Legal Reasoning, Particularism: In Defence of a Psychologistic Approach

BRUNO **CELANO**
University of Palermo

ABSTRACT
In this paper I recommend a close examination of the reasons favouring a deep and potentially far-reaching reorientation of legal theory, and of the theory of norms and norm-based reasoning and decision-making generally, namely, the adoption of a psychologistic approach ("psychodeontics"). I argue in favour of psychologism—not in the abstract but with reference to two particular topics: legal reasoning (specifically, the justification of judicial decisions) and the project of a of two-tier (principles vs. rules) theory of law informed by a particularistic conception of practical reasoning. I show that, according to the particularistic outlook, the rule-exception relationship brings out aspects of practical reasoning that quite naturally lend themselves to an understanding of practical reasoning in psychological terms. In contemporary circumstances, I argue in the conclusion, psychologism is the major route to the naturalization of jurisprudence.

KEYWORDS
legal reasoning, normativity, psychologism, particularism, exceptions

CITATION
Celano B. 2023. *Legal Reasoning, Particularism: In Defence of a Psychologistic Approach*, in Brigaglia M., Roversi C. (eds.), *Legal Reasoning and Cognitive Science: Topics and Perspectives*, «Diritto & Questioni pubbliche», Special Publication, August 2023.

DIRITTO & QUESTIONI PUBBLICHE / RECOGNISE
Legal Reasoning and Cognitive Science: Topics and Perspectives
Special Publication / August, 2023, pp. 21-41

© 2023, *Diritto e questioni pubbliche*, Palermo.
ISSN 1825-0173

Legal Reasoning, Particularism: In Defence of a Psychologistic Approach

BRUNO CELANO

1. *Introduction*

In this contribution, its thrust almost entirely programmatic, I will argue that it is worth carefully exploring the reasons for a drastic reorientation of legal theory, and of the theory of norms and norm-based reasoning more generally, by pivoting toward what, introducing a splashy label savouring of the grandiloquent, I will be calling "psychodeontics".

I will thus be arguing in defence of a psychodeontic approach—not in general terms but in connection with two specific areas: the theory of legal reasoning, and in particular of justificatory judicial reasoning (Sec. 2), and the construction of a two-tier theory of law (we will see in due course what that is) predicated on a particularistic conception of practical reasoning (Sec. 3).

These two areas of investigation are closely related. As we will see, some aspects of the particularistic conception of practical reasoning—those having to do with the relation between rules and exceptions—lend themselves quite naturally to being understood and developed in psychodeontic terms.

Some brief closing remarks will follow (Sec. 4) suggesting that, given the present landscape, a psychologistic approach is our main path toward naturalising jurisprudence.

2. *Psychodeontics*[1]

2.1. *The argument in short*

The argument I will set out in this Section 2 can be summarised as follows.

Two notions of reasoning are usually distinguished: a psychological notion and a logical one. This distinction underlies two further distinctions: explanatory reasons (causes) *vs.* justificatory reasons (reasons in the proper sense), and context of discovery *vs.* context of justification.

It is generally assumed that the theory of legal reasoning, and in particular the theory of judicial reasoning, must have as its object (legal) reasoning understood in a logical rather than a psychological sense.

* This chapter is a translation of an article, originally written in Italian, titled *Ragionamento giuridico, particolarismo. In difesa di un approccio psicologistico* (in «Rivista di filosofia del diritto», 2, 2017, 315 ff.). Its translation was a collective effort. The first draft was written using the DeepL translator. It was then revised by G. Rocchè, M. Taroni, M. Ubertone, A. Zambon, and M. Zgur; copyedited by F. Valente; rechecked and edited by M. Brigaglia and G. Sajeva; and finally approved by G. Todaro. We thank G. Nicolaci and J.J. Moreso for useful discussions.

[1] The ideas set out in this section are deeply indebted to two interlocutors, Marco Brigaglia (see esp. BRIGAGLIA 2016) and Giusi Todaro (see esp. TODARO 2011).

This is a *normative* assumption: A *good* theory of legal reasoning *must* have as its object... Why? Sometimes this is because the assumption, whether implicit or explicit, seems to be the only alternative. Other times the assumption seems to be a matter of epistemological etiquette: In the eyes of a true empiricist, the "things" that are lodged in people's minds (and those quotation marks were meant to convey a sense of restrained indignation) cannot be taken as epistemologically respectable objects. For they are not, in fact, *observable entities*. Linguistic phenomena, on the other hand, are things of the external world and are thus empirically observable. If the theory of legal reasoning is to have any epistemological respectability, then, it must be understood as a theory of (legal) reasoning in the logical sense.

That argument, I will contend, is unacceptable. How can it be claimed that phonemes, morphemes, sentences, propositions (or, more generally, meanings), and logical relations are observable entities any more than are mental events, dispositions, states, acts, and processes?

In truth, and paradoxically, what makes linguistic phenomena and logical relations seem at first sight, from an epistemological standpoint, a more respectable object of investigation than things in the mind is the fact that they are *not*—or not entirely—empirically observable entities. Rather, to use Karl Popper's expression, they are entities belonging to World Three.

My point is this: The assumption that a theory of legal reasoning must deal with reasoning in the logical sense stems from the polemic against psychologism that broke out at the beginning of the twentieth century. It is, indirectly, an expression of twentieth-century anti-psychologism, which (especially through Hans Kelsen) left a deep mark on contemporary legal theory.

Now, it is precisely this basic position, the anti-psychologistic position, that now (at least over the past forty-five years) is in the process of being re-examined. According to some, it is completely discredited. According to many others, the dialectic between psychologism and anti-psychologism is far more complex and problematic than it appeared to the twentieth-century critics of psychologism.

This turning point has come about through the development of cognitive psychology and the cognitive sciences in general, and in particular the development of the model of bounded rationality (seventy years) and of social psychology and the psychology of reasoning (some sixty years), as well as through contemporary research on human inference, heuristics, and biases (some forty-five years) and moral psychology (some twenty years), and then, of course, there is the development of the neurosciences—all very much in vogue, to be sure, but I will do no more than point out the reasons why, in my view, all this research needs to be taken very seriously by anyone intent on engaging with legal reasoning, and with law in general.

2.2. *The illusory solidity of language*

Let us begin, then, with the distinction between psychological and logical notions of reasoning. This distinction underlies—or is reflected in—the distinction between explanatory reasons and justificatory reasons ("good" reasons, or reasons proper), and that between the context of discovery and the context of justification. The three distinctions are not perfectly interchangeable, but they are nevertheless closely related. Addressing the first one is a way of addressing the other two.

In the first, or psychological, sense, reasoning is a particular mental process (a collection of mental states, events, dispositions, and acts). More accurately stated, it is a collection of biochemical processes triggered within a cell tissue, presumably the encephalon: Certain neurons are activated, electrical impulses run along the axons of certain nerve cells, and so on. It is literally a process that takes place "in someone's head".

Reasoning in the logical sense, on the other hand, is a sequence of propositions such that, given some propositions, we obtain from them another proposition (the last proposition in the sequence). It is also said that from the initial propositions, or *premises*, a certain *conclusion* is "inferred," or that

the latter is "derived" or "follows" from the premises, or that the premises "imply" the conclusion[2]. I will say that the premises and the conclusion combined constitute an argument.

In an argument, the premises impart a *certain plausibility* to the conclusion: They lend it a *certain support*, a certain backing, or warrant. An argument is a sequence of propositions such that its conclusion can be said to be (more or less) *justified* or *warranted* in light of the premises assumed.

What does "justification" mean? It means that in an argument, the premises specify or are (more or less good) *reasons* in favour of the conclusion. In general, *p* is a *supporting reason* for *q* if, and only if, were we to hold *p* to be true, we would thereby to some extent be justified in also holding *q* to be true (Watanabe Dauer 1989, 91). The inference from *p* to *q* is correct if the truth of *p* would make the truth of *q* to some extent probable.

So we have an inference when something is taken as a more or less solid reason for something else. From a logical point of view, what is of interest is not reasoning as a mental process, its actual occurrence, but rather the examination of its correctness or incorrectness. The task of logic lies in «the justification and criticism of inference» (Quine 1959, 33), that is, the identification of criteria in light of which the correctness of an argument can be assessed. The logical problem *par excellence* is whether the required relation actually exists between the premises and the conclusion, that is, whether the conclusion actually follows from the premises[3].

As noted (Sec. 2.1), it is commonly held that the theory of legal reasoning must take as its object (legal) reasoning understood in the logical, not in the psychological, sense. More specifically, it is held that the object of the theory of judicial reasoning should be the justificatory reasoning of judges, and *not* a description or explanation of the mental processes that, in point of fact, lead the judge to make a certain decision or the judge's audience to take a certain attitude to it. With some authors, this assumption is explicit. It is often taken for granted.

Why should a theory of legal reasoning assume that its exclusive object of investigation is (legal) reasoning in the logical sense?

