Law and Mind 2: Legal Intuition

Book of abstracts

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Ivar Hannikainen. Cognitive bases of folk jurisprudence

A core question in legal philosophy concerns the necessary and sufficient conditions something must satisfy in order to count as a law or a legal system. Fuller (1969) offered a major contribution to this discussion when he proposed a novel set of necessary conditions. Specifically, Fuller argued that a social arrangement is a legal system insofar as that arrangement satisfies eight principles that he collectively called "the inner morality of law." These principles include, for example the generality principle (that legal systems must have general rules of conduct) or the publicity principle (that legal rules of conduct must be made public for those regulated to learn of their rights and duties).

We conducted three experiments in order to probe folk (Studies 1 and 2) and expert (Study 3) concepts of the law. Our studies aim to capture the levels of support that Fullerian principles garner while also examining two kinds of effects on judgments about the nature of law. The effects, construal level (Trope & Liberman, 2010) evaluation mode (Hsee, Loewenstein, Blount, & Bazerman, 1999). Our studies were conducted on samples drawn from two populations: (1) United States adults (N = 454) with no specific training or knowledge of the law, and (2) bar association members (N = 91) with training and substantial experience in the legal profession.

We found limited support for Fuller's (1969) procedural natural law theory. As we noted at the outset, in the best case for Fuller, we would see (1) widespread and (2) reliable folk endorsement for his principles. This is not what we see. First we consider the widespread front. Though some individual principles were widely endorsed by the folk, others were not, and as a set, the inner morality of law did not garner 2:1 supermajority level support from the folk. Insofar as Fuller aimed to capture 'our' concept of law, his theory misses the mark at least in part. There are larger problems on the reliability front. In a pair of studies (Studies 1a and 1b), we found that when we vary the mode of evaluation, participants are more likely to doubt that Fullerian principles are necessary truths. Framing effects of this kind is problematic for Fuller, because, as we argued above, when there are two conflicting reports of the level of endorsement, Fuller's defenders are now saddled with data to explain away. This general problem looks particularly worrying because, as we argue, non-Fullerian intuitions arise in conditions that are epistemically preferable. In joint evaluation, as opposed to separate evaluation, arguably one's views are more likely to reflecting one's more settled opinion. Study 2 looks similar, for it shows that when we vary construal levels from high to low, participants are more likely to doubt Fullerian principles. Again, Fuller is saddled with something to explain away, and again, there is room to argue that the non-Fullerian response pattern is formed in the more epistemically ideal setting. Such an argument might begin by noting that our intuitions are sharpest when considering more everyday things.

Overall, our experiments suggest that when asked to reason about the law at a higher construal level, a majority of respondents demonstrated Fullerian intuitions. This was true when participants reasoned about hypothetical legal systems instead of actual legal systems (Studies 1 and 3), and when they described the abstract essence of law instead of concrete instances of law (Study 2). Thus, our evidence suggests that naturalist and positivist concepts of law are supported by thinking at different levels of construal, and the philosophical debate concerning the role of morality in law may in some sense emerge from the psychological capacity to oscillate between two conflicting concepts of law.

Legal professionals were marginally more likely to view Fuller properties as necessary (but not true de facto). In contrast, age, gender and years of professional experience did not predict intuitions about the inner morality of law.
Our results speak to two common objections levied against folk psychological evidence on philosophical issues: the expertise defense and the reflection defense. Regarding the former, did experienced legal professionals reveal different intuitions? They did not; legal professionals were also divided with regard to the truth of Fuller principles and susceptible to the effect of construal level. If anything, under separate evaluation, legal professionals were somewhat more likely to treat Fuller principles as necessary properties of hypothetical laws despite recognizing that the principles are flouted by actual legal systems.

Regarding the reflection defense, did conditions favoring more careful reflection influence beliefs about the inner morality law? Indeed, our evidence indicated that, when prompted to resolve the tension between their conflicting intuitions, individuals were more likely to conclude that Fuller principles are contingent, not necessary, properties of law.

This set of studies joins a growing body of evidence revealing that theoretical divisions in legal philosophy arise, to some extent, from the conflicting representations of legal concepts rooted in domain-general psychological systems.

Christoph Bublitz. Rights as Rationalizations? Refining Greene's debunking argument against rights

The dual process model of moral decision-making by Joshua Greene has inspired a novel type of philosophical argument, so-called process debunking arguments. A lesser-known part of Greene's work is his attacks on rights as normative entities. It is a bit unclear whether this is an argument distinct from his attack on deontology (as there can of course be consequentialist rights). But irrespective of Greene's intentions, the question is whether there is something interesting for the law to learn from it.

The talk therefore (i) seeks to reconstruct the argument, which is scattered throughout several passages in his book Moral Tribes. (ii) It translates the argument into the law. Greene's real target, so it is shown, are not rights per se, but only those that resist being weighed against interests or that usually trump other considerations. Accordingly, it is suggested to understand his argument as directed against particularly severe rights, i.e., human or fundamental rights.

In substance, Greene claims that these rights are regularly rationalizations of intuitive System 1 processes. Rights are rhetorical weapons or shields, but often obstacles to a rational decision-making process. Therefore, he suggests discarding them. The reconstruction of his argument (iii) shows that it is valid, but not sound. In particular, the normative premise that intuitive System 1 outputs are defective because they are susceptible to morally irrelevant factors is not convincing. However, a better argument is suggested (iv). System 1 outputs that concern the existence of human rights might be defective because they do not properly acknowledge two important features of human rights. The relational character of rights, in the sense of a correlation between claims and duties, and their general character, in the sense of applicability to a multitude of cases, requiring universalizability. These two features require System 2 processing and overriding of intuitions, because they presuppose perspective taking and counterfactual thinking. Thus, to put it negatively: if a belief about human rights is formed intuitively through System 1 and subsequent rationalizing processes, competing views have not been accommodated sufficiently. This lowers the likelihood of the correctness of the belief. It can thus be debunked, in the way suggested by Greene.

