# A New Perspective on Law's Rationality.
# An Experimental Essay

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ABSTRACT
The goal of this essay is to introduce and assess a bold hypothesis which states that rationality is not an aspect of thinking processes but rather it is encoded in the social environment in which humans operate. All the decisions human actors make are intuitive (instinctive), even if contemplated consciously. They are more or less rational not because of the thinking process which leads to them, but because of the structure of the social environment in which they are made. Some consequences of adopting this controversial view for the understanding of the rationality of law are illustrated with three examples: Hutcheson's conception of hunch, the so-called "Reason First Approach" to legal thinking, and the idea of nudge in institutional design.

KEYWORDS
law, rationality, ecological rationality, reasons first approach, hunch, legal intuition, nudge

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1. *The ecological turn* – 2. *The hypothesis* – 3. *The law*

The title of this paper may be promising more than the paper delivers. The perspective on law's rationality offered here may ultimately not be that new. At the very least, similar ideas have been entertained by many legal and moral philosophers, old and contemporary (CF. HUTCHESON 1929; HAIDT 2001; SETMAN 2022). I believe however that I go a step or two further than they have gone, which makes it possible to fully acknowledge and consider the novelty involved.

The subtitle of the paper positions it as an essay. By choosing this form, I want to stress that this is not a typical academic work, both in style and contents, but also to suggest that I do not present a final product, a well-developed theory. I only try to understand law's rationality from a fresh perspective, and even if the attempt results in a failure, my hope is that it will constitute an invitation to rethink opinions and concepts which are taken for granted and may seem unshakable.

I have also dubbed this essay "experimental", as what I present is a kind of thought experiment. I introduce a bold hypothesis and try to consider how our understanding of the law and its rational dimension would look like if the hypothesis were true.

The hypothesis in question says that rationality is *not* in our minds, but in the environment we inhabit. In order to understand the origins of the hypothesis as well as grasp its meaning and significance, it is reasonable to begin with the conception of ecological rationality.

## 1. *The ecological turn*

«There are three kinds of lies: lies, damn lies, and statistics». This saying was popularised by Mark Twain, who mentioned it in his article *Chapters from My Autobiography* in 1907. However, Twain was not the original author of this phrase. The authorship has been attributed to various well-known figures, such as the British Prime Minister Benjamin Disraeli, Walter Bagehot, Henry Du Pré Labouchère, William Abraham Hewitt, Lord Courtney, or Charles Dilke. Regardless of who came up with this phrase, it is undeniable that it must contain something that resonates with our understanding of the world; otherwise, it would be difficult to explain why this saying is so often and fondly recalled. Yes, it is amusing, but that does not explain the disputes over its authorship, the numerous references in popular culture, the scientific articles dedicated to it, or the Wikipedia entries (cf. WIKIPEDIA CONTRIBUTORS 2023).

This popularity may seem surprising, especially in the times we live in. After all, the 21st century has often been proclaimed the "century of information"; big data and data mining are not only catchy phrases but also thriving businesses, and statistical analyses not only help large corporations better cater to our tastes but also enable more precise medical diagnoses or, as is the case with The Human Brain Project, bring us closer to understanding how the human brain functions. Of course, statistical analyses are challenging, both in execution and interpretation. Mistakes are easily made, and even among specialists, they are all too common. Some lead to

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catastrophic consequences—for example, the statistical analysis errors contributed to the Challenger space shuttle disaster. But even such tragic mistakes do not explain our aversion to statistics: after all, it is not mathematics that is to blame but the person who misused it.

Perhaps the answer to our question is provided by a simple thought expressed in the previous paragraph: statistics is challenging, and our brains are not adapted to using it. No one has demonstrated this more vividly than Daniel Kahneman and Amos Tversky. Participants in one of the experiments designed by them were asked to rank future scenarios for a young woman named Linda, who is thirty-one years old, unmarried, talkative, and very intelligent. She majored in philosophy and was highly involved in fighting discrimination, promoting social justice, and participating in anti-nuclear energy demonstrations. The scenarios that needed to be evaluated included the following versions of her future: (a) Linda is a feminist activist, (b) Linda works in social care and helps people with mental disorders, (c) Linda is a member of the Women's Choice League, (d) Linda is a bank teller, (e) Linda is an insurance agent, (f) Linda is a bank teller and a feminist activist. Kahneman and Tversky were shocked when it turned out that all participants in the experiment considered the probability of Linda being a bank teller who is also a feminist activist to be greater than the probability of her being just a bank teller (cf. KAHNEMAN 2011, 211). This is an obvious error because the probability of the joint occurrence of two independent events is lower than the probability of the occurrence of only one of them. We are not dealing here, of course, with complicated statistical analyses but with a completely elementary property of probability theory. Let's think about how much more difficult it must be for us to understand complex statistical constructs!

