.V.O. Quine argues that the notion of analyticity on which TCA depends cannot be given an explication that would be sufficiently rigorous to ground the methodology associated with TCA. On Quine's view, the problem with defining analyticity in terms of being true or false wholly in virtue of the meaning of terms is that the notion of "meaning" is too "obscure." But any other candidates for explicating analyticity fail because they are as much in need of clarification as the notion of analyticity itself. Consider, for example, the idea that analyticity can be explained in terms of synonymy: the claim would be that a claim is analytic if and only if the subject term is synonymous with the predicate term. The problem, according to Quine, is that the notion of synonymy is as much in need of philosophical explication as the notion of analytic and cannot count as an adequate explication of the latter. Insofar as all possible explanations of analyticity share this defect, all such accounts are "circular" and hence illegitimately used as the ground for thinking philosophy has a distinctive methodology exemplified by TCA.

While quite influential in legal philosophy, these arguments are no longer as influential in other areas – most likely, because they are vulnerable to many plausible criticisms. Indeed, in some respects, the arguments seem straightforwardly problematic. If the claim that a concept is obscure were, by itself, enough to justify disqualifying it from appearing in philosophical discourse, one would have to disqualify such concepts as number and quarks, both of which are very difficult to explicate in a clear intuitive way. Further, if the unavailability of a non-circular explication of a concept were sufficient to warrant disqualifying it from philosophical discourse, many concepts of philosophical importance would be disqualified: there are some mathematical notions (such as the notion of a set, which is defined in terms of obvious synonyms: 'group' and 'collection') and moral notions (such as the notion of good) for which no non-circular explication can be given.[10]

A second challenge to TCA claims that the methodology's reliance on intuitions is problematic because intuitions differ from culture to culture and hence are too unreliable to ground a philosophical explication of anything. But there is nothing either surprising or problematic about this. Conceptual frameworks

10 See, e.g., Grice & Strawson 1956.

are defined by language and language is a social artifact that differs from one culture to the next; insofar as a word does not translate perfectly in another language, intuitions about the relevant concept-terms will not line up. That, however, is not a problem once the truism is understood that TCA seeks to explicate *our* concepts – concepts that are shared within a particular community, an assumption that should, as we have seen, be attributed to Jackson's modest approach to TCA.

Despite the questions concerning the merits of these arguments, they have nonetheless been extremely influential in debates about the methodology of conceptual jurisprudence. In particular, these arguments have led to a call for a "naturalized jurisprudence." Leiter, the most prominent proponent of naturalized jurisprudence, argues that TCA should be rejected on the grounds of these arguments in favor of a methodology that is continuous with scientific methodology and hence empirical in character. Such a methodology must reject all the notions that Quine rejects in "Two Dogmas," including modal notions, such as necessity and possibility. This implies the rejection of the idea that true conceptual claims are necessarily true and can come to be known *a priori.* Insofar as philosophical methodology should be regarded as "continuous with science" and hence as empirical in nature, conceptual claims are contingently true, if true at all.

Apart from the problems associated with the arguments thought to ground a naturalized jurisprudence, there are further worries about naturalized jurisprudence. No one has articulated a reasonably clear statement of how a naturalized jurisprudence should proceed with respect to analyzing concepts. There are many questions about law a naturalized methodology can answer – indeed, any empirical question about the 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. 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.

Of course, one can always accept these implications, as well as the other implications of Quine's analysis for philosophical theorizing about numbers, moral notions, and other notions that cannot be given a non-circular explication; there is nothing resembling an obviously decisive counterargument given above. But

there nonetheless persists the strong intuition that there is something valuable about TCA, conceived as resting on analytic claims and expressing necessary truths about the relevant thing. Indeed, traditional conceptual analysis, metaphysics, and normative theorizing in morality and epistemology continues to be prominent in philosophy, despite the Quinean challenge. Indeed, according to a recent study, 64.9% of philosophers accept the analytic-synthetic distinction, while only 27.1% reject it.[11]

A second methodological challenge to the ascendancy of TCA is *normative jurisprudence*. Normative jurisprudence is typically grounded in a rejection of the view that giving an account of what law is (as such) is a different enterprise than giving an account of what law ought to be, construed to imply that conceptual methodology should be purely descriptive.[12] Intriguingly, Hart (1994: 211) seems to suggest, contrary to nearly everything else he said on methodology, that a conceptual theory of law is sometimes properly evaluated on the basis of normative considerations that go beyond the norms governing sound reasoning and argument:

> A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the variety and complexity of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.