This assumption seems to respond to a requirement of epistemological etiquette. The underlying idea, sometimes explicit, seems to be as follows: The things that are in people's minds are not, for an empiricist, epistemologically respectable objects. They are not, in fact, entities whose existence and properties are empirically observable. Behaviourism was right: There can be no scientific knowledge about such things. (A behaviourist runs into another behaviourist: "You look just fine to me! And how am *I* doing?") Language, on the other hand, is a thing of the external world: Linguistic phenomena are empirically observable. So if, as empiricists, we want the theory of legal reasoning to have good epistemological credentials, we will have to understand it as a theory of (legal) reasoning in the logical sense.

That argument lacks any plausibility, and that for two reasons.

First, psychology (of non-behaviourist orientation), and in particular the psychology of reasoning, has been well established as an empirical science for decades. And in contemporary psychology the ban on introspection has in principle been lifted. Not only that: It is now common in the cognitive sciences to refer to mental entities, states, and events that are not introspectively accessible. And, finally, whatever the state of play was, until recently, as regards the possibility of empirically establishing the presence of mental states, describing them, and explaining their nature, the development of neuroscience has, of course, changed all that.

[2] There are most likely to also be inferences that are not reasoning, as in the case of perceptual inferences. Here I will use the term "inference" as a synonym for "reasoning" in the logical sense.

[3] As should be evident from the text, though it is worth clarifying the point explicitly, the term "logical" (reasoning "in the logical sense") is not understood here narrowly as a synonym for "deductive" but is broadly taken to mean "discursive" or "pertaining to discourse", where "discourse" is in turn understood as any set of sentences or propositions. As I am using the term, then, the field of reasoning in the *logical* sense is divided into two sets: that of deductive arguments and that of non-deductive arguments (generalisations, predictions, and estimates of probability, abduction, analogy, counterfactual reasoning, practical inferences of various kinds).

Second, the thesis that linguistic phenomena are more amenable to empirical observation than mental phenomena is untenable. Phonemes, morphemes, and sentences (understood as *types*, not as *tokens*) are, it would seem, abstract entities. A sentence is not a collection of sound waves, or lines of ink on a sheet of paper, or pixels on a computer screen. A sentence is their *form*. Acts of uttering sentences are empirical, spatiotemporally identified phenomena, like earthquakes. What these acts produce are sets of sound waves, lines of ink, and so on. But, as just noted, none of these sets of sounds or lines of ink on paper through which sentences are instantiated are *themselves* sentences, or so it would seem; rather, as just noted, sentences are their form, or, to use a metaphor, the way they appear to the mind's eye, their intelligible body[4]. They are abstract entities that nonetheless somehow guide and control the activity of the bodily systems (the brain-phonatory apparatus, and so on) that produce spatiotemporally identified instances of them.

What, in all this, is there of the purported solidity of the so-called "external" or "observable" phenomena (and those are shudder quotes in the sense remarked on in Sec. 2.1) which are taken to be the object of direct sensible experience, the object which the argument at issue points to?

Not to mention propositions, and in general meanings.

It will be granted that both signifiers (and in particular sentences) and meanings (and in particular propositions) are constituent elements of linguistic phenomena. Why should mental states be considered empirically less respectable objects than propositions, or, in general, than meanings? Propositions, and meanings generally, are entities no more observable than are emotions, desires, or beliefs. Once again: It is true that acts of uttering a sentence produce sound waves, ink on paper, and the like. But the propositions expressed by them—or, in general, the propositions that *can* be so expressed, those that are expressible: the assertibles, or "sayables," to use an old-fashioned term—are, it would seem, something else entirely. And the very possibility of identifying an empirically perceptible event as an act of expressing a proposition depends on the possibility of accessing these phantom objects[5].

In short, language is by no means an empirically respectable object—and it isn't so by the very canons of epistemological respectability which the argument under scrutiny itself assumes as presuppositions. So why rely on such an unreliable object to argue in support of the thesis that only reasoning in the logical sense, and not reasoning in the psychological sense, should be the proper subject of a theory of (legal) reasoning?

The reason for this is probably that language gives a perceptible guise—gives body—to entities that partake of none, or almost none, of the empirical respectability to which the argument appeals. These entities, as we just saw, are phonemes, morphemes, sentences, propositions, and in general meanings, and they include the traditionally paradigmatic case of what cannot be empirically observed, namely, logical relations. The hope of finding refuge under the protective wings of the language is, historically speaking, the offspring of a polemic that has sprung up *against* the possibility, or at any rate the value, of an empirical science that takes reasoning as its object. And this brings us to the polemic against psychologism[6].

2.3. *Anti-psychologism*

As discussed in Section 2.2, reasoning in the psychological sense is a collection of biochemical states (events, acts, processes) in the mind/brain. What kind of collection? Presumably a collection of mental states that takes reasoning in the logical sense as its *content*.

[4] This, of course, is only a metaphor. The issue is a thorny one; see REY 2006.

[5] These, of course, are controversial statements. It is not my intention here to advance any particular conception of linguistic phenomena. The point of interest is this: Whatever position is taken on the matter, there is none of the obviousness ("These are observable entities!") which the argument assumes there to be.

[6] On this transition see DUMMETT 1984.

This way of seeing things presupposes the distinction between a mental state (act, process, etc.) and its content. And accordingly, as we will see shortly, the traditional way of drawing the distinction refers to a particular way of understanding the content of mental states.

Philosophical culture in Central Europe at the turn of the twentieth century centres around a complex set of theses, assumptions, and arguments broadly labelled "anti-psychologism". As is well known, the polemic against psychologism brings together the thought of Gottlob Frege, Husserlian phenomenology and its several offshoots, large swaths of neo-Kantianism, and the beginnings of logical positivism.

In its paradigmatic form, the polemic concerns the status of the laws of logic and the foundations of mathematics. The anti-psychologistic thesis *par excellence* is that the laws of logic cannot be identified with, or explained in terms of, the laws that govern our mental processes, for otherwise it would prove impossible to account for their universality and necessity (their specific objectivity, and it is worth noting here that this has little to do with the illusory solidity of "observable entities"). Mathematical entities, their relations, and logical relations, cannot be identified with representations, nor can they be explained in terms of representations or of relations between representations or of mental activities, for otherwise it would prove impossible to account for their specific objectivity. (As can be appreciated, the point is precisely that the phenomena in question *cannot*, it is believed, be taken as the object of an empirical science.)

In short, logical laws are not «laws of thinking» (*Denkgesetzen*), expressing how, in fact, mental acts or states are produced in our consciousness; they are not «psychological laws», expressing «general features of thinking as a mental occurrence [«das Allgemeine im seelischen Geschehen des Denkens]»; logic and mathematics are not concerned «with the mental process of thinking [*den seelischen Vorgang des Denkens*] and with the psychological laws in accordance with which this takes place [*die psychologischen Gesetze, nach denen es geschieht*]» (FREGE 1984, 351)[7].

The anti-psychologistic position, however, is not confined to the field of logic and the foundations of mathematics. Rather, the polemic against psychologism invests all areas of the theory of knowledge and the theory of judgment as a whole. There are two main directions this anti-psychologistic programme takes.

(1) *Epistemology, or the theory of knowledge*. In this area, the anti-psychologistic position comes down to the thesis that it is one thing to describe, or (causally) explain, the mental processes in virtue of which knowledge, or belief, is in fact formed in our consciousness; it is quite another to clarify its foundations, that is, to justify it. It is one thing to ask what beliefs someone or some group of individuals have, and in what way they have in fact come to form these beliefs; it is quite another to ask whether, and on what basis, these beliefs are justified, or true. We must not confuse an account of how knowledge is acquired as a matter of fact with an account of what *makes* it knowledge (justified true belief)—of that in virtue of which it "counts" as knowledge, of what confers value on it as such[8].

The first type of enquiry is a psychological enquiry, that is, it concerns our representations, the causes of their production, and their relations. The second is not. Thus, for example, it is one thing to investigate the history of a certain discipline, a certain body of beliefs; it is quite another to ask whether that body of beliefs satisfies the necessary and sufficient conditions for it to constitute a body of knowledge. Take, for example, the question, How is physics possible as a science? This is not (a physical or) a psychological question: That in virtue of which the complex of methods and

[7] Cf. FREGE 1980, p. VI: «Never let us take a description of the origin of an idea for a definition, or an account of the mental and physical conditions on which we become conscious of a proposition for a proof of it. A proposition may be thought, and again it may be true: let us never confuse these two things».

[8] «With the psychologistic conception of logic we lose the distinction between the grounds that justify a conviction and the causes that actually produce it. This means that a justification in the proper sense is not possible; what we have in its place is an account of how the conviction was arrived at, from which it is to be inferred that everything has been caused by psychological factors» (FREGE 1979, 147).

beliefs called "physics" has value as knowledge is not a set of (physical or) psychological facts.

In short, epistemology—the clarification of why something counts as knowledge, as justified belief—cannot be understood as falling within the purview of empirical science.

