The Limits of Theoretical Disagreements in Jurisprudence

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Abstract

This paper discusses the "positivistic" idea of the limits of law in various contexts: the conceptual problem of the "limits of law", the limits of legal interpretation and the limits of theoretical disagreements in jurisprudence. In the latter case, we briefly show how contemporary "reflective" or "critical" positivist theories approach the possibility and limits of disagreements over the "grounds" of law. In what follows, we argue that these theories, which argue for a form of an "institutional" limit for admissible "legal" reasons as built upon theories of basic concepts or normative theories of interpretation, are themselves actually underdetermined by "legal culture" or, so to speak, a "folk theory of law". In the final section, we outline how a folk theory of law constrains both conceptual and interpretive enterprises in jurisprudence.

Keywords Limits of law · Limited domain of law · Limits of legal interpretation · Platitudes · Folk theory of law · Theoretical disagreements

1 Limits of law

The question "what are the limits of law?" is ambiguous. The first basic interpretation of the question pertains to political philosophy and refers to the scope of legal regulations. It is understood as a question regarding the scope of legal regulations that is morally justified. Does the law have moral legitimacy to regulate all spheres of social life or should there be certain spheres of life that should be exempt from legal regulations? This is a normative matter since the answer must be based on considerations pertaining to the issues of individual freedom, collective values, etc. As such, this matter belongs to both political and moral philosophy.

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A second interpretation of the question refers to the practical ability of law to effectively regulate certain fields. Are there any areas of social life in which the law is not able to effectively influence human behaviour and in which, therefore, any attempted regulations prove to be ineffective? The answer to this question must be based on sociological and psychological knowledge related to human motivation and regularities in the decision-making process. Such knowledge should be empirically justified. The question of the limits of law in this meaning pertains to the spheres of sociology and psychology of law.

A third interpretation refers to the scope of legal authority and/or legal power. This relates to the idea that law provides limitations for authorities and lawmakers; the idea of the rule of law along with the requirement that legal decisions should not be arbitrary. As stressed in many approaches to law [e.g., Kantian; see [24: 55–58]], the main problem of the limits of law is that not all coercion in the name of law can be justifiable [56: 8; see also 8: 15].

A fourth interpretation of the question concerning the limits of law is related to law's stability. As Tuori puts it, "if there is something immutable in the law, this something imposes limits on the mutable elements, and, consequently, on the competence of the legislator" [56: 18]. Seen from this perspective, the immutable elements of law were stressed by various theories of law. Natural law theories determined the immutable and universal borderlines of the lawgiver's will. Although, in general, legal positivism focused rather on the mutable and, thus, the contingent nature of laws and legal orders, particular positivist theories provided us with certain universal and immutable characteristics of law and the nature of law. For Kelsen, such a universal element was embedded in the structure of legal cognition, in the invariant formal structure of the law and the basic concepts determining this structure, including the concept of *Grundnorm* [56: 21]. Hartian positivists referred to the invariant structure of all mature municipal legal systems as the system of first- and second-order rules, which accounted for the contingent evolving character of law.

In its fifth and most interesting meaning for us today the question of the limits of law is understood as a general question of delimitation or demarcation [29, 39]. Are there boundaries between law and morality or other social norms? Can law be defined or identified without recourse to morality? The fundamental divide within legal philosophy is organised around this kind of questions. The founder of contemporary legal positivism, H.L.A. Hart, famously argued that law and morality are different but related phenomena [20]. Adherents of various versions of natural law argue that law should be understood as a branch of morality. The core thesis of contemporary legal positivism is that law is a matter of social facts alone [see, for example, 52]. This thesis is denied by natural lawyers who argue that law is a matter of both social and moral facts. An even wider domain of legally relevant reasons is invoked by legal realists or critical legal theorists.[1] This thesis, in turn, is questioned

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[1] F. Schauer writes: "To these assembled theorists, schools, and perspectives, and thus to much of the pragmatic and instrumentalist core of twentieth-century American legal thought, legal cognition is largely unbounded, and so the basic motivation behind the concept of the rule of recognition turns out to be empirically false" [48: 1927].

by legal positivists whose arguments are related to a "limits of law" thesis or "limited domain of law" thesis. The first thesis claims that "there is a test which distinguishes what is law from what is not" [39: 842]. The second claims that "in most advanced legal systems [there is] a substantial quantity of otherwise valid social norms, or otherwise valid sources of decision, that law refuses to accept" [48: 1915].

But even if one accepts the positivistic stance, the problem of demarcation does not disappear. Positivism is in the first instance a theory of legal validity. Rules are legally valid if they satisfy the criteria set out in the system's rule of recognition. The rule of recognition is a social rule determined solely by certain social facts [2]. The controversial matter within the positivistic camp is whether the criteria of legal validity set out by the rule of recognition must be purely descriptive as hard positivists claim or whether those criteria may appeal to morality as soft positivists claim. Irrespective of this controversy, two other issues arise.

The first is that legal positivism as a conceptual theory of legal validity does not develop any specific theory of legal interpretation. Assuming that legal positivism is true, we are able, based on the criteria set out by the rule of recognition of a specific legal system, to determine the set of valid legal rules. But this does not yet determine how those rules should be interpreted and applied. Here a new question of delimitation or demarcation arises. Is legal interpretation always morally neutral or does it necessarily involve an appeal to morality? Raz, the most important adherent of hard legal positivism, claims on the one hand that for conceptual reasons, the criteria of legal validity that are set out in the systemic rule of recognition cannot refer to morality while, on the other hand, he claims that legal interpretation frequently involves moral elements. He famously distinguished "reasoning about the law" and "reasoning in accordance with (or according to) the law".[2] The outcome of the former is the conclusion identifying valid legal rules; the conclusion of the latter is a resolution of a practical legal question that has arisen before the law applying agency. The reasoning about the law does not involve any moral components while the reasoning in accordance with the law, in most cases, does involve recourse to morality. At first glance, this does not contradict the main tenet of legal positivism, as legal positivism is a theory of legal validity and not a theory of legal interpretation and the application of law. Legal positivism does not tell judges how to decide cases. But does this mean that legal positivism may totally ignore the problem of interpretation and as such does not impose any constraints on interpreters? We return to this question later.

The second problem for traditional positivism is that it cannot account for the phenomenon of genuine theoretical disagreements in legal practice. Even though the system of "positive" law is mostly conventionally established by means of human decisions, in any system there still may arise disagreements with respect to "the grounds of law" or, so to speak, with respect to admissible reasons justifying certain "legal" outputs (propositions about one's rights or obligations). Following Dworkin,

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[2] This Razian distinction can be framed in an even simpler way as a distinction between law and legal reasoning, where the decisions produced in the process of reasoning are never fully determined by law alone [42; 48: 1949].

by "grounds of law" we mean the ultimate facts (social. moral or other) that make legal propositions true [8: 5].[3] Lawyers, judges, parties to the dispute or even academics may disagree about what is the correct theory of legal validity (what counts as a ground of law. Theoretical meta-interpretive disagreements may analogously arise about what determines the correct theory of legal interpretation. These kinds of disagreements are, however, held within a certain sphere of underlying agreement with respect to what counts as an admissible argument. Thus, one may speak of the "limits of theoretical disagreements". Since the intuition pertaining to the limits of law appears to be a major premise for legal positivists, it is no surprise that after recognising such disagreements as a serious challenge to a traditional positivist picture of law, new "reflective" legal positivists decided to accommodate them within the positivist vision of law. Thus, the idea that "law has its limits" has been superseded by the idea that there are certain, mostly institutional limits imposed on the reasonable discussions about what law is and how we should interpret it.

Since the problem of the limits of interpretation appears more tangible from a practitioner's perspective, we elaborate on that first. Then, in the third section, we turn to the more general problem of the limits of theoretical disagreements.

2 Limits of Legal Interpretation

What are the limits of legal interpretation? Let us assume for the purpose of discussion that a specific rule has been assessed based on the rule of recognition as a valid legal rule. The question arises whether this rule is applicable to a specific case under consideration. To answer this question, the rule must be interpreted. The interpretation of law sometimes consists of complex reasoning in which recourse is made to various reasons. It appears beyond any doubt that the scope of reasons that may be involved in this reasoning is limited. Not all possible reasons may be invoked as legal reasons, the use of which is permissible in the interpretation of law. We have here in mind justificatory reasons and not motivational reasons. We are interested in a normative question of how legal rules should be interpreted and not in a psychological question regarding what motivates judges and other legal officers to interpret legal rules in a particular way.