One should not make too much of this argument, as Hart is clear in regarding conceptual methodology as properly descriptive in character; however, it is important to realize that this remark is in tension with Hart's clear commitments insofar as recourse to any such practical considerations in justifying a conceptual theory is irrelevant on a purely descriptive approach to conceptual methodology. Strictly speaking, recourse to such considerations presupposes the truth of one possible thesis of a normative methodology – namely, that an adequate explication of the concept of law should have some beneficial social consequences and, thus, that the adequacy of a conceptual theory of law depends on the practical social implications of adopting it.

More commonly, proponents of normative jurisprudence assert that the concept of law cannot be adequately explicated without recourse to moral norms that define what the content or point of law should be. Law as such is, thus, partly defined in terms of the moral value of its point, content, or practices. On this view, as Dickson (2001: 7) describes it, "the task of characterizing law 'as it is' is necessarily and inextricably bound up with one's understanding of how law morally ought to be, such that the two enterprises cannot be separated".

11 Bourget & Chalmers 2013.

12 For a helpful discussion of this motivation for normative jurisprudence, see Dickson (2001: Ch. 1, Sect. A).

Each of these claims about the relevance of practical norms (beyond the norms of rationality) has some powerful implications for methodology. Normative methodology resembles TCA in locating the starting point of conceptual analysis in widely shared understandings concerning the relevant social practices and paradigms picked out by the relevant concept-term. Where normative methodology departs from TCA, however, is in rejecting the traditional view that the ordinary understandings of the practices and paradigms define the exclusive touchstone for testing the theory; instead, an accurate analysis of legal concepts must answer also to substantive moral norms that stipulate either what the content of these concepts *ought* to be or what social consequences a conceptual theory of law *ought* to have.[13]

But why think that one cannot give an account of what law is as such without considering what law morally should be? One class of arguments – perhaps, the most influential – proceeds from the assumption that normative concepts (i.e. concepts with normative content, such as that picked out by "good") must sometimes be analyzed to conform to some relevant set of moral norms. Since, for example, one might think that law's conceptual function is to create the conditions of justice, the concept of law is partly normative in content, requiring that an analysis of law harmonize with certain moral norms.

Ronald Dworkin offers one of the most influential defenses of the idea that the very concept of law is partly normative in character and requires a normative methodology to explicate. On Dworkin's view, certain concepts are "interpretive" in character and, as such, must be analyzed against the backdrop of some relevant class of substantive norms. Dworkin attempts to show that the concept of law is interpretive and hence warrants a normative methodology by showing an analogy between the concepts of law and courtesy, the latter of which he takes to be paradigmatic of interpretive concepts. Dworkin (1986: 47) begins with a sustained argument for the conclusion that courtesy is an interpretive concept:

> Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy," on a certain range of social occasions. /…/ For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But, then, perhaps slowly, all this changes. Everyone develops a complex "interpretative" attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle – in short, that it has some point – that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy – the behavior it calls for or judgments it warrants – are not necessarily or exclusively what they have always been, so that the strict rules must be understood or applied or extended or modified or qualified by that

13 Influential proponents of normative methodology include Perry (2001: 311–354) and Waldron (2001: 410–433).

> point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution – to see it.

Dworkin goes on to analogize the norms of law to the norms of courtesy to support his view that the concept of law is interpretive – i.e., that the real nature of the concept of law is interpretive and not preinterpretive as the positivist supposes. Thus, he concludes, an analysis of the concept of law must depend on certain moral norms that define its normative purpose.

There are a number of potential objections here to Dworkin's line of argument. First, it is not clear that Dworkin has succeeded in showing that the concept of courtesy has interpretive content that warrants a normative methodology. While it may be true that courtesy seeks, as a conceptual matter, to realize some kind of point or value, it does not follow that the content of the *concept* of courtesy cannot be explicated without recourse to *moral* norms – even if the value courtesy seeks is a *moral* value. The point of courtesy is likely defined by social practices that can be observed as a means of identifying that point. What must, of course, be responsive to that conceptual point of courtesy are the *substantive norms* of courtesy; knowing the point of courtesy helps us to identify what the norms of courtesy should be. But it, arguably, gets the matter backwards to think that the norms of courtesy must be consulted to identify what the content of the concept is, even beyond identifying the point of the concept. It is not clear how norms of courtesy could even be identified and distinguished from other kinds of norms without having an understanding of the conceptual point of courtesy. Indeed, the norms of courtesy are what they are because, if followed, they enable a subject to conform her behavior in a way that achieves the point of courtesy; the point of courtesy seems to serve as a touchstone for the correctness of the observed norms. If this is correct, then the content of the point determines the content of the norms; the content of the norms does not determine the content of the point, as the objection assumes.