How can we explain all this? Kahneman and Tversky argue that the error we make in cases like Linda's story stems from relying on the unconsciously used representativeness heuristic. Linda's characteristics are representative of a feminist activist, not a bank teller, which is why the scenario of her future life in which she is a feminist activist exerts such a strong force on us that we ignore elementary principles of probability theory. There are, in fact, more of these heuristics—specific "thinking shortcuts"—in the arsenal of our minds.

In their famous work from 1974, *Judgment under Uncertainty: Heuristics and Biases*, Kahneman and Tversky also described the availability heuristic and the anchoring and adjustment heuristic (TVERSKY & KAHNEMAN 1974). The availability heuristic leads us to base our response to an encountered problem on information that is easiest to recall from memory. For example, when asked whether there are more words that start with the letter "r" or have the letter "r" in the third position, English language users typically—incorrectly—indicate the first possibility, probably because it is easier to remember words in which "r" is the first letter (see TVERSKY & KAHNEMAN 1974).

On the other hand, the anchoring and adjustment heuristic comes into play when an "anchor" appears in the "environment" surrounding the problem being considered. This anchor, which is unrelated to the problem, influences the adopted solution. In their classic studies, Kahneman and Tversky asked participants in the experiment to estimate the percentage of UN member countries that were African countries. However, before doing so, the participants had to determine whether this percentage was higher or lower than the number that appeared on a "wheel of fortune". This device was designed in such a way that either the number 10 or 65 would appear. It turned out that participants who "spun" the wheel and obtained the number 10, on average, believed that around 25% of the UN member countries were African countries. Meanwhile, the participants who "spun" the wheel and obtained the number 65 had a significantly higher average estimate—around 45% (see TVERSKY & KAHNEMAN 1974).

In the context of these illustrations, there is no doubt that basing judgments and decisions on unconscious heuristics can lead to embarrassing errors. Heuristics are the source of great foolishness that does not reflect our species in the best light. It seems urgent to develop mechanisms that weaken the destructive effects of these described mechanisms. Perhaps, instead of burdening

children with multiplication tables, we should start by raising their awareness of the dangers associated with excessive reliance on intuitive judgments. Maybe—alongside some Very Important Social Policy—it is worth investing in a broad educational campaign that explains to society the detrimental consequences of heuristic thinking. Why wouldn't the example with Linda replace Anny Apple, Firefighter Fred and Dippy Duck in elementary English textbooks, and why wouldn't words with the letter "r" in the third position appear on cigarette packages? It would be an EGEDOR: everyone's grand effort in defence of rationality.

Such demands made in the name of fighting stupidity would demonstrate a complete misunderstanding of what heuristics are. They would, ironically, succumb to the influence of the availability heuristic. Let us note that the tendency to consider heuristics as the source of all foolishness stems from the fact that when we describe them, we almost exclusively mention the errors that result from their use: the case of Linda, peculiar games with the wheel of fortune combined with questions about the UN, the trivial question about the occurrence of the letter "r". It is not surprising, therefore, that "heuristics" is for us a source of errors and pyramid-like foolishness. Meanwhile, heuristics are very clever and useful products of evolution.

Human beings live in an incredibly complex environment, facing hundreds of more or less significant decisions every day. There would not be enough time or energy for rational deliberation over each of them. Heuristics, by acting automatically, quickly, at an unconscious level, and effortlessly, usually provide us with good or at least acceptable solutions to encountered problems.