Why? Because, as the anti-psychologist would have it, epistemological enquiry is *normative*: It has to do with what we *must* believe, with what makes a belief, or reasoning, or an inference *correct*. And, the anti-psychologist goes on to say, no collection of facts—not even a collection of facts about the actual production of representations in our consciousness, and the relations that in fact exist between them—makes it possible for us to draw normative conclusions. No description or explanation of psychological processes can account for the truth or correctness of our beliefs or inferences: No such investigation is capable of accounting for the specific normativity of thinking, of knowing (epistemic normativity)[9].

In the lexicon of the anti-psychologists of the early twentieth century, when a certain body of beliefs that claims to be a body of knowledge lives up to that claim, it is said to be "valid". What the anti-psychologist argues is that an investigation into the psychological (as well as the physical and social) processes that explain how knowledge is gained or lost is quite different from an investigation into its conditions of validity as knowledge[10].

(2) *Intentionality*. That first (epistemological) thesis finds support in, and in turn lends support to, a second thesis, stating that (some) mental acts, states, and events are intentional.

Some mental acts and states—e.g., beliefs, desires, hypotheses, hopes, and so on—have the property of "being about", or "being directed toward", objects or states of affairs. The *content* of such acts and states needs to be neatly distinguished from the acts and states themselves. The latter are psychological phenomena (factual data pertaining to internal experience); their contents, on the other hand, enjoy a peculiar form of existence: They exist precisely as meaningful contents. This type of existence—an ideal existence, or "intentional inexistence"—is to be distinguished both from the mode of existence proper to mental acts and states themselves (existing as psychological facts) and from the mode of existence proper to physical objects, states, or processes.

In this second connection (under the rubric of intentionality), the anti-psychologistic polemic is directed against the thesis that all that is given to consciousness is our representations, and consequently that knowledge consists exclusively in comparing our representations, manipulating them, and identifying relations between them. The basic idea is simple: When we have a representation—e.g., when we perceive a physical object or think of a non-existent object—what is given to us is not the representation itself but its object. To see a tree is not to see our representation of a tree: What we see is precisely the tree. Similarly, what we think of when we think of a unicorn is not our representation of the unicorn but the unicorn itself. That in virtue of which a representation we have (e.g., our perception of a tree) is about a physical object (e.g., a tree) is a content, an intentional object (what Husserl called a "noema"), which as such cannot be identified with our representation of the physical object (the tree), nor can it be identified with that object itself[11].

[9] In the contemporary controversy over the naturalisation of epistemology, touched off by QUINE's 1969 essay (cf. Sec. 3.4 below), one of the points—and probably the central point—of disagreement between naturalists and anti-naturalists is precisely over the question of whether or not epistemological enquiry is normative (cf. ENGEL 1996, chs. 1 and 5, and 1998, 375 f.). Also anti-psychologistic are the Wittgensteinian thesis that meaning and understanding cannot be considered as «species of mental acts» (BELL 1992, 402) and the thesis of the normativity of meaning (HALE 1997). And the same goes for the thesis that «the very possession of concepts is a normative matter», and cannot be equated with having a «discriminative ability»: «To have a concept one has to have the idea that one is *justified* in making the relevant discriminations, and such talk of justification is of a piece with talk of rationality and intelligibility—it is a matter of being guided by rules in a fully normative sense» (GUTTENPLAN 1994, 451; italics in the original).

[10] The distinction between an inquiry into the psychological genesis of knowledge (*quid facti*?) and an inquiry into its conditions of validity (*quid juris*?) is clearly of Kantian parentage and is one of the pillars of nineteenth- and twentieth-century neo-Kantianism.

[11] The same argumentative strategy underpins the conception of "propositions" as «non-mental entities expressed

In short, the anti-psychologistic notion of intentionality issues from an attempt to give a non-naturalistic, non-psychological account of the idea that certain mental acts or states are endowed with content. This is the notion of content (the content of mental states) on which rests the traditional way of drawing the distinction between reasoning in the logical sense and reasoning in the psychological sense: Reasoning in the psychological sense is a collection of mental states that takes reasoning in the logical sense as its intentional object (an object endowed with ideal existence, validity, and the like).

2.4. *Anti-psychologism and legal theory: The role of Kelsen*[12]

These different and complementary parts of the polemic against psychologism have exerted a profound influence on contemporary legal theory through Kelsen's theory of law. This is hardly surprising, given that the polemic against psychologism is one of the salient features of the cultural milieu in which Kelsen's philosophical *Bildung* takes place.

According to Kelsen, law is a norm. A norm is a content, or a meaning (*Sinngehalt*, in Kelsen's terms), in the sense specified above:[13] It is the content or meaning of mental acts or states intentionally directed toward certain objects or states of affairs (toward the behaviour of others). As content or meaning, law is neither a psychological phenomenon nor in general a physical phenomenon but something ideal, to be investigated in its specific existence, which Kelsen—no surprise—calls "validity"[14]. In the pure theory of law, the anti-psychologistic thesis that no set of mental or physical facts can account for the truth, or correctness, of our beliefs or inferences is translated into the thesis that what is of interest from the standpoint of a scientific treatment of law is not the law's efficacy but its validity (KELSEN 1945, 30). In the pure theory of law, in other words, there exists between the scientific knowledge of law as such (legal science in the strict sense and the theory of law), on the one hand, and a sociological investigation of the behaviour or mental states determined by law, on the other hand, the same relation that, in the overall framework of the anti-psychologistic polemic, can be found to exist between logic, mathematics, and epistemology, on the one hand, and the sociology or psychology of cognitive processes, on the other.

This is not only a question of historical, or philological, order. The thesis that law, as a norm, is a content or meaning, is key to a particular aspect of the pure theory of law that itself is crucial to that theory: the idea that law is something impersonal, anonymous, "depsychologised", and that therein lies its specific "authority" (KELSEN 1945, 36)[15]. Let me explain.

The pure theory of law offers a particular version of an ancient, and very influential, image of law. According to this image, law enjoys a relative independence, or autonomy (both conceptual and normative), from the preferences, intentions, will, decisions, beliefs—whether actual or possible—of those subject to it. And therein lies its objectivity.

by sentences and forming the objects of propositional attitudes», a conception endorsed, e.g., by Bertrand Russell and George E. Moore. A belief in the existence of such entities—as objects that are neither physical nor psychological—was shared by Bernard Bolzano (*Sätze an sich*), Gottlob Frege (*der Gedanke*), Franz Brentano, Alexius Meinong, and Edmund Husserl (DUMMETT 1991, 250).

[12] In what follows, the basic theses of Kelsen's pure theory of law will be reconstructed as they are in CELANO 1999.

[13] *Translators' note.* In this paper, Celano employs the Italian term "contenuto", literally translated as "content", in the sense specified in the previous section, understood as the (non-psychological) "intentional objects" that mental acts are allegedly directed towards. In talking about Kelsen's views, he shifts to the slightly different expression "contenuto di senso", a literal translation of Kelsen's German expression "Sinngehalt". The latter is usually translated into English as "meaning". In order to make this connection immediately available to the English reader, we have decided to translate "contenuto di senso", on all occurrences, through the phrase "content or meaning".

[14] Kelsen explicitly commits to the anti-psychologistic stance in a couple of key passages in his work. See KELSEN 1960, ix; KELSEN 1966, vii.

[15] For a reading of this Kelsenian passage, see CELANO 1999, secs. 4.3.7, 5.2.3, and 5.2.4.

On this view, law cannot be reduced to any collection of more or less arbitrary preferences, intentions, decisions, or beliefs (or to any collection of actions explained by them). Rather, law is something impersonal, anonymous: It is a set of norms that do not exist as physical or psychological phenomena but are "valid" as such (and yet are not moral truths, either).

From this point of view, the pure theory of law can be understood as the outcome of a particular theoretical operation that consists in transplanting the polemic against psychologism into the terrain of the theory of law, with a view to providing a satisfactory account of the specific objectivity of law. This operation, in other words, consists in using the anti-psychologistic argumentative strategy to claim that law, as such, is independent of the sphere of natural phenomena. How can law, as such, be "valid" independently of human preferences, intentions, decisions, and beliefs? How is it that law cannot be reduced to a set of volitions and beliefs, which are inherently more or less arbitrary? That's simple, Kelsen replies: Law is a norm; a norm is a content or meaning, and—here is the anti-psychologistic thesis—a content or meaning cannot be reduced to, nor can its objectivity be explained in terms of, the mental acts or states (preferences, intentions, volitions, decisions, beliefs) it is the content of.

Stated otherwise, the polemic against psychologism (and we saw this in Sec. 2.3) teaches that the contents of mental acts or states have a particular kind of existence (an ideal existence, an intentional inexistence); unlike psychological phenomena, they enjoy a peculiar objectivity (the objectivity of "thought", or "noema"); and they have an identity independent of human attitudes and beliefs. Law—here is the Kelsenian theoretical operation—is itself a content or meaning. Therefore, just like the laws of logic or of mathematical entities, law is itself something impersonal and anonymous, an entity that is (neither physical nor psychological but) ideal: It is something objective, or "valid", independently of our actual mental processes (whether volitional or cognitive)[16].