Second, and more importantly, it is simply not clear that a concept that has normative content can be adequately explicated only through a methodology that incorporates moral norms. The concept of morality, for example, has normative content: the use of the words "moral" and "immoral," when used in conjunction with a description of an act, express values that provide reasons for action. That X is immoral is a good reason for not doing X. Yet William Frankena provides a plausible analysis of the content of the concept of morality without recourse to a morally normative methodology, relying instead on TCA. As this theory has been described:

> Among those who use "morality" normatively, all hold that "morality" refers to a code of conduct that applies to all who can understand it and can govern their behavior by it. In the normative sense, morality should never be overridden, that is, no one should

ever violate a moral prohibition or requirement for non-moral considerations (Gert 2011).

This analysis is gleaned from a purely empirical observation of how people use the relevant concept-terms, which is, of course, simply a matter of teasing out the implications of the shared patterns of ordinary usage among the relevant class of speakers. It is, thus, not clear that one can infer that a normative conceptual methodology is appropriate for concepts with normative content.

It is true, of course, that conceptual jurisprudence cannot be done without making certain kinds of value judgment that depend on norms other than those governing good reasoning and argument. One cannot begin an analysis of the concept of law without being able to pick out features of law that are theoretically important. It might be true, for example, that all judges wear robes, but this is not a feature of law that is sufficiently crucial to law that it must figure into an explication of the concept of law. Conceptual jurisprudence must, as Dickson (2001: 51–57) points out, therefore be "indirectly evaluative" in the sense that it requires recourse to norms that enable us to distinguish important common features of law from unimportant common features of law; however, a successful methodological approach to law need not be "directly evaluative" in the sense that it requires recourse to moral norms that state what content the law or relevant social practices should have.

As Hart (1987: 39) puts this important point:

> [A]n analysis which allots a place to moral claims and beliefs as constituents of social phenomena must itself be guided, in focusing on those features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values. But again there is nothing to show that this analysis is not descriptive but normative and justificatory.[14]

Accordingly, Hart distinguishes between an indirectly evaluative approach according to epistemic norms that help pick out features of theoretical importance and a normative approach that seeks to justify some of the various practices and structures that determine the relevant concepts of interest.

5 THE RELATIONSHIP BETWEEN CONCEPTUAL ANALYSIS AND METAPHYSICS

As conceived by TCA, the analysis of a concept discloses the nature or essence of the thing referred to by the corresponding concept-word. Thus, a con-

14 Others defending this distinction include, e.g., Coleman 2001; Marmor 2001; Waluchow 1994; Dickson 2001; and Finnis 1980.

ceptual analysis of law is intended to tell us something about the nature or essence of law; that is to say, it is supposed to tell us something about not just all *existing* legal systems, but all *conceptually possible* legal systems. Thus conceived, a conceptual analysis of law consists in a set of conceptually (or metaphysically) necessary truths and thus constitutes a piece of metaphysical theorizing – just as an analysis of the concept of free will is a piece of metaphysics. As Hart cautioned, conceptual analysis may begin from words, but it is important to realize that an adequate explication of a concept will include truths that go far beyond the conventions that establish the core meanings of those words. The project of analyzing the content of legal concepts is the project of exploring the metaphysics of law, explicating its nature in terms of claims that are *necessarily* true – the hallmark of metaphysical inquiry.[15]

The metaphysical character of conceptual analysis, traditionally conceived, is logically connected to the view that the epistemology of conceptual analysis is *a priori* in character. Empirical observation is essential, primarily, for identifying only the contingent sensible properties of particular things. For example, empirical observation is needed to come to know that a bag of rocks contains four rocks, but does not, from the standpoint of ordinary intuition, seem to be needed to know that 2 + 2 = 4; it would be silly to go out and attempt to confirm the truth of this arithmetical proposition by a series of trials in which the sum of putting two rocks together with two more rocks is identified and recorded. We need empirical observation to know that there are two rocks in the bag because that could be false; in contrast, we come to know that 2 + 2 = 4 by grasping, somehow (and the operation of the *a priori* faculty, if such there be, is quite mysterious from the standpoint of epistemological theory), that it could not be false.