Let's consider, for example, what the representativeness heuristic truly gives us. It offers us suggestions based on certain patterns or prototypes. If a situation is similar enough to typical circumstances in which we are in danger, our unconsciousness will prompt us to exercise caution. If someone possesses characteristics typical of friendly and sympathetic individuals—being smiling, helpful, and polite—we intuitively assess that there is no danger coming from them. Certainly, we can make mistakes in both cases. The "dangerous" situation may turn out to be a joke played by our friends (exploiting our unconscious reactions), and the friendly stranger may be a psychopathic killer. The point is that such mistakes will occur relatively rarely; frequent and systematic errors will only arise when dealing with problems that are themselves atypical, at least from the perspective of the evolution of the human mind, such as dealing with statistical analysis or other tasks unrelated to the problems we encounter in our daily lives.

Similar remarks can be made about the availability heuristic and the anchoring and adjustment heuristic. For an organism, events that leave a distinct memory trace are particularly important—they evoke strong emotional reactions or occur relatively frequently. It is good, therefore, that we have quick access to this knowledge, and it is also good—in the overwhelming majority of cases—that we base our decisions on it. The availability heuristic is not primarily a source of troublesome errors but an incredibly helpful mechanism that facilitates navigation in a complex physical and social reality. The anchoring and adjustment heuristic, on the other hand, makes us sensitive to the context in which the problem we are solving appears. Usually, all elements of that context will be relevant, while some random piece of information (such as an unrelated number) will rarely appear there, most likely introduced by a malicious and inventive experimental psychologist.

Therefore, heuristics are not responsible for our stupidity; they rather serve as a useful toolbox that helps us adapt better to the environment in which we live (cf. GIGERENZER 2001). The belief that we can make decisions differently stems from far idealised, and perhaps even counterfactual, standards of rationality that we have internalised. Let's take a look at Kant's philosophy, for example. Kant claimed that only those moral and legal decisions that are in line with the categorical imperative are well justified (rational): «Act only according to that maxim whereby you can at the same time will that it should become a universal law» (KANT 2002, 37). The categorical imperative may seem innocent. It is just one short rule that we intuitively want

to agree with. It does not impose any specific material obligations on us; it only determines a way of acting that is supposed to enable rational decision-making. However, this innocence is deceptive. Let us pause for a moment and consider what Kant expects from us—who a Good Kantian truly is.

Firstly, a Good Kantian can effortlessly handle abstract conceptual constructions. Since the essence of practical rationality according to Kant is universality—the ability to demonstrate that a particular decision is in accordance with a rule of conduct that could be a universally valid rule—a Good Kantian does not focus on specifics but contemplates highly abstract norms of behaviour. In order to effectively do this, the language they use must be abstract, but at the same time, it must not possess the shortcomings that abstraction brings, particularly vagueness and open texture. Therefore, a Good Kantian fulfils Leibniz's dream: they possess an abstract tool for thinking about morality and law that is as perfect as the language of mathematics.

Secondly, a Good Kantian is compelled to think systematically. It may seem that the categorical imperative finds straightforward application to individual isolated problems. For example, when a Good Kantian ponders how to interpret the rule "Vehicles are prohibited from entering the park", they only need to determine which of the possible interpretations would be a good "universal law". The trouble is that in order to do this, one must consider all possible situations in which the interpreted rule could find application in one way or another. A Good Kantian must consider not only whether cars, motorcycles, or bicycles can enter the park. Their universal rule must also encompass toy cars, wartime souvenir transport trucks, electric motor-powered wheelchairs, passenger airplanes, refurbished Spitfires that served in the Battle of Britain, ambulances transporting critically ill individuals, and so on (cf. SCHAUER 2008). Moreover, a Good Kantian must also consider how the adopted interpretation relates to other norms of conduct. If the result of their deliberation is a "universal law", they cannot allow another—equally universal—norm of conduct to lead to a different conclusion. Therefore, a Good Kantian is a true intellectual Hercules: when resolving any problem, they take into account the entire moral or legal system, ensuring that the decision made does not violate the coherence of that system.

Lastly, a Good Kantian is fully autonomous in their decisions. They base them solely on the operations of reason. They are deaf to the voices of other people, capable of ignoring their own intuitions, and dissociating themselves from the strongest emotions. They are, in fact, a perfect inferential machine that reliably draws conclusions based on the premises at hand. (It is worth noting, incidentally, that Kant was not such a naive thinker as to overlook the role of emotions in ethical and legal thinking. The point is that he described this role in a very atypical way. On the one hand, he emphasised that emotions usually considered important for morality, such as pleasure and displeasure, are obstacles on the path to truly moral decisions. On the other hand, he noted that moral conduct is associated with a feeling of respect or esteem (*Achtung*), which, however, does not have a motivating role and rather resembles an epistemic or aesthetic emotion (cf. KANT 2002, 17).)