That, it seems to me, is the background against which we get the thesis that the object of the theory of legal reasoning must be reasoning understood in a logical, not a psychological, sense. Those who, since Kelsen, have thought they could find in the analysis of language—the language of law—the key to an empirically respectable theory of law have likewise fallen victim to the illusion of the solidity of linguistic entities (Sec. 2.2 above), the trap into which analytic philosophy in general has fallen. In this respect, too, there is a perfect parallelism between the course followed by legal theory and that followed by general philosophy.

In the mid-twentieth century, philosophers came to believe that in language they had an object—a field of phenomena—that gives a perceptible guise, and with it credentials of epistemological respectability, to objects (the laws of logic, and intentional objects in general) which anti-psychologism had carefully distinguished from mental (or generally physical) phenomena. In this way, philosophy of language gained the status of queen of the philosophical disciplines. It would finally no longer have been necessary to engage in disquisitions on the ontological status of "thoughts" or "noemata". It would have been sufficient to carefully examine an object of the external world, namely, language itself. Likewise, dealing with legal

[16] Of course, this theoretical operation raises a swarm of difficulties. Whatever we may think of the laws of logic, of the ontological status of mathematical entities, or in general of the notion of epistemic normativity, we are still left to contend with the idea that law—*positive* law, mind you—can enjoy a form of independence and objectivity comparable to the independence and objectivity the early twentieth-century anti-psychologistic scholars ascribed to logical laws or intentional objects, and law can claim this independent and objective status despite its limitlessly mutable content (a feature of law that Kelsen repeatedly underscored). This is an idea that appears to lack any plausibility. In fact, it is difficult to escape the impression that Kelsen's theoretical operation is exposed to the risk of a twofold error. The first is an unfortunate and consequential confusion between the normativity of law, on the one hand, and the normativity of the laws of logic or of intentional objects, on the other (failing to appreciate the difference between the normativity of law and epistemic normativity). The second is yet another hypostatisation: the transubstantiation of social acts and facts into entities independent of them.

reasoning would have meant, not trying to get into the heads of judges or other legal officials or professionals, but observing and describing observable entities: their discourse.

2.5. *The return of psychologism*

The problem with the language-analysis project as just outlined is that (as we saw in Sec. 2.2) language and discourse are by no means "observable entities", empirically respectable phenomena: By the very canons of this strange and unstable form of empiricism, they are certainly no more so than are mental acts and processes.

Since the 1980s, as we know, the primacy of the philosophy of language has been eroding. The title of queen of philosophical disciplines has passed to the philosophy of mind. We have thus transitioned from linguistic entities to mental phenomena, effectively reversing the course outlined in the previous sections.

But that is not the crux of the matter. The central point is rather that the theses and arguments championed by anti-psychologism have been called into question. The anti-psychologistic consensus has broken down.

Among philosophers, the decisive role in so turning the tide was played by W.V.O. Quine. Working in open and direct antithesis to anti-psychologism, Quine put forward a project to "naturalise" epistemology: Epistemological enquiry is to be understood as «contained in natural science» and specifically «as a chapter of psychology» (QUINE 1969, 83)[17].

In the time since Quine set the agenda, "naturalisation" has become a motto for many philosophers, not only in epistemology but also in the widest range of fields, from the philosophy of mind to metaethics. Naturalism, and with it the rejection of anti-psychologistic theses and arguments[18], is a distinctive feature of much of the contemporary philosophical landscape (see, in general, ENGEL 1996).

The return of psychologism took place not only, as just discussed, along the first of the two paths of development of anti-psychologism, namely, epistemology. It also took place along the second path: intentionality.

The argument, broadly stated, is this. It is a mysterious notion of intentionality which early twentieth-century anti-psychologism relies on (Sec. 2.3 above). Indeed, if the human mind has the capacity to "direct itself toward" objects, if certain mental states or processes have the property of "being about" something (i.e., having content), then it must be the case that we can explain this capacity in terms of natural facts and processes. It must be possible to understand and explain intentionality as a psychological phenomenon.

We have thus come back to the distinction between reasoning in the logical sense and reasoning in the psychological sense. As we have seen (Sec. 2.3 above), the notion of content (the content of mental states) on which rests the traditional way of drawing the distinction is linked to the anti-psychologistic notion of intentionality. As we will see in the next section, the naturalisation of intentionality—the development of a psychological notion of content—cannot but affect the distinction between logical and psychological notions of reasoning.

But today (some fifty years on), we can see that the turning point—the return of psychologism—did not invest the philosophical landscape. Rather, the main outcome is this: In the dialectic between psychologism and anti-psychologism, something new has entered the stage and is playing a decisive role, namely, empirical investigations—investigations in cognitive psychology and, in general, in cognitive science and neuroscience. This, in short, is not an

[17] In setting out his *Epistemology Naturalized*, Quine describes the enterprise as «a surrender of the epistemological burden to psychology» (QUINE 1969, 75). Pascal ENGEL (1998, 391) notes that Quine initially intended to subtitle his essay *Or, the Case for Psychologism* (see also JACQUETTE 2003).

[18] ENGEL (1998, 376) appropriately notes that many contemporary anti-naturalists «believe that the recent naturalistic turn is but a reopening of [the] Pandora's box of psychologism».

internal dispute within philosophy departments. Reasoning has returned to being what it was for the Greeks, prior to the codification of logic, namely, one of the objects of experience.

2.6. *The elusive distinction between reasoning in the logical sense and reasoning in the psychological sense*

How, then, in light of the foregoing considerations, are we to understand the relation between the two notions of reasoning, the logical and the psychological?

From the logical point of view, as we know (Sec. 2.2), the interest is not in reasoning as a mental process but in the examination of its correctness (whether a conclusion really follows from its premises). An argument is «any group of propositions of which one is claimed to follow from the others» (COPI et al. 2014, 6).

Under what conditions can this conjecture be considered justified?

Let us leave aside deductive reasoning, i.e., the relation of logical consequence in the strict sense (where the conclusion *necessarily* follows from the premises). This, along with mathematical relations, is the most resistant case, apparently refractory to treatment from a psychological angle. (As we saw in Sec. 2.3, deduction, or logical consequence, and mathematical relations have been the privileged, though by no means exclusive, domain of twentieth-century anti-psychologism.) Let us instead look at the domain of *non-deductive* inference.

This delimitation of the field of enquiry is justified here by a thesis I am introducing as a postulate (an unproven assumption), which is that in the discursive practice of law, the decisive role is played by non-deductive inferences[19], as well as by practical inferences (that is, inferences relating to the means suitable for achieving given ends or for balancing competing ends). In light of this assumption, we can exclude deductive arguments from our field of enquiry without making this exclusion contrived or gratuitous.

There is, however, a second reason that may justify this narrowing of our field of enquiry.

For decades now, there has been experimental research empirically investigating the way in which human beings actually make inferences, draw conclusions from premises, and make decisions. This line of research has shown that, in reasoning, flesh-and-blood human beings follow heuristics, and that, in decision-making, they do not go in search of *optimal* options (as the standard theory of rational decision-making would have it) but settle for *satisfactory* ones. We are not calculating all the logical consequences of our assumptions or (when making practical inferences) the expected utility of all the possible consequences of all the alternative options in search of an optimum: We take shortcuts; we look for satisfactory options. Thus, for example, probability estimates are based on heuristics (such as representativeness and availability)[20].

The use of heuristics brings with it systematic errors, or *biases*. In forming and evaluating hypotheses, for example, we fall prey to confirmation bias (looking for or overestimating evidence in support of a thesis we already support), and in evaluating options, we fall subject to the framing effect (the same option appears more or less valuable to us depending on how it is framed: A glass half empty seems less valuable than a glass half full).

The human mind, in short, is not, from top to bottom, a computer. It is not so in a very specific sense of that term: The point is not that the human mind is not a machine (the human brain arguably *is* a machine), or that it does not make mistakes (machines sometimes do make mistakes: Think of a system crash in a computer). The idea, rather, is that the human mind is not—not only, and not primarily—a calculator of logical consequences or of the choice that

[19] This assumption is, of course, open to challenge. Here, I will confine myself to taking it as a premise in my argument. That said, its plausibility seems unquestionable to me. For a very clear, solid, and in my view compelling argument to that effect, see DICIOTTI 2007.

[20] These are just a few insights sampled from a very rich and structured body of findings. See, e.g., SIMON 1983, ch. 1; NISBETT & ROSS 1980; KAHNEMAN 2011; GIGERENZER et al. 1999.

maximises expected utility. Human rationality, in general, cannot be represented as a programme for executing deductive inferences or maximising expected utility[21].