Insofar as the essential properties of law are possessed by every possible legal system and not by just the existing legal systems we can observe by our senses, empirical observation is irrelevant in conceptual analysis – except as is necessary to understand the concept-term well enough to pick out paradigm instances of the things to which it refers. Accordingly, the methodology for conceptual analysis, thus conceived, would be *a priori*.

Similarly, the metaphysical character of conceptual analysis, traditionally conceived, is thought to be logically connected to the view that the deeper con-

15 It is important to note an important difference here between a modest and an immodest approach to conceptual analysis. Insofar as a modest approach is explicitly grounded in contingent social practices like those that define the language of the community, conceptual truths are necessary *relative to that set of particular commitments*; we impose a certain metaphysical structure on the world through conceptual commitments that arise out of social practices we construct. In contrast, insofar as an immodest approach seeks to identify truths that are independent of human practices, conceptual truths would simply be necessarily true – and without regard to any particular conceptual framework that people impose on the world through linguistic and other social practices.

tent of some concept can be derived from some set of comparatively obvious analytic truths about the thing the concept picks out. If a claim, *C*, is true wholly in virtue of the meanings of the words used to express it, then the denial of *C* is a contradiction. Since a contradiction is impossible, *C* is necessarily true and hence metaphysical in character, as metaphysics deals with issues concerning the nature of things. The content of the concept, then, will be fleshed out by a set of claims that are necessarily true and derived from the analytic truths that form the starting point of for TCA.[16] Again, TCA presupposes conceptual analysis is metaphysical in character.

As noted above, there have been two methodological challenges to TCA – normative jurisprudence and naturalized jurisprudence – and they disagree on the issue of whether conceptual analysis is metaphysical in character. Normative jurisprudence, as will be recalled, holds that an analysis of the concept of law must conform to certain relevant moral norms, just as it must conform to certain norms governing rational discourse. While normative jurisprudence does not entail a meta-ethical position about whether morality is objective (i.e., "moral objectivism"), most theorists favoring a normative methodology also hold moral objectivism.[17] Insofar as moral objectivism entails, as is commonly held, that moral norms are necessarily true, if true at all, applying a morally normative methodology to conceptual analysis will likewise flesh out the content of the relevant concept in terms of necessary truths that express the nature of the relevant thing. Normative methodology, thus, entails that the character of conceptual truths is metaphysical.

What is considerably less clear is whether normative methodology presupposes that conceptual claims are analytic, as TCA appears to. The problem here arises in connection with the character of moral claims. Assuming, as norma-

16 An interesting question is whether, assuming the starting point of TCA consists entirely in analytic truths, the implications of a set containing only analytic truths are necessary also analytic in character. The claim that law consists of norms is surely analytic in character, if any statement is. However, the claim that the existence conditions for a legal system include a social rule of recognition that is practiced by officials is not obviously analytic – even if it is, in fact, a necessary truth about legal systems, by nature – and is derived somehow from the claim that law consists of norms.

Indeed, one can legitimately question whether the starting point – even for TCA – consists wholly in analytic truths. The observations that purport to pick out "paradigmatic" features of law and legal systems do not seem to be entailed by definitions of law. Rather, once we have a pre-theoretic understanding of law, which is partly informed by definitions, the identification of paradigms seems, at least, partly informed by value judgments that distinguish important necessary features of law from unimportant, and are, arguably, synthetic necessary truths.

17 Moral objectivism is the view according to which the truth-value of moral claims is determined by mind-independent considerations, like preferences, beliefs, practices, or desires. Every natural law theorist in legal theory is a moral objectivist. Likewise, Ronald Dworkin is a moral objectivist, and one who calls for a normative methodology. See, e.g., Dworkin (1996: 87–139).

tive jurisprudes typically do, that morality is objective, moral claims might be necessarily true, but not obviously in virtue of being analytic claims; it does not seem true by definition that killing a human being is wrong. One can take the position, of course, that the content of the concept of law is moralized in the sense that the relevant moral claims are built into the definition of law, but this is a deep and difficult issue that cannot be adequately addressed here. Even so, it seems nonetheless clear that normative jurisprudence presupposes that conceptual analysis of law is metaphysical in character.