A Good Kantian is, therefore, a kind of superhero, and their cognitive abilities far surpass what even an exceptional individual can do. Humans do not possess a perfect, unambiguous language; we cannot meet the Herculean task of creating a complete and coherent system of norms ready to uniformly resolve any moral or legal problem. We also lack the self-control required by Kantian autonomy. This can only be summed up in one way: a Good Kantian is like a unicorn—it does not exist in nature.

Similar remarks can be made about other conceptions of rationality. For example, humans are not capable of meeting the requirement of utility maximisation, which sets the standard for economic efficiency. We are also not inferential machines: we not only make logical errors but often do so systematically, even with seemingly simple reasoning patterns such as *modus tollendo tollens* (if *p*, then *q*, and it is not the case that *q*, therefore it is not the case that *p*). Does this

mean that we are doomed to irrationality? That only machines have a chance at full rationality—devoid of emotional pressure, maximising utility, or reasoning in accordance with logically valid inference patterns? Must we be more or less foolish?

The matter, it seems, is more complicated. In the literature on economics and psychology, a distinction between two types of rationality has gained significance: constructive and ecological rationality (cf. SMITH 2008). Constructive rationality encompasses concepts well-known to us from textbooks: Kantian moral philosophy or rational choice theory, which forms the basis of contemporary economics. Within this approach, we construct standards for decision-making and action, which are then used to evaluate actual decisions and actions. Ecological rationality is something different: we say that the decisions and behaviours of individuals are ecologically rational to the extent that they are adapted to the structure of the environment. Whether our decisions are rational in this sense, therefore, is not determined by our method of reasoning or the quality of the premises we rely on. It also does not matter whether our thinking conforms to a particular abstract rule, such as the categorical imperative or the maximisation of utility. On the contrary, ecologically rational decisions do not have to be the result of reasoning at all. They usually serve as prompts from our unconscious intuitive heuristics, which we simply accept without subjecting them to conscious control. The quality of these decisions is not indicated by the way they are made but by the extent to which they are adapted to the structure of the environment.

Which of these two visions of rationality should we follow, then? Is it more important to meet the abstract and often difficult-to-apply constructive standards or to have a good fit with the environment in which we live? Who is the fool here—the lofty Constructivist who enjoys ignoring facts or the somewhat unambitious Ecologist seeking intuitive solutions that easily fit into the given situation? Arguably, this is a poorly posed question. We need both constructive and ecological rationality. The former, as Vernon L. Smith claims, generates diversity—it allows for the creation of many, often different ideas for solving problems. «Selection, however, occurs during ecological processes of adaptation» (SMITH 2008, 38): some of our theories turn out to be valid, and the standards expressed in them become part of our intuitive understanding of the world, while others fail and fade into oblivion.

## 2. *The hypothesis*

In the previous section, I discussed two types of rationality: constructive and ecological. It turned out that the high standards of rational thinking and action described by philosophers in thick volumes, taught in schools and university lectures, are quite troublesome. On the one hand, we often lack the resources required to adhere to the rules of rationality. On the other hand, the world we live in, both physical and social, is so complex that even precise guidelines for dealing with problems encountered do not guarantee success. Our sophisticated intellectual constructions crumble in the face of complex reality. Therefore, we simply cannot be as rational as we would like to be.

However, we are rational in another sense—ecological. Evolution has equipped us with decision-making mechanisms that operate at an unconscious level and are based on simplified rules—heuristics. These mechanisms generally work well, allowing us to make decisions that usually turn out to be good, even though they are not preceded by long deliberation and do not consume much time and energy.

It should be noted that both types of rationality—constructive and ecological—are important and necessary. The former is responsible for variation: it involves creating different concepts of thinking and action that provide an opportunity to break free from established but not necessarily most effective behavioural patterns. The latter has selective power: it determines what is truly effective.

In this context, it is worth revisiting the question of what it means for a human being to be a rational creature. Is our rationality, as Aristotle believed, something completely distinct from the emotional mechanisms we share with other animals? Or should we think about rationality differently, allowing the possibility that it is connected to unconscious decision-making processes based on emotional reactions? Let us take a closer look at this matter.

