Fictional Minds. The Law's Misrepresentation of Human Thought

MICHELE UBERTONE

Assistant Professor of Philosophy of Law, Maastricht University (Netherlands)

✉ **michele.ubertone@maastrichtuniversity.nl** **https://orcid.org/0000-0002-7304-3701**

GIUSEPPE ROCCHÈ

Postdoctoral Researcher of Philosophy of Law, Maastricht University (Netherlands)

✉ **giuseppe.rocche@unipa.it** **https://orcid.org/0000-0002-6426-1942**

1. Fictional Minds

The purpose of this introduction is to identify the topic of the editorial section[1]. In the first part, we will try to explain in what sense legal practice may be said to rely on false presuppositions about the human mind. We will also consider some doubts readers may have about the legal relevance of examining such presuppositions and offer some reasons for treating them as important to understand the way in which legal institutions do and should operate. In the second part, we will consider the content of the different papers that make up the issue, analysing the similarities and differences in the authors' focus and approach.

According to Hans Kelsen, legal sciences differ from natural sciences not so much in the portion of reality they examine, but rather in the interpretative principle they adopt to examine it (Kelsen, 1950; 1991, 24). Any fact of the world can become legally relevant if only a community decides to *treat it as*

[1] Although both sections of this foreword were conceived and discussed jointly by the two authors, in order to comply with a requirement of Italian law, we declare that Michele Ubertone is the author of the first section and Giuseppe Rocchè the author of the second section.

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legally relevant. What constitutes the specific scope of legal enquiry is this *attribution of relevance*, rather than the accurate *description* of empirical facts. Natural sciences observe phenomena to explain them in terms of causes and effects, according to what Kelsen calls the *principle of causality*. Law, on the other hand, when faced with the same phenomena, does not primarily consider causes and effects but rather presupposes the obtaining of empirical facts to then *impute* responsibilities and normative consequences: who is responsible for what and what must follow from a certain fact according to the legal norms in force. It relies on what Kelsen calls the *principle of imputation*. While a scientist might inquire whether a homicide *was* caused by drug use or genetic factors, a judge or a lawyer will consider whether and under what conditions that person *should* be regarded as responsible and whether the act should be punished, according to predetermined criteria.

Both causation and imputation establish nomological (law-like) relations among facts which can be used for drawing inferences, in the empirical sciences and in law, respectively. But there are important disanalogies between these two types of analyses. First of all, of course, scientific laws describe, while legal norms prescribe. Second, while causal analysis is virtually never-ending (any cause is itself caused and we may sensibly ask ourselves what caused the Big Bang, if anything), analysis based on imputation always has an endpoint, the attribution of responsibility to a person is warranted as long as it satisfies predetermined and authoritative criteria. Whereas science regards humans as objects determined by the physical world, the law assumes them as being capable of responding to reasons and considers them responsible in case of failure to do so. Kelsen makes clear that this conceptual operation – carving out certain elements of reality, legal agents, to remove them from the domain of causality and place them in that of imputation – is not committed to the existence of aspects of human behaviour which are exempted from causal laws.

> If human behaviour, to be a possible object of imputation, would have to be considered as exempted from the law of causality,

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> causality and freedom would be, indeed, incompatible. (...) However, there is no such conflict if we understand the true meaning of the statement that man as a moral, religious, or legal person is free (Kelsen 1950, 8).

In a Neo-Kantian vein, Kelsen conceives causality and imputation not as intrinsic features of reality but rather as two alternative *a priori* concepts we employ in order to understand reality (Paulson, 2001, 47).

According to Kelsen, in other words, assuming human responsiveness to legal reasons is a condition of possibility for legal discourse. This assumption is a transcendental matter, not subject to being disproved by scientific progress in the understanding of the actual *causes* of human decision-making. Saying that John's act of disobeying a legal norm can be fully explained by social or biological factors is not, in itself, an argument for claiming that John is not legally responsible for his action. The fact that John's behaviour is caused by something other and additional to his conscious choice does not exclude the possibility that such behaviour can nonetheless be attributed to him. This is because, whatever criterion of imputation a given legal system adopts, it must ultimately rest on normative criteria, criteria that are established by what Kelsen calls "acts of will" (Kelsen, 1950, 2). Once those authoritative criteria are satisfied, any examination of the causal origins of the behaviour becomes irrelevant. This line of reasoning – akin to other classical arguments, such as those derived from Hume's law – has operated as a protective barrier insulating legal theory from the growing influence of the cognitive sciences. As a result, legal theorists have often treated the findings of these disciplines as largely irrelevant to legal reasoning. Canale and Tuzet, in discussing the criticisms made on psychological grounds to the syllogistic model of legal reasoning, for example, write:

> Sometimes the critic of the syllogism adds that it is merely an *ex post* rationalization of a decision already made on other grounds; this would occur especially in those legal systems that allow the

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> operative part of a judgment to be announced first and the reasoning to be drafted afterwards. Yet the reply remains that the objection misses the point: from the standpoint of what justifies a decision, what matters is the logical structure and the reasons set out in the grounds; these are the elements that will be assessed and on which any appeals must be based. The rest, including whatever runs through the judge's mind, is legally irrelevant (Canale and Tuzet, 2019, 23, our translation).

However, even if we accept the Kelsenian point that *some* kinds of facts about human behaviour must be disregarded to think legally at all, and the more general point that law is concerned with how legal authority *should* affect human behaviour rather than how it *does* affect it, this does not necessarily imply that it is rational for us always discard all discoveries about the human mind as irrelevant. We may well have good reasons to revise our criteria of imputation if we realise that they make legal practice unfit to pursue the results that we aim to achieve with it. Law is an activity that, like cooking, architecture, or medicine, human communities undertake in order to achieve certain results. The resolution of disputes, the coordination of large numbers of individuals, the repression and reduction of antisocial behaviour are primary goods, we typically aim to secure through law, just like nutrition, shelter, and health are goods we aim to secure through cooking, architecture and medicine, respectively. If these activities are carried out based on false factual assumptions, they risk producing effects other than those expected. In this perspective, it is not at all obvious that psychological facts should be disregarded when we think about how laws should be drafted or how they should be interpreted.

With this editorial proposal of *Athena*, we aim to explore some of the assumptions about how the human mind works that seem to underlie various legal institutions – assumptions that cognitive sciences are progressively challenging. In every contemporary democracy, it is assumed that citizens choose their representatives "freely and consciously". Parliament translates

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this presumed "popular will" into legal norms, which are then published so that anyone may "know" their content. Judges, in turn, are called upon to "decide impartially according to the law", thereby implementing the collective will in concrete cases. Criminal sanctions are directed exclusively at those who have "voluntarily" broken the law, "knowing" in advance what the legal consequences of their actions would be. All these doctrines form pillars of modern legal culture, but they rest on highly problematic assumptions regarding how the cognitive processes of the actors involved in the legal system actually work. Can lawyers truly afford to disregard the possible falsity of these assumptions?

Here are some arguments that might suggest a positive answer:

1. A critic might say that law is not a set of ordinary speech acts and cannot be said to have presuppositions in the same way as ordinary speech acts do. Legal acts seem to be somewhat detached from the specific person performing them and their psychological states. Law consists of *authoritative* acts endowed with validity regardless of whether they are justified or conceived to be justified by those who issue them. This seems to be an essential aspect of the nomodynamic character of a legal system (i.e., its ability to regulate its own transformation): legal norms are understood as claiming authority for the mere fact of having been produced in a certain manner. A statute, a regulation, or a judgment does not condition its binding force on its *content*, but only on its *source*. They are valid insofar as they come from authorities legitimized to issue them according to certain procedures. This seems to be an essential component of legal practice. If the addressees of legal texts were always allowed to scrutinise the correctness of factual assumptions underlying legal directives and disregard them in case these turn out to be false, then law would lose its authority, and thus its main social function.
2. Even if law had presuppositions, the critic may argue, they would not concern the psychological underpinnings of human behaviour. Law is

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concerned with external and observable behaviours and must necessarily disregard what happens in the inner forum of each individual subject. Again, this seems to be connected to the need for legal acts to limit possible disagreement about their content. As psychological facts are simply too hard to prove, it would be unreasonable for legislators and policy makers to condition their directives implicitly or explicitly to the obtaining of such facts.