We are not, therefore, talking about the undeniable fact that human beings are often confused, uncertain, lost, error-prone, victim to passions, and so on. The thesis, rather, is that the traits just outlined—our recourse to heuristics, and the systematic errors their use leads to, as well as the fact that we are not maximising utility or looking for satisfactory options—are traits proper to human *rationality* (GIGERENZER 2008).

And it is here that the distinction between the two notions of reasoning breaks down.

Under what conditions can a non-deductive, or practical, inference be said to be correct? The question is general, and for a satisfactory answer we should have to distinguish different types of non-deductive argument, or practical inference. But the main point, where we are concerned, is simple: The criteria for the goodness or correctness (or the greater or lesser stringency or plausibility) of non-deductive inferences[22], and of practical inferences, are not independent of the way our mind actually makes those inferences—how could they be? These criteria of correctness are themselves an object of empirical, psychological, investigation[23].

This applies in particular to analogy and concept formation (processes of categorisation), abduction, counterfactual reasoning, and practical inference of various kinds[24]. It is clear that these forms of inference play a central role in legal reasoning, and in particular in judicial reasoning[25].

In what sense, though, are the criteria for the correctness, or plausibility, of inferences of this kind subject to empirical, psychological investigation? (Is this not a blatant *non sequitur*, a blatant violation of the imperative to be careful to distinguish rules from regularities?) The answer is: That certain inferences are more or less good, more or less stringent, is nothing more than a psychological fact—they *are* stringent, good or correct, because they *appear* that way to us. That they are so simply means that they appear that way to us. (That the conclusion follows from the premises is a certain *feeling*, a felt quality.)

In light of these considerations, the distinction between reasoning in the logical sense and reasoning in the psychological sense does not appear so clear-cut. In Section 2.2, this relation was described as follows: Reasoning in the psychological sense is a set of biochemical processes in the brain, whose content is reasoning in the logical sense. But this picture now proves to be inadequate.

[21] See what was said in the previous footnote.

[22] This may even apply to deductive inferences. For an introductory discussion, see JACQUETTE 2003.

[23] It is not that psychologists have an attitude of saying, "We will now explain to you what criteria you should use for determining the correctness of this or that inference". Rather, they mostly confine themselves to investigating the way in which we *in fact* reason. Indeed, the point is precisely that the criteria for the correctness of a certain type of inference cannot be independent of the way the human mind in fact makes that type of inference. As soon as reasoning becomes an object of empirical investigation, the range of inferential possibilities widens out of all proportion. In the maze of these inferential possibilities, how else would it be possible to find one's way around if not by asking oneself how, in fact, the human mind functions? (This aspect of the psychology of reasoning emerges clearly, for example, in the work of Gerd Gigerenzer. See, e.g., GIGERENZER 2008.)

[24] For an introduction, though one that does not address the case of analogy, see GIROTTO 2013, chs. 1, 3, 4, and 5.

[25] In particular, abduction is one of the paths leading to the formulation of unexpressed principles; the construction of intentions that can counterfactually be attributed to the legislator requires, trivially enough, counterfactual reasoning; practical inferences are suited to the function of legislatures and of administrative agencies, as well as to judicial review of the decisions they make. It is a platitude to point out the role that analogy and categorisation play in legal reasoning. Following a widespread practice, even if its justification is uncertain, I will only be concerned here with inferences that seek to answer questions of law (*quaestio iuris*). If, on the other hand, we should also concern ourselves with inferences that seek to give answers to questions of fact (*quaestio facti*), or to problems of proof, we widen the field on which psychological, and generally empirical, investigations have a bearing. Also relevant, in addition to the forms of inference listed in the text, are generalisations, predictions, and probability estimates. These forms of inference, too, are explored in contemporary cognitive psychology: see GIROTTO 2013, chs. 1 and 3.

The content of a set of mental states cannot be understood, in the manner of twentieth-century anti-psychologism, as an intentional object endowed with ideal existence, or as in itself valid independently of the nature of the mind (Sec. 2.3 above). What counts as an argument in the logical sense depends on mental, psychological facts, that is, on the nature of the biochemical processes taking place in the brain—or at least that is the case with non-deductive inferences.

So, then, reasoning in the psychological sense is a collection of mental processes whose content is reasoning in the logical sense, that is, a sequence of propositions whose structure, or form, is determined by psychological facts (events, processes, states, regularities). The two notions of reasoning are like the two sides of a Möbius loop[26].

3. *Rules, exceptions, normality*

3.1. *Particularism*

In a series of writings over the last fifteen years, I have proposed and defended a *particularist* conception of practical reasoning, and specifically of rule-based reasoning (CELANO 2002, 2005, 2006a, 2012, 2016). Before laying out the project for a two-tier theory of law, however, I should clarify what I mean by "particularism".

By this term I mean a conception of practical reasoning revolving around the following thesis (as is customary, I will express myself in terms of "reasons", even if the same thesis can be formulated in terms of "norms", and indeed this latter idiom is the one I will be using in the next section):

(P) Reasons for action are plural[27]. In each case, several reasons apply, most often in conflict with each other[28]. In the event of a conflict, the verdict—that is, the answer (the *right* answer: we are dealing with a

[26] John SEARLE (1983, 1992, 1995) argues that intentionality functions only against a Background of non-intentional abilities, dispositions, and preconditions. I will not elaborate on this thesis or on the arguments Searle advances in support of it. I will merely point out—though this, too, is an idea that would require a separate discussion—that the Background is the natural setting for psychological structures that at the same time play an explanatory and justificatory role. I have elsewhere argued (CELANO 2014) that arguments put forward by very different authors (Pierre Bourdieu, Michel Foucault, David Lewis, Nelson Goodman, and Ludwig Wittgenstein, as well as Searle himself) can be reconstructed as being in agreement in lending some kind of support to the conclusion that in the Background we find such things as psychological phenomena that assume a justificatory role by acting as reasons (and, inextricably, as causes). A clarification, however, is in order. The considerations in this Section 2 take issue with the assumption that the theory of justificatory judicial reasoning must exclusively be concerned with reasoning in the logical sense, and not also with psychological reasoning. But they take issue with this assumption only insofar as the assumption is understood to be justified on the basis of traditional anti-psychologistic arguments or of their revived embodiment in terms of language analysis (Secs. 2.2 and 2.3). In fact, there are excellent ethical-political arguments, ultimately grounded in the rule-of-law ideal, in support of the view that the privileged or exclusive object of consideration should be judges' express statements, even better if set down in writing: Judicial decisions must be reasoned (if, for example, the law is to respect human dignity); the reasoning must be public and clearly identifiable, fixed once and for all, so that it can be subject to scrutiny and evaluation (by the public or by higher courts); the best way to pursue these objectives is to assume that the statements—better yet, the written statements—of judges coincide with their reasoning; and so on. The considerations put forward in this contribution in no way question such ethical-political arguments.

[27] Practical reasons so understood are often incommensurable or indeterminate, but I will not get into that aspect of them here.

[28] I will say that a reason "applies" to a case, be it an individual case or a general one, if the case has the property that, by hypothesis, is a reason for doing or not doing the relevant action. For example, if we assume that the fact that an action is kind is a reason for doing it, the fact that *this* action, or a certain *type* of action, is kind is a reason for doing the action. (The distinction between an individual and a generic case is taken from ALCHOURRÓN & BULYGIN 1971.)

> normative thesis) to the question as to what we have most reasons to do, all things considered, or as to the correctness or otherwise, all things considered, of the conduct being judged—depends on a balancing, or weighing, of the reasons for and against the conduct at issue (there is no preestablished ranking among reasons)[29]. Reasons for action are, hence, *pro tanto* reasons—liable, in each case, to being "defeated" and "overridden" by other reasons, and from time to time subject to balancing. Thus, given a case to which a specific reason or a certain set of reasons applies, which would justify a specific verdict, V1, one cannot exclude in advance the possibility that other reasons also apply to that case, and that the balancing of all the relevant reasons should yield a different and incompatible verdict[30].

Particularism so defined is a conception of the form of practical reasoning, which can be applied both in the moral and in the legal domain. It is not necessarily the case that a particularist in ethics must also be a particularist in legal reasoning, or specifically in the justification of judicial decisions (CELANO 2016). For the sake of simplicity, however, I will not hereafter distinguish between these two domains, even if a comprehensive discussion should.

In Section 2, a position was taken against the anti-psychologistic assumption that the object of the theory of legal reasoning must be reasoning understood in a logical rather than a psychological sense, arguing that this assumption must be called into question and re-examined in light of contemporary empirical investigations, especially psychological ones, into how human beings actually make inferences of various kinds and make decisions. That position—a psychologistic approach to reasoning and decision-making—may at first glance appear unrelated to the position just outlined in this section in favour of particularism. But that appearance is deceptive. Alternatively, some aspects of the particularist conception of practical reasoning naturally lend themselves to a psychological reconstruction, as we will now see.