But why is the limiting of interpretative reasons necessary? If there were no limits to legal interpretation, then the use of any reasons would be allowed. Therefore, there would be no limits for judicial discretion, and judicial decisions would be fully unpredictable. This would mean that law is not able to fulfil its major function of the protection of expectations. Thus, the idea of limits of interpretation appears to be essentially related to the idea of rule of law.

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[3] This formulation does not determine ultimately whether these "grounds" have to exist previously and independently of the application of any legal interpretive method (as at some point the reading of Dworkin's early work *Taking Rights Seriously* [7] might suggest) or whether the existence and content of these "grounds" are always partially dependent on certain interpretive activities (for even at "pre-interpretive stage" where such grounds are identified and where the minimum of interpretation is invoked, as later Dworkin suggests [8]).

This point is made quite explicit from a slightly different perspective by Raz. Let us imagine a purely discretionary system in which judges have no duty to apply any pre-existing rules or precedents, but they are subject to a single instruction: they should make the decision they think best on the basis of all valid reasons [41: 138]. Pursuant to Raz, such a purely discretionary system cannot be called "law" as such a system would not have a guiding function for citizens and, therefore, no expectations as to the judge's decision would be possible. Law must necessarily consist of rules the courts are bound to apply regardless of the view of their merit [41: 138]. The judicial duty to apply pre-existing rules is crucial for any legal system; citizens look to those rules for guidance and they expect them to be reinforced by judges.

We consider the protection of expectations the most important function ascribed to law by the folk theory of law.[4] It is our view, one which we have defended elsewhere [11, 12, 15] and to which we will return to in the second part of this paper, that each legal theory strives to rationally reconstruct the folk theory of law composed of certain truisms or platitudes that are generally accepted by the folk. Law is a social artifact constituted by collective beliefs. In the absence of such beliefs (perceived as platitudes about law), law does not exist. Therefore, no legal theory and no theory of legal interpretation can ignore commonly accepted beliefs although it may be a matter of controversy which beliefs are commonly accepted and which of them are platitudinous.

Therefore, the protection of expectations is the basic function of law and must be considered by each legal theory even if such a theory declares its descriptive nature as legal positivism does. Of course, this value must sometimes be balanced against other values such as justice, efficacy, etc., with respect to a particular case, but it must be always taken into account in resolving cases.

If that is true, the scope of admissible reasons in legal interpretation must be somehow restricted. If all thinkable justificatory reasons were admissible, then there would be no protection of expectations. The wording of legal rules would not restrict judicial decisions and any decisions based on any reasons whatsoever would be possible.

One further matter must be explained. What we have in mind are admissible or permissible reasons and not prevailing or decisive reasons. We need to discriminate between such reasons that are admissible for justification of an interpretative decision -admissible reasons- and such reasons that are excluded or prohibited -inadmissible reasons. Among admissible reasons, there might be such that for a given case they are not applicable or are even wrong and, therefore, must be eliminated in favour of other reasons. In any case, such reasons must be argued against, defeated and rejected and cannot be simply ignored. The rejection of reasons that are inadmissible does not require counter-argumentation; they should be simply ignored.

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[4] Raz denies that law has any central function [43]. Postema argues that Raz's theory implies that law has a central function of supplying a framework of practical reasoning designed to unify public political judgement and coordinate social interaction [38: 80]. We think that such a function (or a cluster of functions) is strictly connected with the idea of protection of expectations (and as such related to general requirements of the rule of law).

We shall call reasons that are admissible in the interpretation of law "legal reasons". The claim that justificatory reasons in the interpretation of law must belong to the set of legal reasons does not imply any specific borderline between law and morality. Legal reasons in the meaning defined above may belong to various areas; they may be semantic, economic, moral or prudential among other reasons. We claim only that the scope of legal reasons is restricted in the sense that not all conceivable reasons belong to the set of legal reasons.[5] Therefore, the question of the limits of legal interpretation cannot be identified with the question of demarcation between law and morality; moral reasons may appear on both sides of the demarcation line.

The interpretation of law is notoriously controversial. So called "hard cases" frequently arise. For the sake of brevity, let us adopt a simple model of interpretation. This model assumes that legal interpretation is guided by rules of interpretation. Obviously, this does not mean that judges and other legal officials always follow the rules in the *heuresis* of interpretation, but only that they refer to rules of interpretation when justifying their decisions. In the model elaborated by Wróblewski, two levels of rules were distinguished [61: 74; 62: 91]. At the first level, a distinction is made between linguistic, systematic and functional or teleological rules. The second-level rules resolve conflicts between those first-level rules. The role of the rules of interpretation is to determine the admissible reasons for interpretative decision.

In each legal culture, several normative theories or doctrines of interpretation exist [60: 143; 62: 61–72]. A normative theory of interpretation is composed of a certain number of first-level and second-level rules of interpretation which provide, in principle, a solution for every interpretative problem. As it appears, there are two types of controversy between various normative theories of interpretation. The first relates to the very legitimacy of certain first-level rules. For example, textualists deny the legitimacy of teleological rules or even the legitimacy of rules referring to the intention of the legislator [47: 16]. The legitimacy of such rules and, therefore, interpretative reasons based on such rules is denied *in abstracto.* They simply should never be applied. The second type of controversy relates to the priority of specific first-order rules. If there is a conflict between, for example, a linguistic rule and a teleological rule, which should have priority?

The first type of controversy is characteristic of common law legal culture (at least for American). Most discussions between supporters of conflicting views are of an axiological nature and relate directly to the legitimacy of first-level rules, not to ways of resolving conflicts between those rules. At stake is the existence or absence of the proper axiological justification of various first-level rules. Rules that are considered *in abstracto* as lacking in axiological justification should be abandoned. The consequence of such an approach is that no conflict between various rules would arise. For example, purposive rules are rejected *in abstracto*

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[5] In the case of Dworkin's interpretive theory, we might say that the scope of legal reasons is vast (judge Hercules is supposed to not exclude any of them *a limine*). Nonetheless, some conceivable reasons are excluded, such as reasons related to certain *policies*, as long as they are not somehow implicated in questions about rights [8, cf. 45: 1230].

by adherents of formalism while rules referring to the intention of a drafter of the constitution are rejected by supporters of the original meaning rule. The proponents of the respective positions maintain that certain rules should never be applied. For this reason, a formalist, for example, would find no conflict between the purposive rule and the plain meaning rule because the former would not be considered. If this is the case, there is no need to introduce the theoretical construction of second-level rules of interpretation.

The second type of controversy is common in continental legal cultures. In those cultures, the general legitimacy of various types of first-level rule (linguistic, systematic, teleological) is not denied. For example, no one denies the rule that the prescribed legal definition of a word should be followed or that if the same word or phrase occurs more than once in the same legal text, the same meaning should be ascribed to each occurrence. Similarly, the rules that the structure of a legal text should be considered in the process of interpretation, or that a statute should be interpreted in accordance with its purpose, are not challenged. Difficulties occur when the application of one first-level rule leads to the ascription of different meaning to the same statute compared with the application of another rule. In such a situation, the first-level rules remain in conflict. The existence of such a conflict cannot be identified *in abstracto*. For example, there is no logical inconsistency between the first-level rules of linguistic and teleological interpretation. They simply indicate different facts or circumstances as reasons for an interpretative decision. A conflict between such reasons only develops *in concreto*. The application of a rule of linguistic interpretation—that the plain meaning of the legal text should be followed—may *in concreto* be in conflict with the application of a rule of teleological interpretation and requires that the interpretation should accomplish the purpose of the statute. If such a conflict arises, it should be resolved by the application of second-level rules of interpretation [16] that determine (i) the sequence in which the first-level rules are to be applied and (ii) the priority relation between them in case of conflict.

The problem with second-level rules is twofold. First, there are no second-level rules that would be unconditionally and generally accepted. Second, even individual judges do not apply second-level rules in a consistent manner. For example, a judge might sometimes give priority to the rules of teleological interpretation and sometimes to the plain meaning rule. Usually, the justification of such a decision does not refer to any particular "ready-made" second-level rule. Such a reference is not ordinarily deemed to be a sufficient reason for an interpretative decision due to the highly controversial nature of second-level rules, since various normative theories of interpretation adopt different second-level rules. A proper justification requires direct reference to the values underlying the conflicting first-level rules.