3. Even if law did have presuppositions of this kind, in particular presuppositions about the rationality and autonomy of human beings, these presuppositions should not be too readily dismissed. Cognitive sciences may have challenged the idea of a fully rational and autonomous subject, but they have not provided conclusive evidence of the necessary irrationality of human beings or of the nonexistence of free will. Many experimental results are contested, partial, or valid only in specific contexts. As long as this conception is not definitively disproved by science, the legal system can continue to rely on it.
4. Finally, even if law did contain false presuppositions about the human mind, their falsity would not necessarily constitute a problem. Law can, and in some cases must, introduce *fictions*: representations that are not intended to reflect empirical reality, but rather to ensure the coherence and functionality of the legal order. What matters, from a legal point of view, is the ability of these fictions to support effective institutional practices, not their truth.

On the other hand, the following considerations may be made in response to this imaginary critic:

1. Being subject to the authority of law means having reasons for acting based on its commands rather than based on our own assessment of what would be best to do. This is what must be taken into account to secure the law's social function. However, for lawmakers to really provide such reasons and thus for law to have authority in this sense, according to Joseph Raz, one condition must necessarily be met.

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Legislators must base their directives on first-order reasons that would apply to the people even independent of the directive itself (Raz 1986). In this perspective, when this condition is not met, in a particular case, the source of directives may lack authoritative power for that case, despite being generally authoritative. Although epistemic and practical reasons may sometimes behave differently, the mechanism of exclusion in the two cases is similar and thus a non-legal example can help illustrate the phenomenon we are interested in. Consider the case of a physician whom you regard as a legitimate authority and whom you consult to determine whether you suffer from a particular disease. She issues a diagnosis because of the symptoms you reported, and you treat her judgment as authoritative. However, suppose that after leaving the clinic a new symptom appears. While the physician's diagnosis remains authoritative – and this prevents you from second-guessing the disease the earlier symptoms may reasonably indicate – the new symptom constitutes an additional reason that cannot plausibly be excluded by the authority of the initial diagnosis. In general, even if we take legal directives to provide content-independent reasons (Hart 1982, 253–55), their status as practical reasons depends on their justification, that is, on their correct connection to the world, and thus on the truth of their presuppositions. This does not mean that individuals are *always* entitled to scrutinize the correctness of legal presuppositions and disobey whenever they believe them to be false. But it is not uncommon for lawyers to consider considerations based on whether a particular application of a rule fulfils its intended purpose. One of the reasons that may generate this situation is precisely the falsity of presuppositions.

2. The law routinely makes its effects depend on psychological facts. One need only think of *mens rea* in criminal law or of the meeting of minds in contract law. What generates legal uncertainty is not the mere requirement that such psychological facts be established, but rather

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that the law often demands their subsumption under concepts that are difficult to operationalize, concepts articulated in folk-psychological terms that do not correspond to the vocabulary of the relevant sciences. On the other hand, the advances in cognitive science that prompt us to reconsider certain assumptions of legal practice are empirical advances. In this sense, the worry that relying on them would make the law indeterminate because they are too open to dispute seems unwarranted.

3. Even if cognitive sciences have not conclusively shown that human beings are entirely irrational or non-autonomous, they remain the best source for determining if and when this is the case. The belief that a certain set of presuppositions of a norm is *certainly* false may, under certain conditions, justify the belief that the norm will certainly fail to produce the intended effects. Likewise, the belief that a certain set of presuppositions of a norm is *probably* false may, under certain conditions, justify the belief that the norm will probably fail to produce the intended effects. If we aim to increase the instrumental rationality of legal practice, it is reasonable to take into account provisional and less-than-certain conclusions (as of course full certainty is never available in science).
4. Finally, false presuppositions in legal norms or institutional practices must be distinguished from legal fictions. When law intentionally introduces fictions, it does so because it is useful to treat a false proposition as true. For example, when several people die as a result of the same event and the exact time of death of each is unknown, the law presumes a fact that is almost certainly false: that they died at exactly the same time. But treating this false proposition as true produces positive and intentionally sought effects, such as legal certainty and the functionality of inheritance regulation. When law rests on false presuppositions that do not help achieve its objectives but instead hinder them, on the other hand, we are dealing with a very

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different phenomenon. The analysis of false presuppositions is precisely aimed at distinguishing useful fictions from mere scientific ignorance in legal practice.

2. Structure and Key Terms of this Section

The papers collected in this issue address the problem of false presuppositions of legal practice about the functioning of human minds from different viewpoints.

Peluso Lopes's paper offers a critical examination of what debiasing strategies can enhance the rationality of judicial decision-making, particularly in light of the limitations of standard procedural safeguards.