3.2. *Two-tier theories of law*

Many contemporary legal theorists are in search of a sort of holy grail: a two-tier theory of law (or of practical reasoning in general), hinging on the distinction between first-level norms, or reasons, often referred to as "principles", always subject to balancing, and norms, or reasons, justified on the basis of those principles[31]. At this second level we have "rules": protected reasons for action (RAZ 1979, ch. 1.), entrenched prescriptive generalisations (SCHAUER 1991).

For the purposes of my argument, there is no need—and indeed it is inadvisable—to get mired into the shifting sands of the distinction between rules and principles (debating whether they have different logical forms, whether they differ only in degree, and so on). For our purposes, what matters is only that the proponents of the project for a two-tier theory (I will call them "friends of balancing" or FBs) distinguish two types of norms—let us call them NA and NB—and believe that when two or more NAs conflict, the conflict is solved by balancing the two NAs and formulating, on that basis, an NB[32].

[29] I will not attempt—nor can I attempt—to translate or define the generic and metaphorical notion of *balancing* in terms of a decision-making procedure. For our purposes, it will suffice to rely on an intuitive understanding of that notion, or even on the bare image of a scale: an instrument for measuring the comparative "weight" of the reasons applicable to the case at hand.

[30] This statement of the particularist position differs quite markedly from the currently most representative and influential one developed by Jonathan DANCY (2004). There is no need to discuss this complication here (for an in-depth discussion see CELANO 2005, ch. II), but I should point out straightaway that particularism so understood and defined should not be mistaken for a mysticism of the individual case, of the "concrete" case. It is in virtue of the *properties* of individual cases that one or another set of reasons applies to them. Balancing and its verdict are therefore always concerned with *general* cases (and it is of course through these general cases that individual ones are made to fall under them).

[31] This, of course, does not exclude the possibility that the law of a particular legal system might also include rules that are *not* justified.

[32] By "norm" I mean a conditional that establishes a relation between a general case, acting as an antecedent, and a

For FBs, then, NAs are "unstable" in the following sense: They are norms that do not directly dictate a verdict for the cases to which they are applicable. When a given NA—NA1—applies to a case, it is not certain that the correct normative solution for that case—the correct verdict, all things considered—is the normative solution given by NA1. The balancing could yield a different outcome.

It will be recognised that this interplay is the particularist position as defined Section 3.1 above. The behaviour of NAs is particularist.

According to FBs, then, when a case comes up in which the relevant NAs conflict (these are the NAs applicable to the case, the NAs such that the case falls under their antecedent)[33], they do not *directly* dictate a verdict—how could they, considering that we are dealing precisely with different, incompatible verdicts?—but do so only through the NB that, by hypothesis, constitutes the result of their balancing. The balancing leads to the formulation of a rule, one under which the conflicting principles applicable to the case at hand are ranked, which in turn prescribes a certain verdict—a judgment as to what is to be done, all things considered, or as to whether or not, all things considered, the conduct in question is correct.

To many contemporary legal theorists a two-tier theory appears necessary in order to account for the nature and role of the legal systems of present-day constitutional states governed by the rule of law, marked by a "double level of legality": The acts of public bodies are subordinate to the law, and the law is in turn subordinate to constitutional norms (FERRAJOLI 1993). The basic idea is as follows. First-level norms (principles) provide a justification for the entire system. They are, however, unstable: In each case their application requires balancing them. The role that second-level norms (rules) play in justification should be to spare the decision-maker the burden of balancing the applicable principles on a case-by-case basis:[34] In a case that falls under the rule's antecedent, the correct normative solution will generally be the one indicated by the rule.

Only *generally*, however. The crucial problem for those who share this project is whether it is possible, and if so how, to draw the distinction between the two levels in such a way that the rules really play, in justification, an independent role from that played by principles—in such a way, that is, that the second level does not collapse into the first.

The difficulty is this: Rules, as noted, are meant relieve us of the burden of balancing principles with each new case. We cannot, however, discount the possibility of there being cases which fall under the antecedent of a rule, NB1, but in which the balancing of principles applicable to the case nonetheless points to a normative solution other than the one indicated by NB1, such that to follow NB1 would be to make a mistake. If we want to avoid such errors—if we do not want to fall victim to a kind of "rule fetishism"—we need to leave open the possibility that the rule can sometimes be reconsidered, the possibility that we must sometimes ask whether, even if the case

"normative solution" as a consequent (the idea of a normative solution, roughly understood as the deontic qualification of a given type of behaviour, is taken from ALCHOURRÓN & BULYGIN 1971). I will say that a norm is "applicable" to a case, be it an individual case or a general one, when the case falls under the norm's antecedent (this, to be clear, is the notion of internal applicability; MORESO & NAVARRO 1996). I will say that a norm has been "applied" when, given a case to which it is applicable, the decision-maker in fact adopts—either by forming an intention or by formulating a judgment (I will say, in general, that the decision-maker has thus issued a "verdict")—the normative solution envisaged by the norm (I will also say that, in this case, the decision-maker "applies the normative solution" in question).

[33] If principles are construed not, as many think, as norms with an "open-ended," relatively undefined antecedent (but even then, we will have to be able to distinguish cases that fall under the antecedent from ones that do not), but as norms lacking any antecedent at all, they can still, at any rate, be said to be norms with a tautological antecedent, an antecedent that is always fulfilled, in that the norm is applicable whenever the consequent is applicable (ATIENZA 2014, sec. 1).

[34] This does not, of course, exclude the possibility of rules also being assigned a further role. Thus, for example, they can be used as instruments for allocating and separating decision-making power (SCHAUER 1991). The one specified in the text, however, is the primary role that FBs assign to rules in the justification of decisions. If rules cannot play this role, they cannot play any independent justificatory role at all.

falls under its antecedent, the rule is to be set aside, and the correct normative solution is the one indicated by the balancing of the principles applicable to the case[35].

But this is precisely where the puzzle lies: How can we determine whether or not, in a given case, the rule is to be reconsidered unless we do reconsider it? If in each of the cases falling under the rule's antecedent, we have to determine whether or not the rule is to be applied, and if in order to do so we have to look at the balance of applicable principles (and, in the event of discrepancy, stick to the latter), then the rules do not play the role they are supposed to play. In justification, all the work is done by principles. As compared against principles, rules are completely transparent: In order to determine whether or not a rule is to be applied, we need to look at the balance of principles (and, in the event of discrepancy, follow the latter). Rules, in short, are superfluous relative to principles. In each case, consideration of the principles and their balancing are both necessary and sufficient for the purposes of justification. The second level collapses into the first[36].

NBs, in other words, are likewise unstable. When a given NB—NB1—is applicable to a case, it is not certain that the correct normative solution to that case (the right verdict on it) is the normative solution indicated by NB1. Why? Because it may be that the case also presents other normatively relevant properties (meaning properties apart from those by virtue of which the case falls under the antecedent of NB1)—it may be, that is, that other norms are also applicable to the case at hand—and that, on balance, the correct normative solution is not the one indicated by NB1. Even the behaviour of NB, it would seem, is particularistic.

3.3. *A conjecture*

Is it possible, then, to draw the distinction between the two levels in such a way as to prevent the second level from collapsing into the first, and at the same time to leave open the possibility that the rules may, in some cases, have to be reconsidered?

[35] I say that a rule is "reconsidered" if, and only if, the decision-maker makes its application in a given case (a case to which the rule is applicable) conditional on the answer to the question whether, in that case, the balancing of the applicable principles indicates the normative solution indicated by the rule; if it does not, the decision-maker will have to apply the normative solution indicated by the balancing of these principles.

[36] In CELANO 2006b, I raised this objection (though in a different statement of it) against the theory set out in ATIENZA and RUIZ MANERO 1996 and 2000. Atienza and Ruiz Manero replied as follows: A distinction needs to be drawn between substantive principles and institutional principles, or principles «relating to the following of rules» (concerned with stability, the predictability of decisions, and the allocation and limitation of decision-making power), and «rules are defeated in cases in which, in a proper balance, principles in favour of deviating from the rule carry more weight than ones in favour of following the rule, and only in such cases» (ATIENZA & RUIZ MANERO 2009, sec. 2, my translation, where the Castilian original reads as follows: «las reglas son derrotadas en aquellos casos, pero sólo en aquellos casos, en los que el balance entre los principios que sustentan el apartarse de la regla tiene un peso mayor que el de los principios vinculados al seguimiento de reglas»). (The same reply can be found in RUIZ MANERO (2013), which also distinguishes between the theory that rules are endowed with «*absolute* stability», a theory the author regards a chimerical, and the thesis, which he defends, that their stability is only relative. But the problem, as we will now see, is precisely how to prevent this alleged relative stability from degenerating into absolute instability.) I do not quite understand this reply. I willingly concede that there are first-level norms of two kinds: substantive and institutional. But the second level collapses equally into the first. To determine whether a rule is to be followed we must still, in each case, look at the balance of principles, whether substantive or institutional, that apply to that case. (How can we determine whether or not, in a given case, *the weight of the principles justifying a decision to depart from a rule* is greater than *the weight of applicable institutional principles* if we do not weigh those two sets of principles, that is, if we do not engage in balancing?) The NB remains transparent relative to the NAs. What we have done is only to broaden the list of NAs to be taken into account—to be weighed—for the purpose of reconsidering the rule. ATIENZA and RUIZ MANERO (2009) follow Schauer in distinguishing between cases in which a cursory glance is sufficient to realise that the rule is to be applied, and those in which it is instead necessary to look closely at the balancing of the applicable (substantive) principles in order to establish which normative solution is correct. But that does not solve the problem: How can we distinguish between cases where a cursory glance is sufficient and cases where it is necessary to look closely unless we look closely? (Elsewhere ATIENZA (2014, sec. 2; 2017, sec. 8) outlines a more complex picture that appears to allow one to escape this objection. But I have argued elsewhere (CELANO 2017) that this more complex picture is open to the same objection.)