Thereby, debunking arguments may find their way into legal theory as a novel type of argument. However, the final part (v) assesses the scope of the argument, which seems considerably more limited than Greene suggests. While some beliefs might be debunkable in this way, many are likely not. Especially principled reasons in favor of fundamental and human rights, e.g. from social contract tradition, seem to be largely immune against a debunking of this type, because they do not involve hot emotions, seem to be generalizable and inherently respect each contract partner as an equal

bearer of rights and duties. The attack on this class of right thus fails. However, the debunking strategy might be interesting with respect to specific, emotionally-laden rights (from abortion to prohibition of torture).

Julia Wesołowska. Awarding compensatory damages on the basis of affective forecasting. The law's intuition versus the science of the mind

How should law determine how much money to award for one's suffering? Should it rely on the intuitions of legal decision-makers, or adhere to science? What if the scientific formula contrasts with the method solidified by years of legal practice? American law awards civil damages not only to compensate for what someone has already suffered, but also for what he or she may be "reasonably anticipated" to suffer in the future (Blumenthal 2005:182). This "reasonable anticipation" involves some assumptions made by the judge and the juries as to the impact of negative events on certain emotional states in victim's future life. E. Greene has derived two models which the jurors use in order to arrive at the estimate of damages – one of them involves anchoring and adjustment and the other one holistic reasoning (Greene & Borstein 2003:157). While further elaboration on the topic correctly underlines the fact that the victim's own estimation of damages biases the jurors' decision, it lacks a fundamental observation – that when taking into account the emotional states of the victims, the jurors implicitly refer to a picture of psyche not dissimilar from their own, "estimating" the level of suffering, out of necessity, using their own frame of reference.

This reflection sparks a debate in light of the discoveries of affective science regarding the accuracy of individual's predictions of their future emotional states, as well as the states of others. "Affective forecasts" have not only a purely cognitive value – their impact on human life is so great, that they are sometimes defined as "the guiding stars by which people chart their life courses and steer themselves into the future" (Gilbert et al. 1998:617). These kinds of prognoses are exactly what is at play during the estimation of the impact of a negative event on the rest of an individual's life – much like the one that occurs when determining compensatory damages.

The significance of affective forecasting in the context of law, and especially, compensatory damages, becomes clear when one is confronted with empirical data showing how inaccurate this mechanism is. As many studies have shown, individuals notoriously miscalculate the emotional impact of various negative events – starting with life-altering ones, like a serious accident, loss of a spouse or a child, and finishing with such trivial ones as menstruation (Ross, 1989:342). In general people overestimate mostly the amount of duration of mental suffering (Gilbert et al. 1998:619. These are precisely the aspects taken into account by American courts while awarding the damages ("experimental evidence suggests that the perceived amount and duration of a victim's mental suffering are indeed primary factors in determining mock jurors' damage awards") (Blumenthal 2005:184). It appears almost paradoxical that it is the most vital factor in such cases that humans tend to get wrong.

This disparity between common-sense, folk-psychological affective estimates used by law and the hard empirical results was noted by legal scholars, who began to examine how the erroneous nature of affective forecasting plays into legal institutions which

involve estimation of mental suffering. In particular, situations where the self-reported future emotions are a factor, are of interest. Such situations include, but are not limited to victim impact statements to capital juries, some sexual harassment claims or contracts for surrogate motherhood (Blumenthal 2005). The possible normative consequences of this disparity are discussed – scholars debate whether law should take into account the errors in affective forecasting by, for example, awaiting smaller, fixed amounts of damages in certain typical cases. While some authors postulate that damages should closely follow scientifically-based knowledge (e.g. by that "injuries that are very painful but that do not produce long-lasting suffering or disability-such as some acute fractures or burns-should lead to relatively low compensation awards") (Greene 2003:179), others are more wary of formulating simple recommendations, believing the matter to be too complex for formulating ready-made formulas. The interest of this presentation is limited to affective forecasting in the context of civil compensatory damages for a number of reasons. It purports to avoid the entanglement of the most extreme emotions present in criminal law, and especially capital cases, and to focus on so called 'hedonic damages', connected with the quality of emotionally felt and constructed daily life. The presentation is aimed not so much at defending either the commonsense or "scientific" basis for awarding the damages as at showing how this disparity challenges the intuitions present in and around the law – intuitions firmly ingrained in society and culture. It seems a worthwhile enterprise to review, first, how law intuitively assesses and estimates future emotions, translating them into the amounts of compensatory damages, and, secondly to understand a phenomenon that may change this dynamics. Not only the implications for both legal practice and theory will be broadly discussed: the empirical facts about affective forecasting will be used as a kind of a mirror for the legal theory to see itself in, with its implicit, commonsense intuitions. Deeper, underlying ethical questions, such as the quasi-retributive role of civil damages, will also be taken into account, as well as the attempt to describe the possible consequences of adapting a standard of awarding damages grounded in affective science.

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Carlo Garbarino. The intuitive mental content of rules

The law is a social authoritative practice, but a debate is raging in jurisprudence about the "content" of law. A central claim of legal positivism - for example advanced by Hart and Raz - is that the content of the law depends only on law practices carried out by agents with normative powers (legislators, judges, or other administrative agencies). By contrast, according to an anti-positivist view - for example advocated by Dworkin - the content of a rule is determined by a form of morality, and not solely by social facts because a legal proposition is entailed by the set of principles that best justify the practices that generate it.