In contrast, naturalized jurisprudence, as is readily evident, denies the most basic assumptions of TCA about the character of conceptual analysis. First, insofar as naturalized jurisprudence is grounded in Quine's rejection of the analytic-synthetic distinction, it, too, rejects the idea that conceptual analysis is even partly grounded in analytic claims – since, after all, there are no such things that can be legitimately defined. Further, insofar as a naturalized methodology is grounded in Quine's argument, naturalized jurisprudence follows Quine in rejecting the philosophical legitimacy of the modalities of necessity and possibility. Finally, insofar as naturalized jurisprudence takes the methodology of conceptual analysis to be grounded in empirical claims and continuous with scientific methodology, conceptual claims will be contingent in character; after all, empirical observation is not needed, according to the traditional views, to observe features of all possible worlds. Naturalized jurisprudence, thus, denies that conceptual analysis is a metaphysical enterprise that results in a theory comprised of necessary truths, expressing the nature of the relevant thing under consideration.

6 CONCEPTUAL ANALYSIS OF LAW: CONCEPTUAL JURISPRUDENCE

Fundamental to the conceptual analysis of law, as traditionally conceived, is the metaphysical thesis that, in any conceptually possible legal system, there are certain properties that *constitute* something as law. Thus, for example, a conceptual theory of law would include a list of properties that constitute anything that has them as a legal system ("law" as institutional system of norms), as well as a list of properties that constitute anything that has them as a legal norm of some legal system ("law" as individual norms). The instantiation of the relevant properties constitutes a system/norm as one of law in exactly the same sense that being unmarried constitutes a man as a bachelor. Any institutional system of norms instantiating the appropriate properties is, for that reason, a legal system; any system that does not is, for that reason, not a legal system. Similarly, any norm instantiating the appropriate properties is, for that reason, a law in some legal system; any norm not instantiating the appropriate properties is, for that reason, not a law in some legal system.

Conceptual theories of law have some intriguing implications that enable us to make more specific observations about the content of particular laws and legal systems. Each of the major conceptual theories of law – positivism, natural law theory, and Dworkin's interpretivism – begin from the assumption that law is, in part, manufactured by contingent social practices, including those involved in legislation and adjudication. This means that the content of legal norms, including those that define the contours of the legal system to which those norms belong, can vary from one legal system to the next. One consequence of this idea is that in every conceptually possible legal system there is a set of norms that establish the existence and structure of a legal system and provide criteria that determine when a norm counts as a *valid* law of the system. If *S* is a legal system and *P* is a statement that describes the properties that constitute a norm as law,[18] then *P* states necessary and sufficient criteria of "legal validity" in *S* in the following sense: for any norm *n*, *n* is a law in *S* at time *t* if and only if *n* instantiates *P* at *t*.[19] Another way of putting this is as follows:

> *The Differentiation Thesis:* In every conceptually possible legal system *S*, there is a set *CoV* (for "criteria of validity") such that, for every norm *n*, *n* is a law in *S* at time *t* if and only if *n* satisfies the criteria in *CoV* at *t*.

The Differentiation Thesis, then, asserts that every legal system contain membership conditions defining the criteria of validity for that system – and these criteria are understood to differ from system to system insofar as the relevant social practices differ.

It is important to realize that, as traditionally conceived, the Differentiation Thesis is a metaphysical thesis – and not an epistemological thesis.[20] The Differentiation Thesis neither presupposes nor implies any claims about the extent to which the criteria of validity can be identified or applied in any possible legal system. Indeed, the Differentiation Thesis, by itself, is logically consistent with a variety of claims about how much we can know about the content of the law – both the legal norms establishing validity criteria and the legal norms that are law because valid under the validity criteria. It is true, of course, that (1) the content of all legal norms ultimately depend, in large measure, on social processes that can be empirically observed and (2) the norms of a system must be understandable in order to be sufficiently efficacious to constitute a legal sys-

18 *P*, of course, might express either a very complicated list of properties that include disjunctions or conjunctions. So insofar as law is a cluster concept or family resemblance concept, the statement of the conditions will include a host of disjunctions joining conjunctions, which express the various degrees of resemblance sufficient to confer the status of law on a norm.

19 As Hart puts the point, "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and *so as a rule of the system*." Hart 1994: 103.