Apparently, even if the first-level rules are conventionally accepted tools of legal interpretation, there is no such conventional acceptance with respect to normative theories of interpretation that provide us with the second-order rules of interpretation. This leaves us with an inevitable disagreement over: (i) which theories are in general admissible in the interpretive discourse and (ii) which theories among these are particularly well suited to the interpretive tasks at hand in any given case. This is the problem with meta-interpretive theoretical disagreements. One may ask what the

limits are regarding this and other kinds of theoretical disagreement in law. We turn to this question now.

3 Limits of Theoretical Disagreements

The question of the limits of law or its interpretation is thus a question of which kinds of reason are admissible in legal discourse—either in general or in the context of the application and interpretation of law. Schauer rightly identifies the problem of the limits of law as one of the essential problems of general jurisprudence [48]. Schauer analyses the "limited domain thesis", namely:

> the proposition that there are in most advanced legal systems a substantial quantity of otherwise valid social norms, or otherwise valid sources of decision, that law refuses to accept. If law is a limited decisional domain, arguments permissible in other and larger domains become impermissible in law. [48: 1914–15]

Schauer does not take the question about the limited domain of law to be a merely conceptual question. He also opposes narrowing the idea of such a domain to the domain of norms and arguments. He writes that "the limited domain hypothesis is about the full range of decisional inputs, and not just about norms, rules, or arguments" [48: 1917]. This approach appears to be correct,for in our terms "decisional inputs" are simply "reasons". Note, however, that one may have many reasons to see something as a *legal* norm, obligation, duty, etc. There are many kinds of reasons that may be embedded in legal practitioners' "webs of belief". Some of these reasons are conceptual, some are empirical or factual and some are descriptive whereas some are normative. The basic question law is supposed to resolve is practical—what one *ought* to do—and the decision about concrete legal obligation may be justified by reference to such reasons. In that context, the idea that law is a limited domain allows for the restriction of the scope of considerations and related reasons that will influence "legal" judgments and decisions.

> With all-things-considered decision making as the baseline, the limited domain hypothesis posits that an appreciably large number of considerations that might be available in all-things-considered decisional domains are unavailable to law. [48: 1930]

This idea appears to be closely related to an old idea that the main function of rules in general is to exclude time-consuming deliberation and provide subjects with clear directives as to how they ought to behave [41: 59]. Nonetheless, Schauer recognises that the differentiation between law and non-law—or to use his words, "the differentiation of legal from other decisional domains"—need not only pertain to the differentiation of decisional *sources*. As such, he recognises that apart from the conceptual differentiation between various legal and non-legal kinds of sources, there

might be a kind of *procedural* differentiation pertaining to the *decision-making mechanisms.*[6]

Another means of differentiation appears to square with the general idea that identifying sources of law and interpreting them are two separate things. However, both means of differentiation—the differentiation of sources and the differentiation of *procedures* applied to *these sources*—are rooted in the very same idea. A judge, who, to use James's phrase, "given previous law and a novel case […] twist[s] them into fresh law" [23: 116; cf. 57: 126] may justify his/her decision only by reference to reasons that are recognised as "legal reasons" in either a source-based or procedure-based sense. One may differentiate between conceptual legal reasons, related *inter alia* to identifying and validating *legal sources*, and other types of procedural reason aimed at dealing with established sources. Interpretive reasons espoused with the idea of two types of rules of interpretation of law referred to above are a good example.

A serious challenge to the "limited domain thesis" in both versions, whether conceptual, as related to sources, or procedural, as related to the process of interpretation, is that there is no general agreement between legal scholars and legal practitioners as to the scope of admissible reasons. It is one thing to agree that law must have boundaries of some sort; it is quite another to agree what these boundaries are. The answer to this question is a matter of philosophic-institutional controversy. Such controversies may arise everywhere in any jurisdiction, since they have a common root: a folk "theory" of law that comprises of various types of platitudes about law and institutions; we return to this issue below. The folk intuition that law has limits has always been a central platitude underlying any positivist approach to law even though it contradicted another trivial idea, namely that law is an essentially discursive, argumentative and thus agonistic practice [36].

Dworkin referred also mostly to the intuition that law has limits when he elaborated on the idea of "theoretical disagreement" in law. His distinction between empirical and theoretical disagreements serves nowadays as a basic departure point for many general jurisprudential enterprises. "Empirical" disputes arise when judges agree on the grounds of law but disagree over whether those grounds are satisfied in a specific case.[7] However, one may worder how such grounds are selected and justified in the first place. Dworkin famously argued that "theoretical" disagreements regarding the proper selection of the "grounds of law"[8] are a central feature of a legal practice [8, cf. 27: 1220]. Theoretical disagreements are commonly treated as a

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[6] "The domain of legal sources might be coextensive with the domain of social sources, for example, but the legal system could still use those sources differently" [48: 1932]. Further, Schauer develops the idea in the following way: "Because applying different procedures to the same inputs would produce different results for some decisions—insofar as the array of results produced by the same sources with one procedure would be noncongruent with the array produced by another procedure—legal procedures would make a difference even if legal sources were not different" [id.].

[7] Empirical disputes arise when judges agree on the grounds of law but disagree over whether those grounds are satisfied in a particular case [8: 5].

[8] Theoretical disagreements are about the grounds of law and revolve over such questions as: what facts have to obtain in order for X to be law; what makes legal propositions true [8: 5].

real phenomenon—only their scope is questioned. Hartian positivists used to argue that as a conceptual matter such disagreements were not to be considered relevant to the understanding of the nature of law, which was supposed to be thoroughly conventional [51]), or they argued that the number of such disagreements was insignificant. They appear only in the narrow minority of cases, in the highest courts—as Leiter puts it, on "the pinnacle of the pyramid". Leiter claims that "theoretical disagreements about law represent only a miniscule fraction of all judgments rendered about law, since most judgments about law involve agreement, not disagreement" [27: 1226]. However, such a thesis is more an empirical thesis than a conceptual one.

Moreover, a distinction has been introduced between various types of theoretical disagreement. D. Smith argues that one should differentiate between theoretical disagreements about *shallower grounds of law* and theoretical disagreements about *deeper grounds of law* [53: 461–462]. The shallower type of disagreement concern either (i) the criteria for ascertaining the sources of law in a given legal system or (ii) the ways in which these sources determine legal decisions; the deeper type of disagreements concern either (iii) what determines the very sources of law or (iv) what determines the ways in which sources of law determine legal decisions. Note that types (i) and (iii) are disagreements over the concept of law, or at least different "legislative theories" or theories of legal validity, whereas (ii) and (iv) are meta-interpretive disagreements over methods of interpretation.

Only recently have positivists agreed that the phenomenon of theoretical disagreement poses a serious challenge to the traditional positivist picture of law [11, 17, 18, 51–53]. Dworkin's claim that theoretical disagreements are the most important feature of legal practice is the consequence of his holistic and pragmatic approach [9: 160]. The central role that such disagreements play is also related to their philosophic-practical dimension.[9] The Dworkinean approach to disagreements is, however, somehow paradoxical, as the mere existence of such disagreements, which are for him *genuine* disagreements, may suggest that law has no limits, or at least the limits of law are as widely sketched as the reach of these disagreements. To restrict the scope of the law, Dworkin reaches for specific interpretive methods. This position may be understood as paradoxical. One cannot take theoretical disagreements seriously (which amounts to taking disagreeing parties as epistemic *peer*s, that is as equally reasonable parties who use equally good arguments) and simultaneously argue for one right position in every disagreement. That is what Dworkin does by introducing his interpretive theory and simultaneously demoting legal positivism as an unreliable theory of law [cf. 10, 11]).

Contemporary legal positivists try to accommodate the phenomenon of theoretical disagreements by showing that the positivist institutional scaffolding may play

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[9] Recall his famous statement: "Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So, any judge's opinion is itself a piece of legal philosophy even when the philosophy is hidden, and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of the adjudication silent prologue to any decision at law" [8: 90].

the role of a frame of reference to such disagreements. All these considerations aim to deal with the phenomenon within certain limits and without arguing for one right position in these disagreements. Such versions of legal positivism appear to take a "meta-theoretical" step. They do not urge one conceptual theory of legal sources or one right interpretive stance. Rather, they try to reflectively posit this inevitably agonistic legal element [37] within the structure of institutional reality.