I will now suggest a way in which this problem can perhaps be solved. I will proceed in two steps. I will first introduce as presuppositions five theses I have defended elsewhere (CELANO 2012, 2016). On the basis of these presuppositions, I will then formulate a conjecture.

First presupposition (in what follows, throughout this section, the term "case" will always be used in the sense referring to a *general* case). The *reasonable* use of rules—their *reasonable* use: this is a normative thesis—, rules that are adequately justified, is based on the possibility of distinguishing between normal and non-normal cases.

Normal cases are those in which it is certainly reasonable to follow the rule (and let me reiterate here that the rules we are talking about are ones understood to be adequately justified). Non-normal cases, on the other hand, are those where it is reasonable to ask whether the course of action indicated by the rule is indeed, under the given circumstances, the course of action to be followed, the right thing to do.

Thus, rules—as such, that is, as protected reasons for action, entrenched prescriptive generalisations (Sec. 3.2 above)—apply to normal cases. In non-normal cases, decision-makers, if reasonable, will not follow the rule. Rather, they will reconsider it: They will ask whether, in a case of that type, the course of action indicated by the rule is the right one, and they will try to answer this question, as best they can, by examining the relevant reasons. (The reasons the rule normally excludes are not, in this case, excluded: The generalisation gets dislodged and is thus no longer entrenched.)

Second presupposition. Normal cases cannot be identified by any exhaustive enumeration of properties. That is, the list of the normatively relevant properties in virtue of which a case is normal is indefinite.

Third presupposition. Correlatively, non-normal cases—and consequently exceptions (meaning *true* exceptions, as per the fourth presupposition below)—cannot be specified in advance except by vacuous clauses ("unless there are decisive reasons to the contrary", "save for adequately justified exceptions", and the like). These cases, too, cannot be specified by any exhaustive enumeration of properties.

Fourth presupposition. In order for a case to properly count as an exception to a rule R, and so as a *true* exception to the rule, it must meet two conditions: (a) the case falls under the antecedent of R, and (b) it would not, in that case, be reasonable to adopt the normative solution provided for by R. True exceptions, in other words, are non-normal cases (cases where it is reasonable to reconsider the rule) in which the course of action indicated by the rule is not the right one: Reconsidering the rule leads the decision-maker (one who is reasonable and adequately informed) to the conclusion that, under the given circumstances, it is reasonable to act in a way other than as the rule prescribes.

Fifth presupposition. So-called "implicit exceptions" are not exceptions proper, unless by this expression one means to refer to the totality of cases covered by the vacuous clauses such as those mentioned under the third presupposition. If, on the other hand, by "implicit" we mean something like "specified in advance by way of an exhaustive, albeit undisclosed, enumeration of normatively relevant properties", then we have a dilemma: Either we concede that the rule was not applicable in the first place (the case was not an exception, after all), or we openly acknowledge that when we make the supposedly implicit condition explicit, what we are in effect doing is we are adopting a new rule, different from the previous one and less general than it. We

have simply changed our mind as to how cases of type T should be regulated (what the right verdict in them is), where T is precisely the antecedent of the rule we have just abandoned[37].

Those are the presuppositions, a set of theses that lay out a specific particularist position, the one I would account to be the most plausible. Now, this conceptual construction can only have any value if we can explain the difference between normal and non-normal cases (and if we assume that the decision-maker is more or less capable of discriminating between them). If we cannot explain where the difference lies—but can no more than say that the former are the cases in which it is reasonable to follow the rule, whereas the latter are the cases in which it is reasonable to ask whether or not the course of action indicated by the rule is the right one—this conceptual construction remains completely idle, uninformative, and gratuitous, even if in itself coherent. That would amount to having said next to nothing, or nothing at all.

Where, then, does the difference lie between normal and non-normal cases? Under what conditions can it reasonably be claimed that the case being decided could be a (true) exception? And, once we concede that the decision-maker has the capacity to discriminate between normal and non-normal cases, how does this discriminating capacity work?

The conjecture can be stated as follows:[38] Whether or not a certain case is normal—recall that on this depends the question of whether or not, in any given case, it is *reasonable* to reconsider the rule (the question, I underscore once again, is a *normative* one)—is something that depends on psychological facts: Certain cases are normal or non-normal if and because they appear that way to us[39], and which cases appear to us to be normal and which do not is a psychological matter of fact. So, then, whether a certain rule, in a certain case, is a reason to act accordingly—whether it is a *justificatory* reason, for that is the crucial point—depends on our psychological makeup.

In conclusion, when the purported reasons are rules, what our reasons are—what we must do, what evaluation we ought to make—depends on a background condition of normality. Given a rule that is adequately justified and applies to a certain case, it is reasonable to follow that rule only under normal conditions. Whether these conditions are fulfilled depends on mental facts. Particularism and psychologism come together.

In other words, as we have seen, the crucial problem for the proponents of a two-tier theory of law—a theory predicated on a distinction between basic reasons (principles) and rules—is whether it is possible to draw that distinction in such a way as to prevent the second level from collapsing into the first, while at the same time leaving open the possibility that, in certain cases, the rules are to be reconsidered. How to determine, in each case, whether the rule is to be reconsidered unless we do reconsider it? The discussion in this section suggests one way in which this question can perhaps be answered. It is not up to us to determine, in each of the cases that fall under their antecedent, whether the rule is to be reconsidered:[40] It is up to our mind.

[37] Cf. BRIGAGLIA & CELANO 2018, sec. 2. Carlos E. ALCHOURRÓN (1996) puts forward a dispositional conception of implicit exceptions that complicates, but does not change, this picture. Implicit exceptions, on this view, are cases which (a) fall under the rule's antecedent, but which (b) the legislators did not have in mind when they enacted the rule (it is worth noting here that we are speaking only of rules attributable to a determinate and identifiable author or group of authors to whom a precise will can be attributed), and which (c)—had they taken these cases into account: Had it only occurred to them that such cases could arise!—they would have regulated differently. Now, when we speak of "implicit exceptions" in these terms, what we are in fact saying is that, if the legislators had only contemplated the case in advance, they would have enacted a different, and less general, rule than the one they in fact enacted.

[38] This conjecture has previously been formulated, or at least suggested, in BRIGAGLIA 2016, sec. 3.3, and is developed in BRIGAGLIA & CELANO 2018, sec. 3.

[39] On the question of who the "us" designates here (or, Who is "we"?), see CELANO 2014, secs. 5 and 6.

[40] Or, *mutatis mutandis*, it is not up to us to determine whether the case in question is one that can be judged simply at a glance or whether it instead requires us to look at it closely (fn. 36).

4. *Conclusion: An invitation to follow the trend*

What I have argued in this essay lines up, or at least is meant to line up, with contemporary research on bounded rationality and human inference, on heuristics and biases, and on moral psychology—all of which is very much the trend now, and mine is indeed an exhortation to pursue that trend before it passes.

There is now a vast, rich, interesting, and rapidly advancing area of psychological, and in general empirical, research that is developing around cognitive science and is concerned with norms and rules, or the way in which these shape human behaviour, and with norm- and rule-based reasoning. These investigations—onto which contemporary developments of neuroscience are grafted—take a more or less consciously psychologistic slant. This whole field of inquiry we might call "psychodeontics" (though this is just a label—a take on Jerry Fodor's "psychosemantics"). It would be inadmissible for these investigations to remain outside the theory of legal reasoning, and the theory of law in general[41]. If they are taken seriously, they are quite likely (and, as I insist, I am not claiming anything more than "likely") to get legal reasoning, and legal theory generally, to fundamentally change course in a more or less drastic way. As I tried to show, there are compelling reasons for exploring the prospect of setting legal theory, and the theory of legal reasoning in particular, on a psychodeontic path.

And that, I believe, is the main path toward a naturalised jurisprudence[42].