20 The claim that the Differentiation Thesis is not an epistemic thesis is also true on a naturalized methodology.

tem. It is also true that the Differentiation Thesis, together with both (1) and (2), entail that we can come to know something about the content of the law in a particular legal system by observing enough about the practices that give rise to the criteria of validity and the activities of officials that conform to these criteria. But it is a mistake to think that the core theses of a conceptual theory of law, which includes the Differentiation Thesis, implies that the criteria of validity in any or every legal system constitutes an epistemic test that settles the question of what the law is in every dispute that might arise. That view was once incorrectly attributed to positivism as the so-called Pedigree Thesis during the early years of the debate between Dworkin and positivists, but is improperly attributed to any of the major conceptual theories of law. Whatever views a theorist takes on this will have to be grounded in other commitments.

Still, it is reasonable to think that statements of the criteria of validity could not provide a decision procedure for identifying the law. As Ronald Dworkin argues so forcefully in *Taking Rights Seriously*, appellate judicial practice is concerned with adjudicating cases that are hard in the sense that the reasons supporting either of two conflicting holdings are similarly weighty. Such cases turn out to be very difficult for judges to decide. While one might take the position, as Raz does, that hard cases arise because there is a gap in the law on the issue, it is sometimes a tricky matter to determine, even on the assumption Raz is correct, what constitutes a hard case. There are, to put the point modestly, probably no decision procedures to be found in complex legal systems like those of modern municipal states.

Further, the Differentiation Thesis implies nothing about the nature or moral character of the law in any particular legal system. Legally valid content might – or might not – be necessarily constrained by moral principles or the inherently interpretive character of law. Since the Differentiation Thesis is agnostic with respect to such claims, it is consistent with classical natural law theory, legal positivism, and Dworkin's constructive interpretation and hence cannot distinguish positivism from other conceptual theories of law. Up to now, every conceptual theorist has assumed it.

One can doubt that the criteria of law can be *fully identified* in every legal system, but general jurisprudence could not get off the ground without assuming there is some distinction between law and non-law. That latter distinction is so fundamental to general jurisprudence and so intuitively plausible that one would need a very good reason to justify rejecting it. The Differentiation Thesis simply expresses that legal norms are distinct from other norms in every society with a legal system. The job of every conceptual theory of law – i.e. of conceptual jurisprudence, in general – is to explain what properties distinguishes these norms that are law from norms that are not law and constitute the former as *legal norms*.

7 CONCEPTUAL ANALYSIS: THEORETICAL AND PRACTICAL SIGNIFICANCE

One might legitimately wonder whether conceptual jurisprudence has any practical applications in resolving substantive problems concerning what the content of a particular law is, or should be. Many persons in the legal academy have developed something of an aversion, if not hostility, to the highly abstract concerns of conceptual legal theory, believing that an analysis of what law is by nature is as normatively impotent as an analysis of what a bachelor is by nature. At first blush, it would appear that understanding the concept of a bachelor has no implications that would answer practical questions that might arise in connection with how bachelors should act or should be treated. A theoretical definition of "bachelor" just seems, by nature, too abstractly descriptive to yield any interesting practical conclusions.[21]

As it turns out, some prominent legal scholars have argued for precisely this thesis with respect to the enterprise of conceptual jurisprudence. Richard Posner, for example, devotes a substantial portion of the first of his Clarendon Law Lectures, which were given at Oxford in 1995, to arguing that conceptual jurisprudence is "futile, distracting, and illustrative of the impoverishment of traditional legal theory."[22] The following passage is representative of the disdain with which he regards conceptual jurisprudence:

> I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it (Posner 1996: 3).

Indeed, Posner (1996: 3) goes so far as to argue that "the central task of analytic jurisprudence is, or at least ought to be, not to answer the question 'What is law?' but to show that it should not be asked, because it only confuses matters".

As might be evident from the discussion of "bachelor" at the beginning of this section, Posner's concerns are not utterly counterintuitive, but the challenge seems most plausible directed at purely descriptive approaches to conceptual analysis, such as TCA and naturalized jurisprudence. After all, there is a general problem of deriving normative practical claims from a set consist-

21 Some legal academicians overestimate the practical consequences of a conceptual theory of law. Some academic lawyers believe, incorrectly, that positivism entails legal formalism, a theory of adjudication that has long been refuted. Since the character of adjudicative practices in any legal system depend, according to positivism, on the content of its rule of recognition and the content of the rule of recognition varies from legal system to legal system, positivism does not entail any particular theory of adjudication. While positivism allows for the possibility of a legal system in which formalist norms govern judicial decision-making, it also allows for the possibility that Dworkinian norms govern judicial decision-making.