In the famous essay *The Emotional Dog and Its Rational Tail*, American psychologist Jonathan Haidt formulated a controversial thesis (cf. HAIDT 2001). Based on the analysis of numerous studies in experimental psychology and neurobiology, he claimed that human moral decisions hardly have a rational aspect. They are almost entirely based on emotional reactions. In the process of upbringing, we learn—instructed by adults but also simply by observing them—unconscious, semi-automatic reactions to social situations. Yes, sometimes we use rational arguments, but not to make decisions—those are the domain of unconscious emotional mechanisms—but rather to justify them; to convince others that we acted rightly.

It doesn't take long deliberations to notice that Haidt's view is provocative, at least in the context of European thought history. After all, all—well, almost all—the greatest philosophers have always emphasised that the use of reason is what determines our humanity and truly moral stance. This is beautifully illustrated by the example of Socrates, who showed how rational argumentation can expose the falsehood of moral views based on emotions, passions, and prejudices.

It is not surprising, therefore, that Haidt's essay sparked significant criticism (cf. PIZARRO & BLOOM 2003; LEVY 2006; FINE 2006). Philosophers and psychologists launched a vehement attack on his theses, emphasising that humans are not as irrational as Haidt presents them. The popularity of Haidt's essay and the strength of the reactions to it are incredibly instructive. It seems that he touched a sensitive chord—deeply ingrained beliefs that cannot be undermined without causing general outrage. This reaction also indicates, however, that "there is something to it" because if Haidt's concept were entirely baseless, it would be difficult to explain such widespread and sharp criticism. And even though Haidt limited his analyses to the sphere of morality, the conclusions he formulated can be generalised. Isn't it true that all our decisions—whether in morality, mathematics, economy, or quantum chemistry—are made based on unconscious emotional mechanisms, and then only justified with rational arguments if necessary? In other words, is rationality truly crucial to being human, or is it merely a set of tools that allow us to justify *ex post factum* decisions made based on emotions?

Perhaps the greatest advocates of reason and rationality in history were Descartes and Kant. The former believed that humans constitute a kind of "union" of two substances: thinking and extended. In other words, Descartes proclaimed the dualism of the mind and body. Importantly, the mind—the "thinking thing"—was considered by Descartes to be purely rational. This is evident particularly when the author of the *Discourse on the Method* ponders the place of emotions in human cognitive experience. Descartes claims that emotions originate from the body, not the mind. One could say they "contaminate" rational thought processes. The mind itself has nothing to do with joy, anger, or shame. It operates more like a perfect geometer, though its focus extends beyond geometric figures to encompass all ideas. These ideas are "seen" by the mind's eye, compared to one another, combined into larger wholes, or conversely, broken down into elementary factors, thus leading to rational decisions. To be fair to Descartes, it should be added that he acknowledged the significant role of emotions in human life and made efforts to adequately describe this role. However, this does not change the fact that the rational mind—as such—had nothing to do with emotional life for him.

Kant, as we have stressed above, held a similar view. When contemplating the foundations of moral and legal judgments, he argued that the greatest obstacle to meeting rational standards in these domains is succumbing to individual preferences, basing our actions on what we like or dislike. These preferences are, of course, based on emotional reactions. Therefore, to be a

rational moralist, we must learn to ignore any suggestions coming from the emotional layer of our minds. An impartial and thus rational moral actor is only someone who acts based on principles accepted through reason, detached from individual needs and emotions.

There were also great philosophers who viewed emotions differently, even claiming that it is not reason but emotions that shape societies. They constitute a much more powerful force than the most refined intellectual speculations. In this context, David Hume said that «reason is a slave to the passions». However, it should be noted that even Hume—though he placed emotions at the center of human mental life—clearly distinguished them from reason. They are something entirely different from rational thinking.

It is therefore difficult to escape the conclusion that the traditional conception of the mind places the ability to reason at its center—or at least in a distinguished position—and treats emotions as something perhaps important but certainly not prominent. It is not emotions that determine who we are, but our capacity for rational thinking.