Capriati's paper focuses on the rationality of decision-makers in political systems and, drawing on an epistemic conception of legitimacy, distinguishes different types of government, based on the different subjects whose rationality must be assumed to consider the government legitimate.

Scuderi's paper challenges a distinction that has emerged in the literature concerning *nudges*: that between behaviouristic social interventions targeting individuals (*i-frames*) and more traditional measures aimed at transforming institutional contexts (*s-frames*), engaging with the notion of *meta-nudge*.

Taroni's paper addresses the phenomenon of surveillance capitalism in the age of tech giants and develops two markedly different perspectives for confronting its threats.

Fernández Núñez's paper considers paternalistic interventions, identifying the various features that may justify restrictions on individual freedom, and critiques the legal use of general anthropological conceptions.

Finally, Artosi's paper is centred on free will in the context of Kelsen's theory of law, focusing on how the great philosopher defended a form of compatibilism.

Different as they might seem, the papers all deal with our problem in one way or another, and they can thus be analysed according to the following

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three parameters: the *content* of the presupposition they deal with; the *subject* about whose mind the presupposition is made; and finally, the *subject* who makes this presupposition. Let's examine these three perspectives one by one.

Mental presuppositions have a certain *content* – that is, they adopt a particular image of how the human mind functions. A recurring target of many contributions is the overly optimistic representation of the human mind. Peluso Lopes discusses how legislators assume judges to be more rational than they actually are and tries to examine how the situation could be improved with particular debiasing strategies. In her view, traditional procedural safeguards are often problematic because they are compromised by a rationalist conception of legal judgment centred on the idea of the *legal syllogism*. The legal syllogism "places a general and abstract norm as a major premise; a representation of the fact as a minor premise; and draws a deductive conclusion, that is, the conclusion by a particular and concrete norm". It is worth noting that although this image is regarded by the author as a *normative* model rather than a description of judges' cognitive activity, it remains true that for a legal system to adopt such a normative standard, it must be committed to the idea that the model can be realistically met by judges and other legal decision-makers. Yet such hopes are ultimately doomed, because

> one of the objections that have historically been raised against the syllogistic model is that judges do not decide according to it but do so under the influence of other dynamics like their emotions, idiosyncrasies and preferences of various kinds. According to this view, the syllogistic reasoning would therefore only be an *ex post* rationalization of a decision already made on other bases.

In a similar vein, the papers by Scuderi and Taroni on the use of *nudge* also engage with the limits of human rationality. While for Peluso Lopes the problem lies in the incapacity of legal decision-makers to effectively shield their judgments from implicit biases, the problem addressed by Scuderi and

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Taroni is that individuals are unable to process all the information relevant to the case at hand. In Peluso's case, the problem seems to be that humans are not able to disregard certain types of information to reach decisions in the way we would sometimes expect them to do; in Scuderi and Taroni, the problem is that humans are often unable to process all relevant data in the way we would want them to. More specifically, in Scuderi, the problematic assumption under examination consists in seeing human rationality as "an optimising choice process, in which individuals select the alternative that maximises their welfare, based on complete information and unlimited computational capacity". Similarly, for Taroni, classical liberal theory presupposes a model agent "who has emancipated himself from the 'state of minority', standing free among others and equal [...] both rational and reasonable, capable of articulating and pursuing their own comprehensive life-plans", a *homo oeconomicus* who knows what he wants and what are the most expedient means to pursue it. On these premises, the role of institutions is reduced to a supposedly neutral protection of individual self-determination. But again, such depictions of the human mind are *fictitious*: human reasoning must be conceived as an activity under constraints (as Herbert Simon made clear), and people's autonomy is a dangerous dogma (a recurrent theme in post-liberal theory).

Capriati's paper also concerns problematic presuppositions about human rationality but does so in discussing the legitimacy of political systems. Capriati considers *epistemic conceptions of legitimacy* and argues that, in such conceptions, a necessary condition of legitimacy consists in assuming the instrumental rationality of the actors endowed with decision-making power. Capriati does not dwell on the reasons why certain presuppositions are not realistic. But he insists that if we believe that there are *correct decisions* in political matters, and that political power is justified insofar as it serves as a tool to reach these, we are compelled to assume someone's rationality. We may disagree on *whose* rationality to assume, but we cannot avoid assuming it altogether.