[41] By this I do not mean, of course, that there are no legal theorists who have pursued this path. Consider, for instance, the work that, from very different perspectives, has been done by Bartosz Brożek, Dennis Patterson, Giovanni Sartor, and Cass R. Sunstein. There are as well numerous recent contributions to "neurolaw," particularly concerned with teasing out the implications that neuroscience carries for the concepts of guilt and liability. And also a subject of investigation is the psychology of judicial decision-making.

[42] A psychodeontic approach is a way—in fact, it presently strikes me as the *only* way—to accomplish the project of "naturalizing jurisprudence", to go by Brian LEITER's 2007 motto (for Leiter's ideas about how to naturalise normativity, see LEITER 2015).

References

ALCHOURRÓN C.E. 1996. *On Law and Logic*, in «Ratio Juris», 9, 4, 331 ff.

ALCHOURRÓN C.E., BULYGIN E. 1971. *Normative Systems*, Springer.

ATIENZA M. 2014. *Ponderación y sentido común jurídico*, manuscript. Available at: http://lamiradadepeitho.blogspot.it/2014/11/ponderacion-y-sentido-comun-juridico.html.

ATIENZA M. 2017. *Algunas tesis sobre el razonamiento judicial*, in AGUILÓ REGLA J., GRÁNDEZ CASTRO P. (eds.), *Sobre el razonamiento jurídico. Una discusión con Manuel Atienza*, Palestra.

ATIENZA M., RUIZ MANERO J. 1996. *Las piezas del derecho: Teoría de los enunciados jurídicos*, Ariel.

ATIENZA M., RUIZ MANERO J. 2000. *Ilícitos atípicos*, Trotta.

ATIENZA M., RUIZ MANERO J. 2009. *Ancora sugli illeciti atipici: Replica alle critiche italiane*, in «Europa e diritto privato», 203 ff.

BELL D. 1992. *Psychologism*, in DANCY J., SOSA E. (eds.), *A Companion to Epistemology*, Blackwell.

BRIGAGLIA M. 2016. *Rules and Norms: Two Kinds of Normative Behaviour*, in «Revus: Journal for Constitutional Theory and Philosophy of Law», 30.

BRIGAGLIA M., CELANO B. 2018. *Reasons, Rules, Exceptions: Towards a Psychological Account*, in «Analisi e Diritto 2017», 131 ff.

CELANO B. 1999. *La teoria del diritto di Hans Kelsen: Una introduzione critica*, il Mulino.

CELANO B. 2002. *'Defeasibility' e bilanciamento: Sulla possibilità di revisioni stabili*, in «Ragion pratica», 18.

CELANO B. 2005. *Possiamo scegliere fra particolarismo e generalismo?*, in «Ragion pratica», 25, 469 ff.

CELANO B. 2006a. *Pluralismo etico, particolarismo e caratterizzazioni di desiderabilità: Il modello triadico*, in «Ragion pratica», 26, 133 ff.

CELANO B. 2006b. *Principi, regole, autorità: Considerazioni su M. Atienza, J. Ruiz Manero*, Illeciti atipici, in «Europa e diritto privato», 3, 1061 ff.

CELANO B. 2012. *True Exception: Defeasibility and Particularism*, in FERRER BELTRÁN J., RATTI G.B. (eds.), *The Logic of Legal Requirements: Essays on Defeasibility*, Oxford University Press, 268 ff.

CELANO B. 2014. *Pre-convenzioni: Un frammento dello Sfondo*, in «Ragion pratica», 43, 605 ff.

CELANO B. 2016. Rule of Law *e particolarismo etico*, in PINO G., VILLA V. (eds.), Rule of Law: *L'ideale della legalità*, il Mulino.

CELANO B. 2017. *Particularismo, psicodeóntica. A propósito de la teoría de la justificación judicial de Manuel Atienza*, in AGUILÓ REGLA J., GRÁNDEZ CASTRO P. (eds.), *Sobre el razonamiento judicial. Una discusión con Manuel Atienza*, Palestra, 59 ff.

COPI I.M., COHEN C., MCMAHON K. 2014. *Introduction to Logic* (14th Ed.), Pearson.

DANCY J. 2004. *Ethics Without Principles*, Clarendon Press.

DICIOTTI E. 2007. *Regola di riconoscimento e concezione retorica del diritto*, in «Diritto & Questioni pubbliche», 7, 9 ff.

DUMMETT M. 1984. *Origins of Analytical Philosophy*, Harvard University Press.

DUMMETT M. 1986. *Frege's Myth of the Third Realm*, in ID., *Frege and Other Philosophers*, Clarendon Press.

ENGEL P. 1996. *Philosophie et psychologie*, Gallimard.

ENGEL P. 1998. *The Psychologist's Return*, in «Synthese», 115, 3, 375 ff.

FERRAJOLI L. 1993. *Il diritto come sistema di garanzie*, in «Ragion pratica», I.

FREGE G. 1979. *Logic (1897)*, in ID., *Posthumous Writings*, ed. by H. Hermes, F. Kambartel, F. Kaulbach, trans. By P. Long, R. White, Basil Blackwell, 126 ff. (The German original: *Logik*, 1897.)

FREGE G. 1980. *The Foundations of Arithmetic: A Logico-Mathematical Enquiry into the Concept of Number*, trans. By J.L. Austin, Northwestern University Press. (The German original: *Die Grundlagen der Arithmetik: Eine logisch-mathematische Untersuchung über den Begriff der Zahl*, 1884.)

FREGE G. 1984. *Logical Investigations. Part. I: Thoughts (1918–19)*, in ID., *Collected Papers on Mathematics, Logic, and Philosophy*, ed. by B. McGuinness, Basil Blackwell, 351 ff. (The German original: *Der Gedanke: Eine logische Untersuchung*, 1918.)

GIGERENZER G. 2008. *Rationality for Mortals: How People Cope with Uncertainty*, Oxford University Press.

GIGERENZER G., TODD P.M., THE ABC RESEARCH GROUP. 1999. *Simple Heuristics That Make Us Smart*, Oxford University Press.

GIROTTO V. (ed.) 2013. *Introduzione alla psicologia del pensiero*, Il Mulino.

GUTTENPLAN S. 1994. *Normative*, in ID. (ed.), *A Companion to the Philosophy of Mind*, Blackwell.

HALE B. 1997. *Rule-Following, Objectivity and Meaning*, in ID., WRIGHT C. (eds.), *A Companion to the Philosophy of Language*, Blackwell.

JACQUETTE D. 2003. *Introduction: Psychologism the Philosophical Shibboleth*, in ID. (ed.), *Philosophy, Psychology, and Psychologism: Critical and Historical Readings on the Psychological Turn in Philosophy*, Kluwer.

KAHNEMAN D. 2011. *Thinking, Fast and Slow*, Penguin.

KELSEN H. 1960. *Hauptprobleme der Staatsrechtslehre*, 2nd Ed., Scientia Verlag. (Originally published 1911.)

KELSEN H. 1966. *Allgemeine Staatslehre*, Gehlen. (Originally published 1925.)

KELSEN H. 1945. *General Theory of Law and State*, Harvard University Press.

LEITER B. 2007. *Naturalizing Jurisprudence*, Oxford University Press.

LEITER B. 2015. *Normativity for Naturalists*, in «Philosophical Issues», 25, 64 ff.

MORESO J.J., NAVARRO P.E. 1996. *Applicabilità ed efficacia delle norme giuridiche*, in Comanducci P., Guastini R. (eds.), *Struttura e dinamica dei sistemi giuridici*, Giappichelli.

NISBETT R., ROSS L. 1980. *Human inference: Strategies and Shortcomings of Social Judgment*, Prentice Hall.

QUINE W.V.O. 1959. *Methods of Logic*, revised edition, Holt, Rinehart and Winston. (1st ed. 1950.)

Quine W.V.O. 1969. *Epistemology Naturalized*, in ID., *Ontological Relativity and Other Essays*, Columbia University Press, 69 ff.

RAZ J. 1979. *The Authority of Law: Essays on Law and Morality*, Clarendon Press.

REY G. 2006. *The Intentional Inexistence of Language—but Not Cars*, in STAINTON R.J. (ed.), *Contemporary Debates in Cognitive Science*, Blackwell, 237 ff.

RUIZ MANERO J. 2013. *Two Particularistic Approaches to the Balancing of Constitutional Principles*, in «Analisi e diritto», 197 ff.

SCHAUER F. 1991. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press.

SEARLE J.R. 1983. *Intentionality: An Essay in the Philosophy of Mind*, Cambridge University Press.

SEARLE J.R. 1992. *The Rediscovery of the Mind*, The MIT Press.

SEARLE J.R. 1995. *The Construction of Social Reality*, Penguin.

SIMON H.A. 1983. *Reason in Human Affairs*, Stanford University Press.

TODARO G. 2011. *Naturalizzazione della dialettica: L'errore nella giustificazione dialogica delle credenze*, Ph.D. dissertation, University of Palermo.

WATANABE DAUER F. 1989. *Critical Thinking: An Introduction to Reasoning*, Oxford University Press.