22 Posner 1996.

ing of nothing but purely descriptive claims; if purely descriptive claims about what law is are logically independent from normative claims about what law should be, as is presupposed by TCA and naturalized jurisprudence, then the latter claims cannot be deduced, without more, from the former. Nevertheless, it is important to realize that proponents of normative methodology explicitly deny, as we have seen, the claim that what law is and what law should be are logically unrelated issues. Whether this denial is enough to insulate normative approaches from Posner's criticism is not entirely clear; however, there is enough of a difference between normative and descriptive approaches to warrant some caution in thinking this criticism would sweep across all the methodological approaches.

In any event, Posner's view that conceptual jurisprudence should not be done, even if he is correct in thinking that such analysis results in theories that are normatively important, is problematic. To see the problem, it would be helpful to consider how Posner's criticism would come off in another context. Though a great deal of work in pure mathematics has been used to create technologies that greatly improve our lives, one of the most celebrated mathematical accomplishments of recent years is not thought to have such applications. A few years ago, Andrew Wiles of Princeton University devised what is believed to be a successful proof for Fermat's Last Theorem, which asserts that there are no positive integers *x, y, z,* and $n > 2$ such that the equation $x^n + y^n = z^n$ is true. Despite the fact that no one in the mathematical community necessarily believes this will ever have practical applications that result in the betterment of the human condition, tens of thousands of hours were devoted by mathematicians eager to finding a proof or disproof of this proposition.

What surely explains this, at least in part, is that we value knowing things for other than instrumental reasons. Sometimes knowing a proposition p is instrumentally valuable in the sense that it that knowledge provides the means to an end of producing a useful technology. Much mathematical theory can obviously be justified by the value of the practical benefits to people, but that is not the only reason to value mathematical inquiry. If knowledge is not always intrinsically valuable (i.e. valuable for its own sake as an end-in-itself), it is sometimes intrinsically valuable. Knowledge of abstract truths defining basic structures of significant practical value (such as mathematics) seems valuable for its own sake; indeed, it is not unreasonable to think that all knowledge is (or should be) intrinsically valuable to a rational being. The same would be true of the concept of law; assuming an analysis of the concept of law has no practical instrumental value, it is plausible to think that understanding the nature of an institution that restricts the freedom of autonomous agent is intrinsically valuable.

But is Posner correct in thinking that nothing of substance turns on a conceptual analysis of law? Certainly, there is something that can be said for his view. Consider, for example, the dispute between Dworkin and Hart on the issue of judicial discretion. Dworkin once argued that the issue of whether it is fair for judges to assess damages against a defendant in a hard case depends on whether the correct way to characterize the judge's decision is as implicit in preexisting law or as creating new law; as Dworkin (1967: 31) put the point:

> If [judges have discretion to decide hard cases by making new law] ... we must acknowledge that the murderer's family in *Riggs* and the manufacturer in *Henningsen* were deprived of their property by an act of judicial discretion applied *ex post facto*. This may not shock many readers—the notion of discretion has percolated throughout the legal community—but it does illustrate one of the most nettlesome of the puzzles that drive philosophers to worry about legal obligation. If taking property away in cases like these cannot be justified by appealing to an established obligation, then another justification must be found, and nothing satisfactory has been supplied.

Such takings of property are morally illegitimate because it is unfair to take property from a person under a law that did not exist at the time of the behavior that gave rise to the liability—or so the argument goes.

But Dworkin's theory seems to fare not much better on this count than Hart's view that judges decide hard cases by making new law. What distinguishes hard cases from other cases, on Dworkin's view, is that, in hard cases, there is more than one holding that coheres with the existing institutional history. What makes an issue of law hard, then, is that the law (construed to include the existing institutional history) doesn't give reasonable notice of what, if anything, it requires.[23] If, however, fairness precludes taking property from a defendant under a law that did not exist when the behavior giving rise to the liability occurred, it also precludes taking property from a defendant under a law that does not give reasonable notice to the defendant that the behavior at issue gives rise to such a liability. Just as it is unfair to punish a child for breaking a rule that was not communicated to her in terms that she could reasonably be expected to understand, it is unfair to compel a person to pay damages under a law that does not adequately inform the person that the behavior at issue gives rise to liability under the rule. It is not enough that to justify assessing damages against a person that she has a legal obligation; that obligation must be communicated in terms that a competent speaker of the language can understand.