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Fernández Núñez's contribution focuses on the breadth of the assumptions that the law needs to make about the human mind. The author's aim is to question the idea that relying on broad anthropological assumptions might be necessary for both the justification and the critique of paternalistic interventions. He shows how in heated debates on fundamental rights, opposing assumptions do emerge: there are *Pelagians*, who trust people's discernment, and *Augustinians*, who are enamoured of the idea that people are "vulnerable, wounded, torn, ruined". The former (like Maniaci) are overly restrictive towards paternalism, while the latter (like Moreso) are overly complacent towards it. The author invokes the adoption of a more nuanced approach.

The conflict between two opposite presuppositions seems inescapable in Kelsen's view, as depicted by Artosi, in his paper on free will and responsibility. According to Kelsen "only man's freedom (that is, the fact that he is not subject to the law of causality) makes responsibility (and that means: imputation) possible"; on the other hand "The establishment of a normative, behaviour-regulating order, which is the only basis of imputation, presupposes that man's will is causally determinable, therefore not free". There seems to be no room for manoeuvre to escape from the impasse, as the general functioning of law seems to require two absolute, broad, and incompatible presuppositions. The solution is found then not in the abandonment of general presuppositions in favour of more circumscribed ones, but rather in the adoption of compatibilism, to the extent that, at the end, imputation does not require either the fact or the fiction of free will.

As is clear from the discussion above, the presuppositions considered in the different contributions concern the minds of different actors within the legal system. This is our second parameter of comparison.

Peluso Lopes focuses on judges; Taroni and Fernández Núñez discuss assumptions related to ordinary citizens. Ordinary citizens are also the focus of Scuderi's contribution, but he adds a further subject to the analysis: the *administrative machinery* that occupies the space, often neglected by legal

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theory, between governors and the governed. Scuderi's thesis is that, although cognitive science has dispelled the rationalist illusion when it comes to private citizens, we still entertain a similar illusion regarding the activities of public administration. We continue to believe that while *nudge* is a suitable technique to guide private behaviour, interventions on the institutional structure, the so-called "s-frame", should be based on traditional instruments such as sanctions and economic incentives. Against this view, Scuderi argues that some contemporary interventions in administrative law can be better analysed in terms of *meta-nudges*, that is, nudges targeting public officials themselves. A defence or critique of such measures goes hand in hand with a defence or critique of the underlying assumptions of rationality.

For Capriati, the identity of the people whose mental characteristics must be presupposed is central. In his view, different political conceptions of legitimate power can be distinguished on the basis of *whose* rationality they assume. More specifically, he examines aggregative democracy and argues that it presupposes individual rationality of single voters; then he turns to deliberative democracy and argues that it presupposes the rationality of groups or discursive practices; and finally explores the possibility of a *machine government* which would require assuming the rationality of machines.

In Artosi's paper, dedicated to the presupposition of free will rather than rationality, the subject of the presupposition is the person who realizes the condition of the Kelesenian legal norm, and that ought to be punished and rewarded accordingly. It is the freedom and responsibility of this subject that must be reconceptualized to be rendered compatible with with the principle of causality.

The third and last parameter we will consider is the source of the presupposition, that is, the subject *making* it.

In his analysis of the connection between rationality and legitimacy, Capriati considers the people affected by government decisions and possessing the power to influence them. In other words, according to him, different

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conceptions of legitimate political power depend on which entities are believed to be rational by the *governed*. A peculiar feature of epistemic conceptions of democracy, in Capriati's analysis, lies in the coincidence between the people *making* the assumption and the people *whose* rationality is assumed. This circularity is an epistemic corollary of the idea that, in democracy, power belongs to the people.

In Peluso Lopes's analysis, the sources of the presupposition are the *drafters of the procedural system*. They endeavoured to counter certain forms of prejudices: "there are several elements of substantive and procedural law that can be interpreted as sedimented debiasing strategies, serving to avoid legal decisions that are arbitrary, unfair or ill reasoned". But they neglected "to adequately address the negative effects of biases that operate beneath the level of consciousness, and which are not subject to direct introspection".

In Taroni's contribution, the presupposition lies instead in laws on consumer protection. In the era of surveillance capitalism,

> [t]raditional frameworks of law and regulation, built on the assumption of autonomous and rational subjects, are increasingly inadequate when confronted with the pervasive and opaque use of behavioural influence techniques by private actors.