But what is ultimately this "content" of the law? Is there a way to move on in this debate? I advance a neuro-based approach, arguing that a possible strategy is to explore whether and how the law implies an intuitive "mental content" in the agent confronted by it. In broad terms mental content is what a mental state "represents" and also defines the type of a mental state, a desire, a belief, or something else. This twofold aspect of a mental state is generally defined as "intentionality", often in an intuitive form. Because consciousness and intentionality are essential properties of mental states in general, also the mental content of an agent confronted by a rule is termed here as a form of "intuitive intentionality" which defines the type of the normative mental state such as obeying/disobeying a rule, or deliberately exercising powers or liberties under permissive rules.

So the aim of the paper is to explore forms of intuitive intentionality expressing norm's acceptance. I surmise that an authoritative directive becomes moral, legal and practical depending on the intuitive mental content of norm's acceptance, and I focus on of the nature of legal rules in relation to their concrete application by individual, autonomous recipients. To do that I develops an initial phenomenology of the intuitive mental content of those personal rules.

According to moral realism moral and legal judgments express a belief which can be true or false, , while according to moral anti-realism, moral and legal judgments express individual mental states which cannot be true or false. In moral realism moral and legal properties are identical (or reducible) to natural properties, while in moral anti-realism a (moral or legal) rule acquires a concrete content if it is accepted by an individual. I propose that the anti-realist program provides an analytical tool to solve the ontological problem about intuitive personal rules. Within this approach one can rely on a first-person perspective, in a methodology that extends its focus to the subjective experience of norm's acceptance itself.

The focus of this subjective experience is the phenomenological experience of the intuitive mental content of norm's acceptance which is established as self-observation in a fully developed and rigorous methodology of first-person empiricism. The observer (the agent) and the object (the mental state) are not distinguished but belong to a subjective experience (first-person perspective). The protocol of this first-person investigation is established in the sense of self-observation in which the observer deliberately suspends personal beliefs for purposes of the analysis. So one can analyze the mental content of norm's acceptance in a fully developed and rigorous methodology of first-person empiricism.

The anti-realist approach that unfolds in the first-person perspective appear to be capable to answering questions about norm's acceptance in so far as it relies on an account of what it means that a person accepts a rule as a legal rule, while a third-person perspective does not attain this result. I propose here to call "legal phenomenology" this study of intuitive structures of consciousness confronted by rules as experienced from the first-person point of view. The central structure of such an experience is its intentionality, that is the directedness of experience toward the rule, a property of consciousness that is a consciousness of, or about, such a rule. This experience is directed toward the rule by virtue of its mental content (which represents the rule as internalized by the recipient), together with appropriate enabling conditions defined by legal practices. Rules (moral, legal, practical) are thus ultimately personal rules and a rule becomes moral, legal and practical depending on the intuitive mental content of norm's acceptance.

The most inclusive case is that in which an individually accepted rule is moral, legal and practical at the same time, but an individually accepted rule can combine any two dimensions (moral, legal or practical) but exclude one of them. Let us take as an example the prohibition of smoking in public places. This prohibition can be accepted both as a legal and a practical rule (but not as a moral) rule. This occurs for example when the prohibition that is publicly posited is accepted by the individual as a legal rule but also as a practical rule that promotes personal good health, in so far as there is no acceptance by the individual of that rule as a moral rule. The same rule that prohibits smoking can be individually accepted both as a legal and a practical rule (but not as a moral) rule. There are also instances in which an individually accepted rule is only moral, or only legal, or only practical. The paper will provide further examples of these intuitive forms of norms acceptance

In conclusion: anti-realism in this context (i.e. the idea that moral, legal and practical judgments express individual mental states, which cannot be true or false) shows that there is a subjective ontology of rules, which can be moral, legal or practical only at an

individual level particularly in rule-following through intuitive forms of rule acceptance. This approach is aligned with the particularist approach to normative ethics, an approach that opposes generalism by claiming, in its extreme possible version, that normative moral reasons ultimately depend on the context, i.e. the rationality of moral thought does not depend on a suitable provision of suitable principles applicable to similar situations. Bringing this anti-realist meta-ethical attitude into the debate about jurisprudence makes it possible to abandon the idea that legal practices have a distinctively legal nature, rather than also having a moral and practical dimension, depending on the cases.

Jaap Hage. Legal intuition and justification

In the 1970's the hermeneutic approach to legal reasoning was very popular, including the work of Josef Esser. In his book Vorverständnis und Methodenwahl, he presented a theory of legal decision making that assigns a role to a direct grasp of the law, preceding legal reasoning based upon methods of interpretation. In the Netherlands, these ideas inspired several publications which proposed theories of legal justification and/or judicial decision making – the two were not always clearly distinguished – that treated legal argumentation as a tool for justifying legal judgements that were arrived at intuitively. Legal reasoning was assumed to be 'regressive': the conclusion was already given with legal intuition , and legal argumentation served two functions. The one function is as check on whether the intuitive judgement can be justified at all. The second function is to provide the conclusion with arguments that convince the audience.
In the philosophy of science, this distinction between intuitive hypothesis formation and logical testing them was popular too. According to Popper, the characteristic that sets off science from metaphysics (non-science) has nothing to do with a method for the formation of hypotheses, but only with the possibility of testing them. In this connection, a distinction was made between the context of discovery (hypothesis formation) and the context of justification (hypothesis testing). The former would be a merely psychological process, not amenable to logical scrutiny, while the latter would, on the contrary, be a matter of logic.

Also in the 1970's – but with a precursor in 1951 - Rawls proposed a method for moral theory formation which assigned a central role to moral intuitions. A moral theory would be justified if it could unite well-considered moral intuitions and general moral principles in a coherent whole.