Psychological and neurobiological research conducted in recent decades has led to a somewhat different view of the mind appearing more frequently in scientific and popular discourse. Perhaps the most well-known embodiment of this view is the thesis put forth by Daniel Kahneman: the mind consists of two systems, 1 and 2. System 1 is responsible for unconscious decision-making: it operates quickly, without significant energy expenditure, and beyond conscious control. Its functioning is based, if not entirely, then to a large extent on emotions. On the other hand, System 2 enables conscious decision-making, but it is time-consuming and requires effort. Important note: The majority of decisions we make on a daily basis come from the unconscious System 1. The resource-consuming System 2 is not suitable for frequent use. It is useful in exceptional situations, especially when System 1 suggests conflicting solutions or when we encounter an unusual problem (cf. KAHNEMAN 2011).

A variation of this vision of the mind is the above-described conception of Jonathan Haidt. Let us recall that he compares the human mind to an emotional dog wagging a rational tail. By this, he means that our minds are fundamentally emotional mechanisms, which evolution has only complemented with the ability to think rationally. However, rational thinking does not replace emotions in any way; it merely supports them. Haidt himself claims that this support is relatively small: we use rational arguments to *ex post factum* justify decisions made unconsciously through emotional reactions learned through years of experience. Not everyone goes as far as Haidt; some philosophers and psychologists emphasise that rational thinking does sometimes have a real impact on the decisions we make.

Nevertheless, the fact remains that—at least in cognitive science and philosophy inspired by it—the way we think and talk about the mind and rationality has fundamentally changed. The mind is no longer seen as a rational analytical machine that derives unshakable conclusions from available premises, sometimes struggling—or even losing—against irrational emotions. Emotional mechanisms have become a crucial and inseparable layer of the mind. And we don't have to consider them irrational: even if they do not meet the rigorous standards formulated by philosophers, more often than not, they prove to be ecologically rational.

But what if we go even further? What if the human mind is entirely emotional? Some contemporary philosophers suggest this direction of research (cf. HURLEY et al. 2011). Perhaps we should acknowledge that the mind does not operate based on any algorithms but rather constitutes a space in which different emotional states compete or cooperate with each other, with the task of regulating behaviour. In this view, "reason" is merely a derivative of emotional mechanisms, and its task is to organise more fundamental processes based on emotions. Emotions have the first and final say.

Let's indulge our imagination even further. Why not consider that everything rational in the traditional sense is outside the mind? As organisms, we learn to navigate the complex physical and social world from birth. We learn that we can only leave a room by opening the door, that

it is impossible to jump onto a balcony on the third floor, that it is better not to say certain words in the presence of adults, as it will result in punishment, that hot water can burn us, and that uttering certain phrases will lead to our behaviour being accepted or disapproved by a particular audience. We learn all of this thanks to the existence of emotional mechanisms: the conclusion that one cannot jump to the third floor is not the result of any reasoning, just as the feeling that a certain argument will serve as a good defence against disapproval is not the product of any conscious thought process.

From this perspective, logically valid schemes of reasoning—such as *modus ponens* (if *p*, then *q*; *p*; therefore *q*)—do not exist within our minds but are external to them, similar to doors, balconies on the third floor, or reactions to the words we utter. We reason according to *modus ponens* not because we *apply* that inference scheme, but because we encounter certain obstacles in our ecological niche—for example, the disapproval of a logic teacher. We are emotional beings from beginning to end, but ones that inhabit a rational ecosystem. Rationality is not within us but in the world in which we find ourselves living.

This vision may seem very extravagant if not senseless. It is certainly inconsistent with what we are accustomed to thinking about rationality. However, it is worth considering it—not necessarily to accept it, but to better understand what it means to be rational.

## 3. *The law*

Let us pose the question now how this unorthodox approach to rationality may influence our understanding of the law. The view experimentally embraced here is that the human mind is not rational in any traditional sense of the word. When we make decisions—unconsciously or consciously—we do it always in an intuitive or instinctive way. The fact that some of those decisions *seem* rational is made possible by the fact that we inhabit an environment—physical and social—which is so structured that if favours "rational" decisions.