According to this view, one of the deepest problems of our time can be found in the fact that the agents of surveillance capitalism do not rely on fictional presuppositions and so they take advantage over political institutions that still do.

The assumption of free will seems to be a practical and theoretical necessity in Artosi's work, meant to make intelligible the principle of retribution. In this sense, the presupposition would be, in other words, an inescapable common heritage of our culture. Artosi makes the effort to show that we may get rid of the assumption instead, and that it is ultimately a matter of moral sensibility if we have strong resistance in punishing someone when we believe that she has been caused to do what she did.

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The individuation of the authors of the presuppositions raises a further issue. Is it really so clear, as the previous discussion suggests, that institutions are permeated by presuppositions?

A distinctive feature of Fernández Núñez's contribution is his sceptical answer. When discussing paternalistic interventions, he observes that the law does not explicitly incorporate paternalism; rather, paternalism functions as a way to make sense of certain restrictions on autonomy. Yet many such restrictions are equally compatible with alternative justifications. As he notes,

> [i]t is very easy for the same decision to be presented, either by the authority that promulgates it, that called upon to interpret it, or for the observer or critic, to identify, alongside paternalistic foundations, non-paternalistic foundations that are (or that are intended to be) complementary or alternative to the former.

Presuppositions, then, lie in the eyes of the beholder. It is often less the legislators than the legal scholars and philosophers who boldly ascribe a paternalistic foundation, and the accompanying assumptions of irrationality, in order to make sense of certain legal outcomes. But this interpretive attitude is questionable, as the *Lochner* and *Wackenheim* cases illustrate, and even dangerous, since it perpetuates the belief that our moral common sense is inherently paternalistic.

A similar scepticism towards the idea that legislators presuppose the agents' rationality can also be found in Scuderi. The popular distinction between the *i-frame* (concerned with individual behaviour and based on behavioural techniques like *nudge*) and the *s-frame* (dealing with traditional bureaucratic regulation) suggests that while in the i-frame the assumption of rationality has been replaced by a more realistic view of human behaviour, the regulation of bureaucracies still presupposes bureaucrats' rationality. Scuderi challenges this stark dichotomy. While such presuppositions of rationality are indeed present, they are neither necessary nor inevitable to make sense of certain legal interventions. As noted above, the author argues

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that a recent development in Italian administrative law (the introduction of the *principle of mutual trust* between officials and citizens) can be seen as a *meta-nudge*, a nudge directed at the intermediaries who shape others' behaviour. Presuppositions, again, may lie more in the eyes of the scholars inclined beholder than in legal reality; yet they remain relevant, since law is a socially constructed entity inseparable from legal culture.

Before concluding, it is worth highlighting another common thread shared by several of the contributions. As we have seen, some of the authors in this issue take as their starting point the limits of human rationality and cognitive capacity, limits that are often overlooked by the institutional framework or by legal culture. Yet they do not stop at this rather discouraging diagnosis; instead, they move beyond it to develop a *pars construens*, a constructive line of analysis that seeks to build upon, rather than merely lament, both these limitations and the failure to adequately acknowledge them.

In particular, Peluso Lopes focuses on the measures that may be adopted to counter implicit bias in judicial decision-making. She advocates the introduction of auditing systems to make judges aware of unconscious influences on their reasoning, screening for cognitive decline, assessments of judges' physical and mental health, and debiasing training as an integral component of their continuing education.

Scuderi's recommendations, by contrast, do not target the legislator but rather legal doctrine, which tends to assume, unjustifiably, that "behavioural tools are inherently incapable of producing structural effects". The author's theoretical effort seeks to overcome this illusion, which he regards as a dangerous distraction from building effective systemic interventions.

Finally, turning to Taroni's paper, the reader will find not only a discussion of the importance of resisting certain fictional presuppositions but also a reflection on the various ways such resistance may take shape. On the one hand, Taroni contends that an effective means of countering the influence of the web giants of surveillance capitalism is to adopt "strategies analogous to those employed by the surveillance capitalists themselves", using

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institutional nudges to counteract exploitative nudges. On the other hand, she draws attention to Stegmaier's *philosophy of orientation*, a distinct approach, rooted in a philosophical tradition and sensibility different from those explored by the other authors, centered on the awakening of individuals' rational capacities.

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