As these somewhat older examples illustrate, the distinction - if not opposition - between on the one hand intuitive or heuristic judgements and on the other hand tested and legitimized judgements took a central place in physical, moral and legal methodology. Meanwhile, psychological research has improved our knowledge of what goes on in knowledge acquisition. However, the question remains what the role is of intuitive or heuristic judgements in the justification of physical, moral or legal theories. In this contribution I will focus on the role of intuitions in the justification of legal judgements, recognizing that this topic has both similarities and dissimilarities to the role of intuition in non-legal domains. I will argue that there is a limited role for intuition in the justification of legal judgements.

Piero Mattei-Gentili. Convention, Heuristics & and Rule-Following in the Creation of Judicial Precedent

The essay is based on two interrelated premises: a) that, in broad sense, adjudication (judicial activity) is a joint activity and; b) that, aside from "applying" statutory norms, its dynamic may be better understood by the scheme of Wittgenstein's rule-following. The former means that the agents involved in the activity share a goal –to decide similar cases in a similar manner or, more specifically, to interpret and apply legal norms in the most uniform or constant manner possible, although this does not exclude that they may share many other common goals, as it is plausible to think– and for that, they work within a frame of actions looking out for a sort of coordination that allows them to achieve that goal. The latter involves the process of imitation and identification of patterns of behavior by the agents from their peers, so as to abduct a rule to be applied in the due case. The abducted rule, thus, would be a rule of (social) behavior, different from a legal norm. The rule has not a precise identifiable author, by definition is effective, and may not be uttered at all (or even be hard to express), nevertheless, members of the community can identify it and look out to follow the rule as the others do.

Then, following Giovanni Tarello and Riccardo Guastini, I assume the distinction between the product and process of interpretation. In this sense, the precedent can be regarded from two perspectives: a) as the result of an antecedent interpretative activity held by a judicial authority or, b) as the interpretation that comes from observing foregoing resolutions from judicial authorities.

With the above in mind, I will focus on the perspective of the precedent as an activity to develop a conceptual explanation of the formation and evolution of judicial precedents based on the rule-following dynamics present in the interpretation of past judicial decisions. For that matter, with the conceptual aid of social philosophy for the formation of social rules and conventions (mainly David K. Lewis and Cristina Bicchieri) and taking into account the cognitive bias in decision-making (mainly the anchoring and the herding effects) that have been made explicit by the studies of Behavioral Economics, I will sustain the thesis that the formation of precedent is largely the result of following certain rules (not legal but internal "social" rules) for the interpretation and application of past standards of decision to new cases. These rules (that live within the community of judicial decision-makers), or rules for interpreting the precedent, are the result of –and thus, explained because of– a combination of factors that involve the desire of coordination for acting as it is expected by the judicial peers as well as the cognitive bias that affect the reasoning behind decision-making based on past and analogous decisions.

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Gábri Angéla. Neuroscience and psychology of judicial decision-making

It is now widely accepted in neuroscience and psychology that we are hardwired to think in two different ways depending on the mental task we are faced with. The first kind of thinking, called in the literature System 1 (S1) produces "effortlessly originating impressions and feelings that are the main sources of the explicit beliefs and deliberate choices of System 2". If we accept that judges, as human beings, have a functional System1/System2 mental system, their mind will be prone to fast-thinking when dealing with familiar situations and tasks (and turning to slow thinking when new, problematic situations are encountered). Every time a judge recognises in a new case features that make it similar to an old one, the judge will apply intuitively the same solution. This process has its own negative aspects with regard to the heuristics and biases identified by cognitive psychology. These factors can easily influence someone's decision-making and judges are also susceptible to these biases while using system 1. My assumption is that judges only have the chance to exclude these factors if they have knowledge about their existence and they shift their cognitive thinking process from System 1 mode to System 2.

András Molnár. What Is the "Subject" for Law and Neuroscience Research?

The paper addresses the question whether the concept of the autonomous subject can be ultimately expelled from the realm of law on the ground offered by the determinist branch of law and neuroscience studies. The insights of cognitive neuroscience are considered to have revolutionized our understanding of law and its possibilities. This belief is not without reasons. Cognitive neuroscience brought about such a deep understanding of the workings of the human psyche that is unparalleled in history. For the law, this means that new, more effective and more precise ways have been and are being developed to explain legally regulated behavior, so that legal regulation and judicial decisions can—or are hoped to—be more accurately adjusted to the empirical facts of the brain and the neural correlates of the respective acts. These results can be called the "practical" side of law and neuroscience research: new discoveries are intended to be utilized sooner or later to decide concrete cases. Such application ranges—to name just a few examples—from the possibility of lie-detection (Schauer 2016) to redress for emotional harm (Fox and Stein 2016: 113-121) to the evaluation of addiction in criminal law (Kenneth 2013; Hall and Carter 2013). There is, however, a "theoretical" aspect to the issue as well. Throughout the history of modern thought, social and natural sciences strove to provide causal explanation to human behavior. These explanations gave a boost to the emergence of materialistic thought and mechanism. Cognitive neuroscience, exploring the natural processes of the brain, the organ of the human body most commonly connected to the construction of the mind, intruded into the intimacy of our experience of being a transcendental, autonomous subject that is something metaphysically more than the sum of its bodily/material parts, a prevalent view primarily associated with Cartesian dualism. While a mechanistic conception of the human being indubitably conforms to the paradigm of natural sciences (the notion that all observable phenomena can be explained as part of a chain of causes and effects), such "basic facts" are hard to reconcile with our conception of ourselves as "conscious, intentionalistic, rational, … ethical and free will possessing agents" (Searle 2007: 4-5). This state of affairs poses a significant challenge to our current conception of legal responsibility, the doctrine that legally relevant behavior (with certain slight exceptions) has a mental component (be it intent, negligence, desert, consent, or any other state of mind) beyond the act as perceptible to the external environment. The contradiction led (to describe the situation in a simplified way) to the division of law and neuroscience research to two main branches: "determinists," stating that our conception of human agency should be revised to conform to the ever-increasing explanatory force of natural sciences, relying frequently (though not exclusively) on the observations and theories of Libet (especially his famous experiment, 2004: 126-137) and Wegner (2002); and "compatibilists," claiming that while the laws of nature and their effect on humans as biological organisms are in no way to be denied, their existence does not exclude free will and the construction of

the mind, these latter being something different than mere causal processes (Pardo and Patterson 2013: 44).