This is a very strong claim. Imagine that one is trying to solve a geometrical problem, or considers a complex case in tax law. One is fully aware what they are doing and puts much conscious effort in finding a solution. For example, one is drawing certain figures to visualise the geometrical problem at hand, or works back and forth with the geometry axioms to produce a rigorous proof of the claim which constitutes a solution to the problem. Or—in the context of the tax law case—one is perusing past cases and familiarises themselves with doctrinal theories in order to test various ways of interpreting a set of tax law provisions. The claim advanced here is that even with such conscious effort one is not *applying* the rules of logic or other methodological precepts. One is only generating circumstances under which one's instinctive or intuitive faulty has a reasonable chance at stumbling upon a solution to the problem which is coherent with the *external* requirements of rationality.

This is a crucial point. No one ever applies *modus ponens* (or any other rule of rational thinking for that matter); they only *think* they do. What really happens is that a solution comes to one's conscious mind of which they *feel* that it is the right solution. And the emergence of the feeling is conditioned by the training one has gone through in the process of inculturation. The social institutions (understood broadly, as embracing conceptual structures which favour particular kinds of decisions in typical situations) have been simply embodied in one's mental maps responsible for intuitive judgment.

It would be impossible to consider in detail how this dramatic shift in understanding rationality may alter our understanding of legal thinking and legal institutions. However, since the goal of the present paper is only to put forward a bold hypothesis and initiate rather than summarise a discussion, I will limit myself to illustrating some potential consequences of the view of rationality embraced here for legal philosophy by considering three different issues.

Legal philosophers have sometimes expressed the view that legal thinking has little to do with conscious deliberation and the careful application of rules, but rather is the domain of intuition and insight. The *locus classicus* of this minority approach is a lecture of J.C. Hutcheson *The Judgement Intuitive: The Role of the "Hunch" in Judicial Decision* (HUTCHESON 1929). There, Hutcheson advances a conception that the mind of a judge is not a «cold logic engine», which algorithmically deals with the law understood as a «system of rules and precedents, of categories and concepts» (HUTCHESON 1929, 274); it takes advantage—especially in complex cases considered by brilliant judges—of imagination and intuition:

> «While when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact [...], I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way» (HUTCHESON 1929, 278).

Therefore, Hutcheson seems to believe that in hard cases the legal mind does not rely on the application of legal rules and the use of rational reasoning schemes: it is the domain of hunch. He further observes that this kind of dissociation of decision-making and rationality is confirmed by the fact «all of us have known judges who can make the soundest judgments and write the dullest opinions on them» (HUTCHESON 1929, 287). *A contrario*, it would seem that easy and straightforward cases do not require hunch and can be dealt with through the utilisation of "logical algorithms".

From the perspective of the view embraced in this essay, the way Hutcheson treats easy and straightforward cases is based on an illusion. Similarly to hard cases, they are decided by intuition. However, since they quickly "fit" into the institutional framework of the law, one is unable to *observe* the work of intuition here. No play of imagination is needed; poor judges do as well as extraordinary do. Let us observe that the change of perspective I argue for makes things much simpler. One does not need to assume that there are two different mental faculties at work in dealing with legal cases: hunch when hard cases are considered, and 'logical engine' when an easy case is solved. There is a continuity between easy and hard, and both kinds of cases are solved in the same instinctive way.

Another illustration I would like provide is the understanding of one of the most popular and intriguing conceptions of practical rationality discussed today, which is usually called the "Reasons First Approach" (cf. WEDGWOOD 2015). It is advocated, in different versions, by Joseph Raz, John Skorupski, Thomas Scanlon, or Mark Schroeder, and posits that the irreducible concept of reason is central to any successful explanation of rationality and normativity. But what are reasons? According to Raz, they are certain facts which «constitute a case for (or against) the performance of an action» (RAZ 2011, 36). The fact that I am hungry is a reason for eating something; the fact that my uncle is seriously ill is a reason to visit him; the fact that I have made a promise to a colleague to help him paint his house is a reason to do it.

It is not our power of rational thinking which makes facts into reasons; rather, «they are reasons because rational creatures can recognise and respond to them» (RAZ 2011, 85). In other words, reasons are "out there"; they exist independently of whether they are identified as such or not. Moreover, as Raz repeatedly observes, finding an appropriate response to a reason does not necessarily involve our rational faculties or abilities—it is possible to do it «without the mediation of rational power» (RAZ 2011, 85). As Raz puts it, «with experience we learn to identify and respond to reasons instinctively, though in ways which depend on and presuppose first, reliance on past reflection, and second, the monitoring presence of rational powers which control and stand ready to correct misidentifications or misdirected responses» (RAZ 2011, 86).