"Reflective versions of positivism" still conceive law's existence as dependent on the consistent practice of officials. However, they approach that practice differently than classical Hartian positivism. On the one hand, such theories are more abstract and inclusive than Hartian positivism on the "subject-level", which pertains mainly to the identification of the content of the concept of law.[10] On the other hand, such theories that try to "take theoretical disagreements seriously" must embrace a meta-theoretical perspective, taking a stance on the status of the argument between different legal theories, or concepts of law. Thus, "reflective legal positivism" operates at two levels: the subject level of understanding and explaining the coherent practice of officials and the meta-theoretical level of discussing the controversy between different, also non-positivist, subject-level theories. The crucial question is whether positivist theories that make such a move up the theoretical ladder do not betray their basic subject-level assumptions. Obviously, the proponents of this approach must decline, at least tacitly, the distinction between theory and meta-theory; this is what makes their theories "holistic" and, thus, similar in some extent to Dworkin's approach. However, they remain positivist, as they focus on limiting the scope of theoretical disagreements by reference to a refurbished positivist "social thesis".

Three examples of such recent "reflective positivist theories" come to mind. Since we do not have space here to discuss them thoroughly, we limit ourselves to the presentation of their most important features. The first is Shapiro's theory of planning, which sees the legal system as a wide complicated social plan, the realisation of which is a joint commitment of planners and agents. The second is Golanski's institutional account of theoretical disagreements as disagreements held within the "institutional structure of law". The third is Tuori's "critical legal positivism". Let us elaborate on them briefly.

In Shapiro's view, "theoretical disagreements" are understood as disagreements between various interpretive methodologies. Plans determine the structure for many types of social interactions, but they do not determine them completely. Rather, plans are sometimes more general and sometimes more detailed and specific. Moreover, plans do not necessarily determine legal outcomes. An important element of this theory is the relation between various interpretive methodologies and the way one should choose between them. At this point, Shapiro's positivism makes a "meta-theoretical step". Plans allow for a certain distribution of trust between agents. Planners who trust more in the reflective abilities of agents leave them more discretion and allow them to apply more demanding interpretive

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[10] The subject-level differences are the differences between the theories of the same kind addressing similar questions and problems like, for example, the question of the grounds of law as related to law's *sources*.

methodologies (like, for example, the Dworkinian one). Where, however, the scope of trust is limited, the plans are more detailed, and the interpretive methodology should be less reflective and less demanding. It appears that, in Shapiro's view, the right way to resolve any theoretical disagreement—which is understood as a disagreement between interpretive methodologies—is to analyse the institutional structure of plans to see the actual division of trust within the system [52: 313].

The second theory by Golanski is a "legal" specification of Searle's institutional theory. It claims that there are two ways of understanding "theoretical disagreement". According to the narrow view, the disagreement is about which methodology of interpretation should be applied to legal materials in particular circumstances (originalism, evolutionism, intentionalism, consequentialism, etc.). This may be consistent with Shapiro's approach. According to the wide view pursued by Dworkin, theoretical disagreements are understood as disagreements over the soundest interpretation of a certain aspect of legal practice [8: 87; cf. 17: 24]. Golanski claims that contemporary institutional philosophy has produced analytic tools that allow us to differentiate between various types of theoretical disagreement, most of which do not have moral character. This is precisely that differentiation which makes this theory "positivistic".

Golanski argues that:

[a]n understanding of the logic of institutional power and authority shows that 'theoretical' disputes in law are, in the first instance, best understood as controversies over the standards for determining whether the existing legal materials are sufficiently directed at the present circumstances, and whether they provide a solution to the new matter with sufficient exactness. [18: 229–230]

Although these kinds of disagreement relate to the relation of fit between existing legal materials and new contexts or situations, they are not necessarily moral disagreements because disagreeing parties do not necessarily aim at the moral justification of that relation [18: 264]. As such, they belong to the (i) and (iii) types of disagreement described above.

Note that both theories provide a test for the "limits of theoretical disagreements in law". Such a test could be interpreted as a test determining which theories of law and legal interpretation are admissible in legal discourse as in the case of Golanski's theory, or which shall have priority in certain contexts as in the case of Shapiro's theory. Note, however, that both theories appear to assume that there might be a set of various theories admissible in legal discourse—the set that would be delimited by institutional designers' plans and arrangements.

The (Razian) thesis of the "limits of law", namely that "there is a test which distinguishes what is law from what is not", is now superseded by a "limit of theoretical disagreement" thesis according to which "there is a test which distinguishes what is an admissible legal theory or legal argument from what is not". Even though this test works mostly with respect to meta-interpretive disagreements, namely disagreements related to the methods of interpretation, it may also be used to demarcate the acceptable general theories of law, i.e., of legal validity or of legal *sources*, from unacceptable ones.

Finally, the third theory we want to refer to is "critical legal positivism" developed by Tuori. This theory provides us with a more general explanation of the admissibility of certain types of reasons in legal discourse. Tuori argues that law should be understood as a *multi-layered phenomenon* where social practices are combined with normative thought [56].[11] In this view, law is not exhausted by concrete legal materials such as, for example statutes, regulations and court decisions, but includes "sub-surface" layers: *legal culture* and *deep structures of the law*. Tuori's reflection grows from the identification of the well-known problems with traditional forms of legal positivism:

> [T]raditional positivism has to abandon either the strict separation between the 'Is' of empirical social facts and the legal 'Ought' (Hart) or presuppose at the top of the hierarchically-structured posited legal order a non-positive, hypothetical norm (Kelsen). [56: 27]

Tuori argues that any alternative to traditional forms of legal positivism "should be capable of providing a solution which does not include the assumption of universal and immutable normative principles" (Tuori, id.) If we stick to the idea that modern law is "positive", then this very idea "entails that the substantive limits of modern law, as well as the yardsticks for its legitimacy, have to be found within the positive law" [56: 28; cf. 35]. What is most important here is that the theory must embrace "the possibility of an immanent normative criticism of positive law" [56: 28].[12] Tuori's critical version of positivism makes relevant the division between the descriptive social and normative layers of law by "emphasising the constant interaction between the law as a symbolic normative phenomenon and the legal practices producing and reproducing this phenomenon"; this eventually leads to a dialectical revision of the positivist dogma, namely the separation (or separability) thesis. However, the main reason we take Tuori's theory to be a theory about the positivist limits of theoretical disagreements is best captured by the following quotation:

> Immanent criticism cannot expand to a fundamental criticism of the law. By 'fundamental criticism' I refer to criticism which is suspicious of the justifiability of all law and which tends to renounce every form of legal regulation of society. This kind of criticism is possible only from outside the law, as autonomous criticism which draws its grounds upon somewhere else than upon the positive law itself. Fundamental criticism is not possible as immanent criticism for the simple reason that immanent criticism, despite its critical nature, also contributes to the reproduction of its object: it sustains the law both as a normative order and as specific legal practices. [56: 29]

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[11] The thesis that law is a *multi-layered phenomenon* has been discussed by many scholars, including J. Wróblewski. However, Tuori is inspired by the views of Ewald and Habermas [56: xiii].

[12] "If we can define the limits and the criteria of validity of the law from within its positivity, we have demonstrated the possibility of an immanent legal criticism which employs inter-subjectively acceptable substantive criteria. […] In Kelsen's view, a substantive normative criticism would require a moral position outside the law" [56: 28].

One can see that in this dialectical and critical version of legal positivism, there must be a "postivistically" or "institutionally" imposed framework for theoretical disagreements as various forms of criticism may appear with respect to applied concepts and interpretive methods. However, the criticism that "critical legal positivism" has in mind cannot be of a "fundamental" kind. Tuori argues that there are limits for such a criticism, which are determined by legal culture and law's deep structure.[13] Furthermore, an essential element of this structure appears to be a conviction that law is an institutionalised, "positivised" practice.

All these "reflective" positivist theories rely on certain important shared intuitions about law's relation to morality, law's positivity, and its "institutional" character as well as some general characteristics of *legal culture*. Hence, we would like to briefly discuss the general way in which various legal theories are admitted into legal discourse.