The prima facie stake of the debate between determinists and compatibilists—a division itself simplifying—is the legitimacy of our conception of the legal subject as an autonomous and responsible entity, and thus the applicability of the concept of legal responsibility as we know it. It is this issue that my lecture aims to address, with special emphasis on determinist attempts to do away with human agency characterized by free will (Alces 2018: 12, 35). While neuroscience may make one confident about the hope of "unveiling" the mystery of the mind, and this may seem to result in the dismissal in the concept of free will, Searle seems to be on the right track when he points out that "[h]uman rationality presupposes free will," and that the distinguishing of rational and irrational behavior "is only possible is there is a space in which rationality can operate" (Searle 2007: 10). Law and neuroscience research seems to have neglected to ask the question Schlag asked succinctly: "who or what thinks or produces law" (Schlag 1991: 1629)? The point of my paper, relying heavily on Schlag's insights, is that law and neuroscience research needs to explain a dual (not dualistic) concept of the subject. The first kind of subject is the individual human being who participates in a civil litigation or a criminal procedure. In this case, the insights and conclusions provided by determinism can be utilized to improve legal practice by rendering it more up to date with scientific achievements and providing better grounds for deciding cases. If one follows Schlag's reasoning (Schlag 1991: 1647), it is safe to argue that the individual human being appears more as the object than the subject of law. One should be aware, however, of a second type of subject: the subject that determines the normative and theoretical framework for law to follow. In this latter case it is highly debatable whether the autonomy of this type of subject can be deconstructed the way the autonomy of individual participants (i. e. subjects of the first type) can. The problem is that while law and neuroscience scholars argue that the elimination of the "folk psychological" concept of responsibility necessitates an instrumentalist theoretical approach to determine legal goals and measures (Alces 2018: xiii-xiv), such reasoning in fact fails to answer the question how instrumentalist normative propositions can be derived from the fact that free will is an illusion. On this more general level the construction of a subject that posits a normative framework for law is inevitable. The concept of the subject thus cannot yet be dismissed totally from law on the basis provided by law and neuroscience research.

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Nathanael E.J Sumampouw. Confirmation bias in police investigators working with Child Sexual Abuse cases

Police investigators are expected to examine evidence: eyewitness' statements, suspect statement, technical evidence (medical or trace evidence), reliably and objectively. Therefore, professionals must be able to dissociate themselves from extraneous context and other influences which potentially interfere with their ability to objectively examine, evaluate and judge the relevant information. However, forensic experts such as police investigators are prone to confirmation bias (Charman, 2013; Kassin, Dror, & Kukucka, 2013). Confirmation bias is expected when forensic experts evaluate and integrate various types of evidence (Charman, 2003). Based on previous findings on the proneness to confirmation bias, we conducted an experimental study in which CSA police investigators were assigned to a bias versus no bias condition. All police investigators received a case vignette on CSA in which statements of a young child concerning abuse were included. In the bias condition, police interviewers received extra domain-irrelevant information in the form of a witness statement. In this witness statement, it was described that the child was a bad child, had often lied about being abused in the past. The other group did not receive this information. Following this, the police officers had to answer questions concerning the credibility of the statements and which type of questions they would ask in a follow-up interview. It was expected that the bias group perceived the statements as less credible and was least likely to use open invitations in follow-up interviews.

Tomasz Zygmunt. Hunch: intuition or insight?

The presentation addresses the issue of unconscious legal decision making. It focuses on two psychological phenomena, namely intuition and insight, and uses them as conceptual tools to reformulate one of the most famous theories concerning judicial decision making: Joseph C. Hutcheson's conception of judicial hunch. In his essay "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision", Hutcheson exposes the process of making a judgment as the unconscious – or at least partially unconscious – capacity of a judicial mind to solve a legal case not by deductively applying legal rules, but rather by a judge's "feeling". On these grounds, legal theory has devised a variety of concepts covering unconscious legal decision making, notably some that are based on instruments and concepts of contemporary psychology. Importantly, the rapid development of research on human intuition was accompanied by a new conceptualization of legal reasoning in which the psychological phenomenon of "intuition" was used as a conceptual tool to revive realistic theories – these, paradoxically, could have been called "intuitive" only until that moment. Hutcheson's "hunch" was, hence, adjusted to the concept of intuition under a psychological theory of human decision making. It appears, however, that Hutcheson's conception can be reformulated in a brand new way by using another psychological phenomenon as a conceptual tool. This newly refreshed concept is called "insight" and is associated with the sudden impact of a solution coming to a human mind "out of nowhere" while a person is struggling with an unusual problem. The main goal of presentation is, therefore, to reformulate Hutcheson's theory of hunch by dividing it into two psychological concepts: intuition and insight. In the field of psychology, the term 'insight' refers to the occurrence of "a sudden change from not knowing a problem's solution to knowing it consciously" (Siegler 2000, p. 79). Common scientific opinion associates insight with a so-called "eureka" moment or "Aha!" experience (e.g. Zander et al. 2016). This metaphor refers to the story of Archimedes who, while struggling with a riddle about a fake gold crown, was enlightened by his overflowing bath. Although such an explanation of how Archimedes obtained the famous principle is questionable, this story illustrates the psychological background of insight. When the human mind faces a problem which cannot be solved analytically (or such a solution requires too much effort), after a period of time an intriguing moment can happen in which the solution sometimes suddenly comes to mind "out of the blue", usually accompanied by a feeling of excitement. Three main features of insight can be extrapolated from this description:

1. An impasse within the process of problem solving.
2. The abruptness of the solution's manifestation.
3. A feeling of excitement as a concomitant of the answer.