These examples are far from being conclusive, of course. But they do provide some reason to think, as Posner does, that we cannot solve substantive

23 Some cases are hard enough that it takes a judge of exceptional (as Dworkin puts it, "Herculean") ability to discern the correct answer to the question.

problems of law and morality simply by moving concepts around.[24] Concept-words are used to group acts, events, and entities and hence do no more than pick out particular classes of acts, events, and entities. It seems clear that we cannot solve any interesting moral problems merely by altering our conceptual characterization of some act, event, or entity. Whether hitting someone in the face is morally wrong cannot turn on whether it is properly characterized as an "assault" or as a "kiss"; if it is properly characterized it as a "kiss," then we will have to rethink our moral views about the permissibility of kissing. What substantive normative qualities any particular act or event has cannot turn on how it is grouped through our linguistic practices with other acts or events.

But Posner fails to realize that this isn't the only way in which an analysis of legal concepts might make a difference in our lives. Proponents of conceptual analysis who feel the need to justify their view by reference to socially useful consequences typically do so by pointing to its epistemic benefits. In discussing the value of conceptual analysis in the area of metaphysics, Frank Jackson (1998: 30) writes:

> Although metaphysics is about what the world is like, the *questions* we ask when we do metaphysics are framed in a language, and thus we need to attend to what the users of the language mean by the words they employ to ask their questions. When bounty hunters go searching, they are searching for a person and not a handbill. But they will not get very far if they fail to attend to the representational properties of the handbill on the wanted person. These properties give them their target, or, if you like, define the subject of their search. Likewise, metaphysicians will not get very far with questions like: Are there *K*s? Are *K*s nothing over and above *J*s? and, Is the *K* way the world is fully determined by the *J* way the world is? in the absence of some conception of what counts as a *K*, and what counts as a *J*.

The point of conceptual analysis, on Jackson's influential view, is not that it entails solutions to important substantive problems of law, ethics, or politics. Rather it is that conceptual analysis helps us to solve those problems by helping us to see and formulate them more clearly. As Coleman (2001: 13) puts this absolutely essential point, "Conceptual analysis is essentially a philosophical enterprise: its aim is to help us think more carefully".

Even so, the issue of determining whether and how theories of conceptual jurisprudence are valuable is an important one. It is always helpful to know whether a particular area of theorizing results in any practical benefits to humanity beyond increasing the store of human knowledge. At this point, too little work in this area has been done to offer any general conclusions.

24 Cf. Murphy 2001.

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Synopsis

Kenneth Einar Himma

Conceptual Jurisprudence

An Introduction to Conceptual Analysis and Methodology in Legal Theory

SLO. | *Pojmovno pravoslovje. Uvod v pojmovno analizo in metodologijo v teoriji prava.* Avtor skuša ponuditi razumljiv uvod v tematsko področje pojmovne analize pravnih pojmov (tj. »pojmovno pravoslovje«) in temu primerno metodologijo. Na precej osnovni ravni razloži, kaj pojmovna analiza je, kako se jo opravlja (tj. po kakšni metodologiji) in zakaj je pomembna za teorijo prava. Obenem prikaže, kako je pojmovna analiza povezana z drugimi filozofskimi področji, kot sta metafizika in epistemologija. Nato pojmovno pravoslovje opiše kot dejavnost, usmerjeno v razlago tistih lastnosti, ki (1) pravno ločijo od nepravnega in (2) pravo vzpostavljajo kot tako. Ta opis pospremi z nekaj intuitivnimi primeri in z razlago ter oceno treh različnih metodoloških pristopov, na koncu pa obravnava še praktični pomen pojmovnega pravoslovja.

Ključne besede: pojmovna analiza, pojmovna metodologija, narava prava, metafizika prava, praktični pomen, pojmi

ENG. | This essay attempts to provide an accessible introduction to the topic area of conceptual analysis of legal concepts (or "conceptual jurisprudence") and its methodology. I attempt to explain, at a fairly foundational level, what conceptual analysis is, how it is done (i.e. its appropriate methodology) and why it is important in theorizing about the law. I also attempt to explain how conceptual analysis is related to other areas in philosophy, such as metaphysics and epistemology. Next, I explain the enterprise of conceptual jurisprudence, as concerned to provide an account of those properties that (1) distinguish things that are law from things that are not law which (2) constitute the former things as law, illustrating this explanation with what I hope are intuitive examples. Three different methodological approaches are also explained and evaluated. Finally, the practical importance of conceptual jurisprudence is discussed.

Key words: conceptual analysis, conceptual methodology, the nature of law, metaphysics of law, practical significance, concepts

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