4 Folk Limitations of Law and Legal Disagreements

One assumes that any serious or genuine theoretical disagreement is a reasonable philosophical peer disagreement about what counts as law or about what methods of interpretation are both acceptable and most suitable either in general or in specific institutional circumstances. However, the question arises of what makes various traditional positivist and non-positivist positions equally admissible in the discourse. Our answer is that various theories may only occupy a legitimate position in theoretical disagreements if they deal with the same or equal *evidence* by means of *shared general scientific methodological standards.*[14] It is a fact that an evidential and prudential equality exists between traditional legal positivists and non-positivists, and is recognised by both sides as epistemic peers. In the case of the dispute between positivists and non-positivists, there is only partial agreement over several sources of law. Positivists accept social sources as sufficient evidence; Dworkineans consider these insufficient. Moreover, positivists deem improper any additional theoretical evidence that their opponents invoke. Nonetheless, this does not preclude all parties from engaging into a reasonable discussion.

This suggests that to recognise the limits of theoretical disagreements, one first scrutinises the way in which they arise. There must be something all theorists share as a start. In our opinion, all significant general legal theories are products

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[13] "We can perform the task of determining the law's limits while respecting the positivity of modern law if we understand it as a multi-layered phenomenon where the surface level of the discursively formulated legal order—of regulations, court decisions and scholarly standpoints—is sustained by the legal culture and the law's deep structure [...] [T]he deeper layers of the law create the possibility for legal practices and the surface-level normative material these produce. But at the same time, the sub-surface levels of the legal culture and the deep structure also impose limitations on this material. Limitation is the inseparable obverse side of constitution" [56: 217].

[14] We take this requirement to be very *general* indeed, to the extent it allows for far reaching methodological debates over proper method in general jurisprudence.

of analyses of the concept of law and as such are dependent upon shared folk theories of law. Raz expressed this idea in the following way:

> The notion of law as designating a type of social institution is not, however, part of the scholarly apparatus of any learned discipline. It is not a concept introduced by academics to help with explaining some social phenomena. Rather it is a concept entrenched in our society's self-understanding. It is a common concept in our society and one which is not a preserve of any specialized discipline […]. It occupies a central role in our understanding of society, our own as well other societies. In large measure what we study when we study the nature of law is the nature of our self-understanding […]. It is part of our self-consciousness of the way we conceive and understand our society […]. That consciousness is part of what we study when we inquire into the nature of law. [43: 31]

There is no doubt that the traditional positivistic thesis of the "limits of law" discussed above represents a platitude that people living in municipal legal systems generally share. For example, Raz explicitly states that the claim that "law has limits" is "truistic" [40]. There are also other kinds of platitudes pertaining to other features of a legal system. In his magisterial book, Hart wrote: "The starting point for this clarificatory task is the widespread common knowledge of the salient features of a modern municipal legal system which… I attribute to any educated man" [20: 239–240].

Thus, it appears that this traditional form of legal positivism relies on platitudes about law. *Folk intuitions embedded in platitudes constitute the common "understanding" of law and provide an ultimate criterion for determining limits of the concept of law. It* would follow that folk theory "genetically" delimits the scope of possible theories of law.

Tuori even provides an elaborate description of how "positivist" theories of law depend on such shared "understanding":

> The positivity of modern law corresponds—so I venture to maintain—to how a typical (continental European) lawyer conceives of the law. (…) [This] formalistic narrative corresponds to the average self-understanding of (continental European) lawyers, although they may only rarely feel a need to make it explicit. Rather, it constitutes a part of what—following Pierre Bourdieu—can be termed their habitus; it is this very habitus that enables them to act as lawyers, as agents in specific legal practices. [56: 7]

And then he admits that,

> [t]he account of the law attributed here to the typical lawyer represents a kind of spontaneous positivism. Positivistic legal theory can be understood as the reflexive level of this spontaneous positivism: positivistic theory has given an explicit and systematic expression to the self-understanding of the typical lawyer. [id.]

What is worth stressing is that even early representatives of conceptual legal dog-
matism such as Puchta or Savigny argued that positive law was not yet exhausted by
legislative sources. In this view, sources of positive law also included legal convic-
tions of the people and the so-called scientific or lawyers' law; the people's legal
convictions amounting to "the Volksgeist" stood as a more fundamental layer than
legislation and the lawyers' law [58; via 56: 152]. Most of this layer was filled with
rather practical knowledge. What is however important is that,

> in modern society, knowledge about the legal culture can in principle be
> expressed discursively, transformed from practical into discursive knowledge.
> This is what is done by legal scholars within theoretical legal dogmatics or by
> judges when justifying the decisions in hard cases. Conforming to the reflexiv-
> ity of modern culture, the borderline between practical and discursive knowl-
> edge in the consciousness of legal actors is blurred. Yet in exploring the multi-
> layered nature of modern law, it is important not to confuse the legal culture
> with its surface level discursive expressions. [56: 163]

The point is, however, that legal professionals have internalised these elements as
part of their practical consciousness; they usually employ them in legal practices in
at least a partly unconscious way. Thus, as Tuori notes any suggestion that there is a
deeper structure of the law underlying the legal culture may be surprising for them
[56: 184]. However, he also observes that:

> the reflexivity of modern culture makes it possible to transform even practical
> knowledge about the deep structure into a discursive shape. This is attested to
> by the legal philosophical literature aiming at reconstructing the deep struc-
> ture. But knowledge about the deep structure of the law constitutes in the con-
> sciousness of legal actors the most fundamental, deepest sedimented layer,
> whose excavation and discursive formulation is a more demanding task than
> the articulation of the legal culture. In this respect, the law's deep structure
> comes close to what the Freudian psychoanalytical theory, at the level of indi-
> viduals, calls the subconscious. [56: 184]

This reflectivity squares with the idea of "internal criticism" discussed above. As far
as the same *practices* may receive different but competing discursive articulations,
we may speak of genuine theoretical disagreements in legal discourse.

However, one is not forced to accept Tuori's methodological approach, which
relies on critical post-Marxist and post-Freudian trends in philosophy. What is
referred to here as a "subconscious" level of shared understanding squares with what
is referred to by analytic philosophers under the name of "folk theory", "ordinary
conception", or "shared/common beliefs" [22, 30, 31]. Thus, Tuori's point may be
reformulated as a claim that what determines legal culture, along with all conceptual
and normative arguments, is a folk theory of law. At the beginning of *Legality*, Sha-
piro provides the following description of this methodological approach relying on
Jackson's conception of the method of conceptual analysis:

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

at the crime scene, collecting as many clues as she can. She will study those clues hoping that the evidence, coupled with her knowledge of the world and human psychology, will help eliminate many of the suspects and lead her to the identity of the killer. In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely to elucidate the identity of the entity that falls under the concept in question. The major difference between the philosopher and the police detective is that the evidence that the latter collects and analyses concerns true states of affairs whereas the former is primarily interested in truistic ones. [52: 13]

As suggested above, the folk theory in general would be embedded in ordinary common sense. It need not be specified fully and explicitly, and indeed it usually is not. Any discursive theory of an object or phenomena referred to in folk consciousness would be construed by means of conceptual analysis of folk beliefs. Such an analysis is an armchair attempt to locate the meaning of the terms used in the folk theory in the terms of another by means of testing intuition against possible cases; therefore, it is an exercise in a form of translation or paraphrasing. It is an attempt to locate the meaning of terms of folk theory in terms of a more sophisticated special theory rooted in a metaphysically privileged vocabulary (cf. 22).

Shapiro provides a preliminary list of platitudes of the folk theory of law:

The philosophical clues, in other words, are not merely true, but self- evidently so. The key to conceptual analysis, then, is the gathering of truisms about a given entity [52: 13].