As a characteristic of insight, none of these features are undisputable in the field of

psychological discourse. They may, however, be used as a proposition for exemplary reformulation of the theory of judicial "hunch", as well as the arguable basis for future deliberation. On the basis of this thesis the following interpretation of the theory of judicial hunch is proposed.

The presentation consists of four main sections. In section one, the psychological concept of insight is shortly described and juxtaposed with intuition. In section two, the concept of hunch is reviewed in accordance with two psychological phenomena that occur during unconscious human decision making: intuition and insight. In section three, the distinctive features of insight in legal decision making are analyzed to create an adaptive toolbox for further theoretical considerations. The final section summarizes the argumentation and conclusions of the following deliberation.

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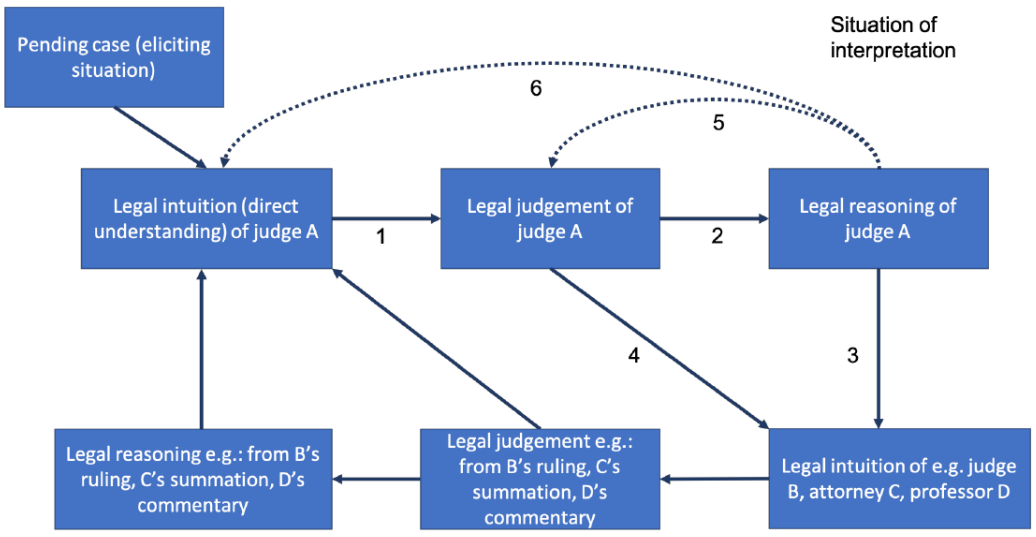
Jan Ptaszyński. Is intuition everything? Preliminary model of judicial decision-making

In this presentation I am going to (i) sketch a model of judicial decision-making and (ii) try to show why I believe that judges – if not necessarily use – are at least incentivized to frequently use their effortful system 2 when making legal decisions. The methodology that I embrace is methodological individualism. So as the starting point I need to define the subject of legal cognition (legal decision-maker) that I am going to analyze. My subject will be a judge. Thus, I am going to model judicial decision-making.

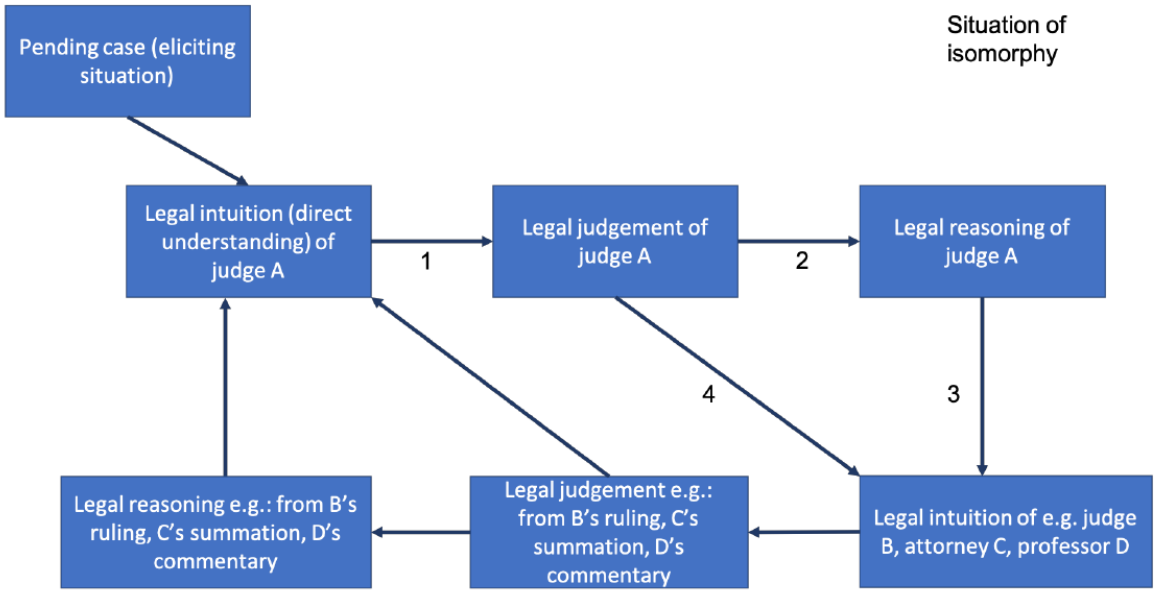
While judges are ordinary human beings with all our species' mental flaws and talents (evolutionarily shaped mind), they are also trained in a particular way to work in the juristic world and solve legal problems.