The "Reason First Approach" is troublesome when seen from a perspective of some traditional conceptions of rationality. First, it is difficult to accept that simple, instinctive behaviour—such as eating when one is hungry—should be seen as a "response" to reason. Second, it is equally difficult to agree that one can respond to reason and act rationally in an unconscious way. Third, the ontological status of reasons is questionable: why should we assume that there exist designated "state of affairs" or "facts" called reasons, which are independent of our minds? Where do those mysterious entities come from? Such declarations make one think of sharpening the Occam's Razor.

These troublesome aspects of the "Reason First Approach" become less controversial, or even disappear altogether, when the view embraced in this essay is taken to replace the traditional conception of rationality. If every decision we make is instinctive, then it is not surprising that deciding to eat when one is hungry is not much different from solving a complex mathematical puzzle or a legal hard case. If one utilises intuition even when one consciously entertains a problem, then it is not surprising that we make rational decisions (i.e., we respond to reasons) also in an unconscious way. If all that is rational is "out there", outside of the human mind, in the social structures which the evolutionary forces have shaped, speaking of reasons as independently existing facts seems much more innocent. It may not be the best conceptual scheme there is, but at least reasons are no more mysterious entities emerging out of nowhere. It seems therefore, that there is much to defend the "Reasons First Approach" with; the fault of its proponents is not that they are too revolutionary, but that they are not revolutionary enough, as when Raz insists that responding to reasons requires «reliance on past reflection, and [...] the monitoring presence of rational powers which control and stand ready to correct misidentifications or misdirected responses» (RAZ 2011, 86).

My final illustration comes from the domain of institutional design and revolves around the concept of nudge. It was popularised in 2008 in the book by Richard Thaler and Cass Sunstein (cf. THALER & SUNSTEIN 2019). Adopting Kahneman's conception that the human mind operates with two systems: the conscious and deliberative System 2, and the unconscious intuitive System 1, Thaler and Sunstein argue that people make a vast part of their decisions in an unconscious way. This fact, they claim, should be reflected in the way we think of designing social institutions. Rather than shaping them for a rational and deliberative individuals, the policymakers should put in place such frameworks, which recognise the importance of unconscious decision-making and "nudge" people to behave in a way which is beneficial for them and the society.

The key thesis behind the idea of nudge is that it is unreasonable—or, in fact, impossible—for human beings to behave *only* in a rational and deliberative way. Because of that, no social institutions designed *solely* for rational individuals will lead to beneficial outcomes; they must necessarily include "nudges" which serve as "obstacles" or "incentives" in the environment and which are recognised by the unconscious mind and lead it to beneficial behaviour. The key in this setting is, of course, to design the system of nudges in such a way that the behaviour they generate is indeed beneficial.

The difference between the original conception of nudge and the conception advanced in this essay is that the existence of two different systems: 1 and 2, is rejected here. What we have is *only* the intuitive (although not necessarily unconscious) System 1. As a consequence, *all* institutional design should be nudge-esque. This claim immediately leads to the final question I need to shortly address. If all our decisions are intuitive, how can we *rationally* design anything? The designers of social institutions are human beings, which means that they do *not* think in a conscious deliberative way, but rather make their own intuitive decisions. How is it possible that such decisions have led to the emergence of a social structure which embodies some form of rationality?

The only answer to this question lies in the mechanisms of variation and selection associated with cultural evolution. Once put into such an evolved social framework, people learn by

experience how to intuitively react to various situations: they learn the tricks to earn money, solve legal cases, or write books on institutional design. They also learn how to construct arguments and present the process of deliberation as if it was a purely conscious and rule-governed effort. In this framework, new tricks may emerge and people may learn them; but they appear as any evolutionary novelty - through chance or error.

The law is a part of this complex social structure. It is not an ideal system of norms, although we have learnt the trick to present it as such. Legal decisions are not deliberative rational acts: they are, as all our decisions, intuitive; but we have also learnt the trick how to disguise them into something they are not. We put the disguise on instinctively, and tearing it away is difficult. It goes against all the tricks we have learnt. But are we old dogs to be afraid of new tricks?

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