Furthermore, regarding law, he continues:

[…] In assembling a list of truisms about law, the legal philosopher must include truisms about basic legal institutions ("All legal systems have judges," "Courts interpret the law," "One of the functions of courts is to resolve disputes," "Every legal system has institutions for changing the law"); legal norms ("Some laws are rules," "Some laws impose obligations," "Laws can apply to those who created them," "Laws are always members of legal systems"); legal authority ("Legal authority is conferred by legal rules," "Legal authorities have the power to obligate even when their judgments are wrong," "In every legal system, some person or institution has supreme authority to make certain laws"); motivation ("Simply knowing that the law requires one to act in a certain way does not motivate one to act in that way," "It is possible to obey the law even though one does not think that one is morally obligated to do so," "One can be a legal official even though one is alienated from one's job"); objectivity ("There are right answers to some legal questions," "Courts sometimes make mistakes when interpreting the law," "Some people know more about the law than others") and so on. [52: 15]

Note that, in a sense, these platitudes might relate to other generally shared claims about law associated to the general requirements of the rule of law.[15] There is a widespread general agreement between legal theorists and laypeople that law should be general, non-retroactive, prospective, not vague, stable, etc. In a recent paper, Raz argues that any theory of the rule of law is an "ideal theory of law's virtues". However, he stresses:

> There is no agreement about what it is: This lack of agreement is common to important normative institutions and principles, like freedom of speech. The lack of agreement is often a source of strength–people unite in supporting such institutions and principles in spite of diverse views about their nature. But should we not try to establish which of the views is correct? Often more than one is correct, the disagreement is illusory, an illusion resulting from the fact that the term 'the rule of law' is used to designate somewhat different ideals. There is no point in verbal disputes about which ideals deserve to be called the RoL [rule of law]. However, it may also be important to distinguish the different ideals, as they are likely to differ in at least some of their implications. [44: 1]

Raz is right in saying that there are disagreements over the theoretical articulations of these values and requirements. But the reasonability of any disagreement over these ideals would be dependent upon rooting these theories in common-sense beliefs about law's institutionalised and authoritative mode of operation and its ability to guide human conduct. The limits of theoretical disagreements in jurisprudence are fixed by the same shared set of truisms of folk theory that delimit the scope of disagreements over law's internal virtues. Different ideals may be associated with them and articulated in a theory. But, contrary to Raz, this does not mean that disagreement is illusory for it is still rooted in a shared practical yet not-articulated understanding of law and its functions. That is what makes this disagreement reasonable even though there is no unique correct answer in the discussed matter. This caveat is important for our purposes for this is exactly why, even in the case of accepting a positivist theory of law that declares indifference with respect to admissible theories of legal interpretation, there are obvious limits to legal interpretation and theoretical disagreement circumscribed by that shared understanding (which is, in turn, essentially related to a general and vague idea of the rule of law).

5 Artefactual Concept of Law and Its Analysis

It is worth remarking that there are two roles that a conceptual analysis may play: modest or immodest. As Himma, following Jackson [22] notes:

> The goal is either to understand certain features of the world as they are defined and articulated through our conceptual practices or to understand those

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[15] The striking variety of truisms invoked by Shapiro is discussed by Chiassoni [4: 154].

features as they actually are independent of the practices that enable us to describe them. [21: 208]

Immodest conceptual analysis provides us with an insight into what the world is like independent of our linguistic practices and conceptual frameworks. It is an analysis of the content of our concept that yields truth about the essential characteristics of the referent [21: 208]. As a result, analysing the way we talk about, use and apply our concepts will yield knowledge not merely of those concepts themselves but also of what the world is like, i.e., of the reality those concepts attempt to conceptualize [28, cf. 6: 488].

However, the modest conceptual analysis is "the elucidation of the possible situations covered by the words we use to ask our questions" [22: 33]. It gives us an insight into what the world is like *as defined* by the ordinary understandings that underlie our linguistic and other relevant social practices; it illuminates our concepts—our thoughts and speech—not the referent we might have intended to understand. It does not pretend to give us access to mind-independent reality. The subject matter of our inquiry is the folk theory of items, covered by the concept to be analysed. The purpose of the analysis is to answer the question of how we comprehend the world, not the question of what the world is actually like. As such, this type of analysis will only deliver an understanding of our concepts and will be "ethnographically relative" [28]. As "an exercise in sophisticated conceptual ethnography" and "glorified lexicography", such analyses cannot provide what some legal theorists are explicitly after, i.e., a description of the nature of law, of its essential properties.

This distinction has been applied to analyse the methodological approaches of most prominent representatives of general jurisprudence. For example, Himma argued that Dworkin deploys an immodest conceptual analysis whereas positivism deploys a modest conceptual analysis [21]. Farell suggested that Hart's positivism deploys modest conceptual analysis [14: 1006; cf. 19: 577). Meanwhile, Leiter and Langlinais argued that most post-Hartian analytical jurisprudence (Hart, Raz, etc.) deploys immodest conceptual analysis [26: 671-689]; this position appears to also be accepted by Sciaraffa [49]. It is unclear, however, whether Shapiro [52] deploys analysis in modest or immodest form.[16]

All these examples show that a reference to a folk theory of law, platitudes about what law is, serve as the best available evidence for legal philosophers. The question is, however, to what extent the results of an analysis (discursive articulations in Tuori's terms) are really representative of a part of institutional reality and to what extent they merely reveal a discursive thought about something non-existent or fictious. In what follows, we argue that the solution would depend on the selected, metaphysically privileged picture implied by the selected target vocabulary in the conceptual analysis. As we have suggested, reflective positivist theories rely on some version of institutional ontology, which in turn relies on some idea that places law and related concepts within the domain of "artefactuality" (artefact kinds). The

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[16] For a well-argued critical view on conducting Canberra-style analysis in positivistic context see Spaak [54].

target vocabulary of institutional ontology thus implies some sort of realism with respect to artefact kinds.

The main problem we try to deal with in the final part of the paper is thus the problem of how the idea of law as an artefact–institutional concept squares with the thesis that theoretical disagreements have limits. If the main problem we deal with is the problem of determining "a test which distinguishes what is an admissible legal theory or legal argument from what is not", then we must be able to defend the view that there might be many equally good discursive articulations of folk's platitudes, such as, for example, analyses and theories of *the very same abstract institutional artefact*, namely "law" and related practices. Our suggestion is that within certain limits provided by a folk theory of law, any analysis of an artefact concept such as the concept of law will be immodest in the sense that it would capture some essential characteristic of law and would thus square with the *realist* approach to artefact kinds.[17] In other words, any analysis of the folk concept of law would yield some immodest results, since it is a folk theory of law that serves as a legitimate point of departure in legal theorising. In connection to this, a couple issues arise.

One interesting issue is a certain type of paradox related to legal theorising. This "paradox of legal theorising" would be a theoretical analogue of so called "paradox of analysis" indicated 75 years ago by Langford [25]. According to Langford, an analysis of certain supposedly analytical sentences can be either correct or informative, but it cannot be both. In the same vein, legal theories cannot be both trivial and informative since if they are trivial, they do not develop but merely repeat all the truisms about law, particularly the folk theory of law, and if they are informative, then they are inherently controversial because they treat some of the truisms as false, or, at least, reinterpret them in a nonstandard way, as any discursive, coherent theoretical articulation would do. The question is, thus, how can a theory of law or legal interpretation be both informative and true?

Our sketchy way to answer this paradox is to argue that it might not be the very same proposition that must be true and informative. Thus, one may argue that legal theories refer to true folk propositions, the content of which is most probably not fully determined and provide detailed "reconstructions" of these propositions given a certain metaphysical framework. In this light, the problem of the limits of theoretical disagreements would be a problem of the underdetermination of a theory by folk evidence. Disagreeing theorists would refer to the same evidence, but they would analyse and interpret it differently.[18] To vindicate the phenomenon of rational

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[17] That this will yield further limitations with respect to the concept of legal interpretation and the idea of theoretical disagreements.

[18] Another option is that theorists, in fact, refer to different but equally sustainable platitudes. However, the question is whether legal theorists could refer to a totally different body of evidence and still speak about the same thing. We doubt that. Another possibility is that there are in fact manifold concepts of law (pluralism)—these are concepts of law that may not have any common content. This view is usually related to some anti-essentialist theses (such as Tamanaha's [55]). In such cases, there is evidential equality—parity between theorists and their concepts—but, is there really any disagreement? We would rather say that parties would speak one past another (as in the Dworkinian scenario of them being "semantically stung" [8: 44]).

theoretical disagreement in law, one must assume that there is some truth of the matter that counts. The common content of the concept might be minimal, however. That is why we think it necessary to accept some kind of minimalist essentialism along the lines of, for example, Elder [13] within an artefactual theory of law and along the lines of Burazin [2, 3], Crowe [5] or Banaś [1]).

Moreover, we assume that any theory that treats law (or a system of law as a kind of mind-independent institution must treat law as an artifact.[19] According to the artifactual theory of law:

> legal systems are artifacts because they are created by authors (as a rule collective ones) having a particular intention to create the institutional artifact 'legal system' based on the authors' substantive and substantively correct concept of what the legal system is under the condition that this intention be largely successfully realised. The intention required here is, of course, not an individual intention or a sum of individual intentions but the result of collective intentionality. By being institutional by nature, institutional artifacts differ from 'ordinary' artifacts (such as chairs, hammers or clocks) in that they are rule-based and require collective recognition (acceptance). [2: 68; cf. 3: 112–135]

This kind of theory relies on a "function-concept of an artifact" where the general intention required to successfully create an artifact is the intention to make a thing that corresponds to a list of salient functional features that systematically complies with the concept of that thing [5: 741]. X is a social institutional artefact of kind K (e.g., law) if (a) members of a social group have in mind a function-concept of K that includes both its characteristic function and a range of other salient features, and (b) the item in question is collectively accepted as largely complying with that concept [5: 741], it follows that any given social group *must* have an appropriate concept of K to create a social artefact of the kind K.[20] Such a pre-conception underlying a given practice, i.e., a folk theory developed around an artifact, may consist of both descriptive and normative beliefs about it.