With the subject's described, there is a need to determine the boundaries of the legal decision-making phenomenon that my presentation will deal with. I want to focus on the type of thinking specific to judges. This thinking might be defined as technical, lawyering problem-solving that judges do. Framing the problem this way should allow to describe the particularities of legal decision-making. Being aware that in reality one cannot clearly distinguish the factual and legal part of court's case or judges' thinking, I will nonetheless exclude the factual judgements from my analysis and treat the full knowledge of the facts of the case as given. Thanks to that I will be able to model decision-making processes of judges, who resolve legal problems with better or worse knowledge of the facts of a pending case. So, the presentation will be about judicial thinking of law and legal decisions resulting from it.
I will start by taking an elder model of the judicial application of law developed by Polish legal theorist Jerzy Wróblewski and juxtaposing it with the insights from moral psychology (Haidt's social intuitionist model). Then I will merge the models and present their synthesis (confer Figure 1 and 2 in the pdf file enclosed). The intuition may be there treated as system 1 kind of thinking while reasoning as system 2 type of it.



(1) intuitive legal judgement (legal decision-making)	(4) social persuasion
(2) *post hoc* reasoning (justificaton of legal judgement)	(5) legal judgement made basing on legal reasoning
(3) reasoned persuasion	(6) private reflection creating new legal intuition

Figure 1 - model of legal judgement (situation of interpretation)



(1) intuitive legal judgement (legal decision-making)	(3) reasoned persuasion
(2) *post hoc* reasoning (justificaton of legal judgement)	(4) social persuasion

Figure 2 - model of legal judgement (situation of isomorphy)

Yet this model shows only that judges might use both systems: effortless system 1, and the conscious system 2 to come up with this or that solution (problem-solving scheme). It does not however catch the moment of decision. Therefore, I need to correct it by explaining how judges choose between, consciously or unconsciously invented, legal solutions.

To do so I will use the somatic marker hypothesis . I am going to claim that problem-solving schemes are developed first and the emotional choices between them come second. So, judges firstly try to come up with the solution to the legal problem.

However, no matter which system they use, these systems only serve to find the right problem-solving scheme (procedure). The decision (a choice of the best procedure) is guided by emotions. Competing solutions, be it intuitive solutions or reasoned solutions, are chosen with the help of bodily states that give clues which verdict (which of the possible future behavior) is more advantageous for the judge. So, my ultimate model would look like this:

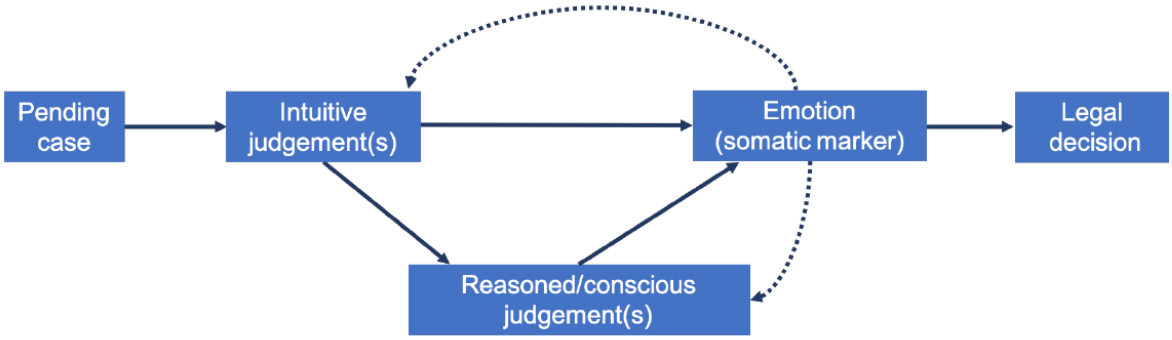


Figure 3 – model of legal decision-making

Both of my models, as based on Haidt's model, stress out the role of intuitive-driven judgement. But Haidt's contention that conscious reasoning is used virtually only to justify the already-made decision is controversial. Therefore, I will also make use of the concerns and findings of its critiques, especially those emphasizing the importance of system 2 kind of thinking in moral issues . Besides that, I will try to discuss – basing on the general theory of judicial behavior – what incentives drives judges to use their systems 2 in the modern European justice systems. I am going to argue that while intuition is crucial in legal thinking, the structure of judiciaries leads judges to more strategic behavior (and therefore to strategizing, which rests upon the conscious emulation of mental representations, shortly: use of imagination). Judges are highly influenced by their supervisors from higher (appellate) courts and thus have an incentive not to limit themselves to intuitive judgements but also to consult their system 2 to make sure that later on they will be able to sufficiently justify the decision so that it will not be reversed by higher courts. Another two reasons for the use of reasoned judgement will only be mentioned shortly: on the one hand the inflation of law. The corpus of statutes and other sources of law is significantly growing each year. In such circumstances judges not only make the decision facing uncertainty of their outcome but also lack previous experience (that creates legal intuitions) in solving such legal problems. Therefore, they had to engage in deliberative thinking and – perhaps using a metaphor – come up with the new particular solution basing on some old legal principle. On the other hand, it may happen that a judge comes across a conflict between her own morality and the group morality expressed in legal institutions. In other words, a conflict might occur between judge's moral preferences and her legal intuitions. I would expect such a dilemma to

push a judge into using all capacities that she possesses (including system 2) to solve it.