What we want to argue for squares with a suggestion made by Williams [59] in his discussion of the essential determination of artefactual functions. He suggests that any practical claim about the "goodness" of an artefact, e.g., "a good law", invokes the problem of evaluation within theoretical disagreements about that artefact. Williams notes:

> [T]he meaning of a phrase of the form 'a good x' has to be taken as a whole; and its meaning is partly determined by what fills the place of 'x'. Can we go further than this and say that in phrases of this form, the meaning of the whole is essentially determined by the meaning of what takes the place of "x"? […] In many cases, it looks as though we might take this further step. For if we consider functional descriptions of artefacts, such as 'clock' or 'tin opener', or

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[19] We mean here mind-independence in the weak sense. An object is mind independent in the weak sense if its existence does not depend on the beliefs of any particular person but depends on shared collective beliefs.

[20] Artifactual theory of law draws on Searle's account of institutions [50].

again descriptions of human beings which refer to their roles or jobs or skilled activities, such as 'gardener' or 'general' or 'cricketer' it does seem that if one understands these expressions (at least in the strong sense that one understands what a tin opener is, for instance, or what a general does), then one has understanding, within limits, of what a good thing of that sort is. [59: 45]

The practical discourse consists mostly of such evaluative claims. Legal education is partly about learning what counts as a "good" legal argument and what does not. The idea of law being an artifactual type must, therefore, be supplemented with the idea of at least a partly "institutionalised" legal culture (education, etc.) based on a more fundamental "understanding" of law that provides limits for various kinds of arguments, including evaluative ones, related to law. What vindicates the theoretical evaluative discourse about law is a shared understanding of what a good law is. Our suggestion in this context is that there must be a specific foundational folk theory which would amount to a set of platitudes necessary for a group to share collective intentions and beliefs that are able to successfully create an institutional artefact of a certain kind K in the first place. Such platitudes would be mostly of the functional kind, that is, pertaining to an idea, however vague, of what functions law is supposed to fulfil and, thus, included in the commonly shared platitudes about law's virtues.[21] This set of platitudes embedded in a common understanding of law could not be false in that it would be true that any instance of law *should* possess certain characteristics to perform its essential functions. The inevitable link between normative intuitions about law and the content of the concept of law cannot be denied.[22] Such platitudes would obviously be supplemented by other sets of platitudes, some of which could be false. For example, people used to hold a distorted view on a God-related authority of law. However, this foundational, essential and interlinked set of platitudes—both normative and descriptive must be shared across legal cultures and jurisdictions otherwise such an enterprise as general jurisprudence would not be possible. So, one should distinguish between a general folk theory that comprises generally shared platitudes about law that cannot be false and that play the role of a necessary reference point for any theory of law and a possible remaining part of folk theory that would be culturally relative and contingent, and thus vindicating particular jurisprudential efforts.

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[21] We think here of the implicit awareness of the function of the kind as having a certain status—perhaps knowledge of the "success conditions", i.e., the conditions pertaining to a particular type of thing that may count as an artifact; people should be generally aware of those conditions—somebody who intends to create a K but produces the wrong kind of thing to be K ends up with something that is not K.

[22] Raz famously argues against conceptual dependence between the concept of law and the ideal of the rule of law: "Clearly, the extent to which generality, clarity, prospectivity, etc. are essential to the law is minimal and is consistent with gross violations of the rule of law. But are not considerations of the kind mentioned sufficient to establish that there is necessarily at least some moral value in every legal system? I think not. The rule of law is essentially a negative value (…) conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself" [41: 224]. However, it seems that Raz has to agree that it is impossible to imagine a system of law where none of the intuitive requirements of the rule of law were implemented, at least to a minimal extent (for plausible arguments on that behalf see Oberdiek and Patterson [34], Marmor [32] and Rijpkema [46]).

6 Conclusion

In conclusion, we want to draw attention to the fact that traditional legal positivism, with its main thesis about the limits of law, appears to be the simplest articulation of a set of general platitudes about law—legal positivism as a theory of "obvious law" [3]. Legal positivism does not account for an "all-considered judgement", but it has a certain epistemic virtue in that it allows us to determine law's sources by specific *assumed standards*. As such, it is an "obvious" input, a conceptual premise, in any reasoning according to law or the application of law. However, if the outputs are counter-intuitive, Moore suggests that we should turn to morally determined theories, or moral reasons, to achieve an "all-things-considered safety-valve judgment". Thus, non-source-based reasons serve as a "safety-valve" in the system and as such they are also "admissible".

Theories that argue for such a "safety-valve" simply stress and develop further certain normative platitudes of the folk theory of law. This group of theories includes the "reflective" versions of legal positivism referred to above.

In any case of a discursive articulation of an idea of law, its interpretation, etc., there must be something to begin with. The truism of law's limits is explained by legal positivism by means of the theory of a determining role of legal practice: traditional positivism with respect to the sources of law and institutional scaffolding: reflective positivism with respect to theoretical disagreements. Positivist theories are, however, quite minimalistic in those explanations. This minimalistic character is manifested in the claim that the rule of recognition reflects some kind of "common meaning" or "use" of the word 'law' [37: 316]. In their complicated practice, officials are simply eager to count something as law, and since law is mind-independent only in the weak sense most of them cannot be wrong in doing so. Such an attitude may be plausible from an historical point of view as many lawyers and officials believe that in the majority of legal cases, the answer to the question "what is law?" is not a difficult one. Thus, the general intuition that most cases are "easy cases" is reflected in the positivist theory—the theory of the "obvious law" [33: 446; cf. 15: 327].

One will, however, always remember that folk theory reflected in common institutional practices of both officials and lay people may be articulated in various ways. Foundational folk theory, related to the general beliefs about rule of law, is a necessary reference point for a legal philosopher. Certain platitudes must be accepted by anyone who wants to theorise about law. Theoretical disagreements arise due to underdetermination of theories by the same platitudes. Theories that ignore the foundational platitudes of law are not theories of law. They do not participate in a reasonable theoretical disagreement about law. They are the theories of a different objects.