All those cases may be put into one box called "be-rational box". That is the comparison with an experiment done by Pizarro, Uhlmann, and Bloom . When asking experiment participants to morally judge a woman willing to kill her husband, who later died but not because of her behavior, they told the treatment group to make "rational, objective" moral decision first and only afterwards to decide it intuitively. The researchers found that this group tended to make different, more logical, choices (presumably based on moral reasoning) than the control group that appeared to only use moral reasoning to justify their previous moral intuition. Summing up, my view is that judges are humans, who are continuously under pressure to "be rational" and thus use their systems 2 quite often.

Maurits Helmich. Is Legal Philosophy a Branch of the Moral Philosophies?

Law is a complex phenomenon, and there is a rich debate in jurisprudence concerning the best ways to study it. Ronald Dworkin has proposed to solve legal philosophy's methodological puzzle by framing legal questions as moral questions: how can we best interpret existing legal practice? This essay argues against this methodological view. It contends that we should above all study law as a social phenomenon, an institution that shapes our lives normatively. That requires the use of moral phenomenology, but still involves a social -- not a moral -- question.

Michał Araszkiewicz. The Notion of Direction of Fit in Legal Reasoning. A Generalized View

The notion of direction is widely employed in philosophy of mind and philosophy of language in the context of discussion of the so-called directions of fit. Basically speaking, in the philosophy of mind such mental states as beliefs have mind-to-world direction of fit (if a belief is incompatible with the reality, the belief should be corrected or rejected), while desires and intentions have world-to-mind direction of fit (if the state of affairs is incompatible with the desire of an agent, then this agent, ceteris paribus, will have a ground to act to change this state of affairs to conform to the agent's desire). In the philosophy of language, a speech act of assertion has word-to-world direction of fit, while for instance a request has the opposite direction. In case of performative speech acts we have the so-called double direction of fit: a part of institutional reality is created by means of a facit of an appropriate agent, but at the same time the content of speech act reflects the state of affairs as created (cf. Austin 1962).

In a simplistic view of the law, endorsed by John Austin, legal rules are orders of the sovereign, expressing its desires (Austin 1932). In this account, legal rules have clearly world-to-word direction of fit. However, as far as contemporary conceptions of law employ much more complex view on what the law is, its analysis in terms of direction also becomes complicated. In this talk, we adopt a view that law is a complex social practice the propositional content thereof is developed by means of constrained, constructive argumentation (Hage 2012). We therefore assume that the content of law is what the best available arguments tell us it is, however the process of argumentation is constrained by multiple factors, including, for instance, our scientific knowledge about the world, folk theories adopted by the relevant actors in the course of legal reasoning, and so on. The adopted view seems to suggest that because legal discourse is essentially practical, the propositions forming legal argumentation have world-to-word direction of fit. If we argue about the law, we want something be altered in the social world (or be preserved, if it is contested). However, the actual picture is, again, much more complex.

In the literature of the subject there were certain interesting attempts to spread out this complexity into prime factors, to mention Eng's theory of fused modality of legal propositions (Eng 2003). Eng argued that legal propositions have dual nature: they are presented both as description of a part of legal reality (to which the recipient should conform its beliefs) and as normative propositions (which should be accepted on the basis of a theory that serves as justification for normative claims, and there are many such theories). Eng's theory has been the subject of intensive criticism (Dahlman 2004). However, we argue that Eng managed to capture an important intuition which is a part of a larger picture.

We claim that there is an inherent tension in legal reasoning between accounting for the content of law as beliefs (referring to a relatively stable part of social reality; we will abbreviate this aspect as Law as Reality; the view should not be identified with legal realism) or as goals/intentions (aiming to develop or alter this reality in certain manner or to pursue certain policies, etc.; let us refer to this moment as Law as Policy). The Law as Policy view seems to be compatible with the view of law as constructive argumentation, however one should keep in mind that the process of this argumentation is constrained; the primary source of applicable constraints follow from what we refer to as Law as Reality. A good illustration of the latter phenomenon is the doctrine of stare decisis in Anglo-American law or the fundamental conceptual elaborations as present in continental legal culture.

The "tension" is a metaphor, which should be clarified by means of analytical tools. In the talk we will analyze the four basic structures of reasoning as defined by Trzęsicki (2011; namely: inference, explanation, verification and justification) and investigate how are they used in the process of legal argumentation. Against this background we will also analyze which elements of reasoning follow from the view of Law as Reality and which are brought by the Law as Policy perspective. It will be presented how the notion of direction of fit are used in this context and, eventually, how the claims about the role of direction of fit in this process are contested. Or should be contested. The main result of the paper is the classification of legal reasoning patterns with regard to the type of direction of fit they make use of, taking into account the distinction between Law as Reality and Law as Policy. Eventually, we contend that while in general view, the law may be seen as double-directed enterprise (Policy becomes Reality which constrains Policy etc.; cf. Hage 2012), in concrete case of legal reasoning the two moments are often separable, which has an influence on the argumentative strategies adopted by relevant agents.

Piotr Bystranowski, Bartosz Janik, Maciej Próchnicki. Anchoring effect in judicial decision-making: a meta-analysis

Anchoring effect, the tendency to over-rely on salient but not necessarily relevant numerical values present in the decision context, seems to be one of the best documented biases in the behavioral theory of judicial decision-making. Over the last thirty years or so, substantial experimental evidence has been gathered, showing that individuals tend to rely on a variety of anchors while deciding on, e.g., the amount of damages or a prison term. However, despite the abundance of experimental studies in this area and the possibly utmost importance of the anchoring effect for the operation of the legal system, only one review of literature and no systematic meta-analysis on anchoring in judicial decision-making have been published. This paper is aimed at filling this gap. The following meta-analysis is aimed at assessing not only the general effect size in the existing literature but also a number of moderators possibly mitigating or intensifying the anchoring effect, such as the expertise of subjects (laypeople vs. professional legal decision-makers), the degree of relevance of the employed anchor or the presence of various techniques of debiasing.