References

1. Banaś, Paweł. 2019. *Truth and Truth-Makers in Legal Discourse*. PhD dissertation. Available online: https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/77315/banas_truth_and_truth-makers_in_legal_discourse_2018.pdf.
2. Burazin, Luka. 2015. Practical Concepts of Law as An Artifact Kind. In *Pravni Vjesnik God* 31/3-4.
3. Burazin, Luka. 2018. Legal Systems as Abstract Institutional Artifacts. In *Law as an Artifact*, ed. L. Burazin, K.E. Himma, and C. Roversi. Oxford: OUP.
4. Chiassoni, Pierluigi. 2013. Ruling Platitudes, Old Metaphysics, and a Few Misunderstandings About Legal Positivism. In *The Planning Theory of Law: A Critical Reading*, ed. D. Canale and G. Tuzet. Dordrecht: Springer.
5. Crowe, Jonathan. 2014. Law as an Artifact Kind. In *Monash University Law Review* 40/3.
6. Dickson, Julie. 2011. On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become. In *Law and Philosophy* 30/4.
7. Dworkin, Ronald. 1977. *Taking Rights Seriously*. Massachusetts: Harvard University Press.
8. Dworkin, Ronald. 1986. *Law's Empire*. Cambridge-Mass: Harvard University Press.
9. Dworkin Ronald. 2006. *Justice in Robes*. Cambridge. Mass, London.
10. Adam, Dyrda. 2016. The Epistemology of Theoretical Disagreement. In *Metaphilosophy of Law*, ed. P. Banaś, A. Dyrda, and T. Gizbert-Studnicki. Oxford: Hart.
11. Dyrda, Adam. 2017. *Spory teoretyczne w prawoznawstwie. Perspektywa holistycznego pragmatyzmu* (*Theoretical Disagreements in Jurispriudence. The Perspective of Holistic Pragmatism*). Warszawa: Scholar.
12. Dyrda, Adam. 2018. Truisms, Heuristics and the Concept of Law. In *Principia LXV*.
13. Elder, Crawford. 2007. On the Place of Artifacts in Ontology. In *Creations of the Mind. Theories of Artifacts and Their Representation*, ed. Eric Margolis, Stephen Laurence. Oxford: OUP.
14. Farell, Ian. 2006. H.L.A. Hart and the Methodology of Jurisprudence. In *Texas Law Review* 84.
15. Gizbert-Studnicki Tomasz, Dyrda Adam, Grabowski Andrzej. 2016. *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa (Methodological Dychotomies. Critique of the Positivistic Theories of Law)*. Warszawa: Wolters Kluwer.
16. Gizbert-Studnicki, Tomasz. 2010. Dyrektywy wykładni drugiego stopnia (The Second-Level Rules of Interpretation). In *W poszukiwaniu dobra wspólnego (In Search of Common Good)*. ed. Agnieszka Choduń and Stanisław Czepita. Szczecin: Wyd. US.
17. Golanski, Alani. 2016a. Why there is Widespread Nonmoral Theoretical Disagreement in Law. In *Selected Issues in Modern Jurisprudence*, ed. D.A. Frenkel. Athens. Athens Institute for Education and Research.
18. Golanski, Alani. 2016b. Nonmoral theoretical disagreement in law. In *Mitchell Hamline Law Review* 42(1).
19. Green, Leslie. 2005. General Jurisprudence: A 25th Anniversary Essay. In *Oxford Journal of Legal* Studies 25/4.
20. Hart, Herbert L.A. 2012. *The Concept of Law*, 3rd ed. Oxford: OUP.
21. Himma, Kenneth. 2016. Immodesty in Dworkin's Theory: The Lines Dividing Different Kinds of Conceptual Theory of Law. In *The Legacy of Ronald Dworkin*, ed. Wil Waluchow and Stefan Sciaraffa. Oxford: OUP.

22. Jackson, Frank. 1998. *From Metaphysics to Ethics. A Defence of Conceptual Analysis*. Oxford: OUP.
23. James, William. 1975. *Pragmatism*. Fredson Bowers and Ignas K. Skrupskelis (eds.), Cambridge-Mass: Harvard University Press.
24. Kant, Immanuel. 1991. *The Metaphysics of Morals (introduction, translation and notes by Mary Gregor)*. Cambridge: CUP.
25. Langford Cooper H. 1942. The Notion of Analysis in Moore's Philosophy (w:) P.A. Schilpp (ed.). In *The Philosophy of G.E. Moore*. Evanston–Chicago.
26. Langlinais, Alex and Brian Leiter. 2016. The Methodology of Legal Philosophy. In *The Oxford Handbook of Philosophical Methodology*, ed. Herman Cappelen, Tamar Szabó Gendler, John Hawthorne. Oxford: OUP.
27. Leiter, Brian. 2009. Explaining theoretical disagreement. In *The University of Chicago Law Review* 76.
28. Leiter, Brian. 2011. Naturalized Jurisprudence and American Legal Realism Revisited. In *Law and Philosophy* 30/4.
29. Leiter, Brian. 2013. The Demarcation Problem in Jurisprudence: A New Case for Skepticism. In *Neutrality and Theory of Law*, ed. J.F. Beltran, J.J. Moreso, and D.M. Papayannis. Dordrecht: Springer.
30. Lewis, David. 1970. How to Define Theoretical Terms. In *The Journal of Philosophy* 67.
31. Lewis, David. 1972. Psychophysical and Theoretical Identifications. In *Australasian Journal of Philosophy* 50.
32. Marmor, Andrei. 2003. *The Rule of Law and its Limits*, USC Public Policy Research Paper No. 03-16, access online: http://weblaw.usc.edu/centers/class/class-workshops/usc-legal-studies-working-papers/documents/03_16_paper.pdf.
33. Moore, Michael. 2012. The Various Relations between Law and Morality in Contemporary Legal Philosophy. *Ratio Juris* 25 (4).
34. Oberdiek, John, and Dennis Patterson. 2007. Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology. In *Law and Philosophy: Current Legal Issues*, vol. 10, ed. M. Freeman and R. Harrison. Oxford: OUP.
35. Pichlak, Maciej. 2015. Krytyczny pozytywizm prawniczy Kaarlo Tuoriego (Critical Positivism of Kaarlo Tuori). In *Principia* LXI-LXII.
36. Poscher Ralf. 2016. Why We Argue About the Law: An Agonistic Account of Legal Disagreement. In *Metaphilosophy of Law*, ed. P. Banaś, A. Dyrda, T. Gizbert-Studnicki. Portland: Hart.
37. Postema, Gerald. 1987. Protestant' Interpretation and Social Practices. In *Law & Philosophy* 6.
38. Postema, Gerald. 1996. Law's autonomy and public practical reason. In *The Autonomy of Law: Essays on Legal Positivism*, ed. Robert P. George. Oxford: OUP.
39. Raz, Joseph. 1972. Legal Principles and the Limits of Law. In *The Yale Law Journal* 81 (5).
40. Raz, Joseph. 1979. *The Rule of Law and its Virtue, In The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press.
41. Raz, Joseph. 1990. *Practical reason and norms*. Oxford: Oxford University Press.
42. Raz, Joseph. 1998. Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment. *Legal Theory* 4 (1).
43. Raz, Joseph. 2009. *Between Authority and Interpretation*. Oxford: Oxford University Press.
44. Raz, Joseph. 2018. *The Law's Own Virtue*. Oxford Legal Studies Research Paper No. 10/2019; Columbia Public Law Research Paper No. 14-609; available at: https://scholarship.law.columbia.edu/faculty_scholarship/2277.
45. Regan, Donald. 1978. *Glosses on Dworkin: Rights, Principles, and Policies*. In *Michigan Law Review* 76.
46. Rijpkema, Peter. 2011. The Inevitability of Moral Evaluation. In *Ratio Juris* 24 (4).
47. Scalia, Antonin. 1997. *A Matter of Interpretation*. Princeton: Princeton University Press.
48. Schauer, Frederick. 2004. The Limited Domain of the Law. In *Virginia Law Review* 90 (7).
49. Sciaraffa, Stefan. 2011. *Hermeneutic Concepts and Immodest Conceptual Analysis of the Law*, available at SSRN: http://dx.doi.org/10.2139/ssrn.1905836.
50. Searle, John. 1995. *The Construction of Social Reality*. New York: The Free Press.
51. Scott, Shapiro. 2007. The "Hart–Dworkin" Debate: A Short Guide for the Perplexed. In *Contemporary Philosophy in Focus 22*, ed. A. Ripstein. CUP: Ronald Dworkin. Cambridge.
52. Shapiro, Scott. 2011. *Legality*. Cambridge: Harvard University Press.

53. Smith, Dale. 2010. Theoretical Disagreement and Semantic Sting. In *Oxford Journal of Legal Studies* 30(4).
54. Spaak, Torben. 2016. The Canberra Plan and the Nature of Law. In *Metaphilosophy of Law*, ed. Adam Dyrda, Pawel Banaś, and Tomasz Gizbert-Studnicki. Oxford: Hart Publishing.
55. Tamanaha, Brian. 1997. *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law*. Oxford: Clarendon Press.
56. Tuori, Kaarlo. 2002. *Critical Legal Positivism*. New York: Routlege.
57. White, Morton. 2002. *A Philosophy of Culture*: *The Scope of Holistic Pragmatism*. Princeton, Oxford.
58. Wilhelm, Walter. 1958. *Zur juristischen Methodenlehre im 19. Jahrhundert*. Frankfurt am Main: Vittorio Klostermann.
59. Williams, Bernard. 1972. *Morality: Introduction to Ethics*. New York: Harper & Row.
60. Wróblewski, Jerzy. 1959. *Zagadnienia teorii wykładni prawa ludowego*. Warszawa *(The Problems of the Theory of Interpreatation of People's Law)*.
61. Wróblewski, Jerzy. 1990. *Rozumienie prawa i jego wykładnia (Understanding of Law and Its Interpretation)* Wrocław-Warszawa-Kraków-Gdańsk-Łódź, Ossolineum.
62. Wróblewski, Jerzy. 1992. *Judicial Application of Law*, ed. Z. Bankowski, and N. MacCormick. Dordrecht: Springer.