

# THE DARK SIDE OF THE FORCE: SUPERSTITION AND/AS LAW

VINCENZO ZENO-ZENCOVICH\*

*What is the relationship between the law [and lawyers] and superstition, in its most common sense such as black cats, mirrors, ladders, specific numbers, objects or persons which are supposed to bring bad [or, sometimes, good] luck? Some reasons of interest are both intrinsic and historical. The western legal tradition is based on logical propositions with a rational foundation, which clearly is in contrast with superstitious beliefs which are, in their essence, non-rational. There are therefore many reasons to suggest that law is completely removed from superstition, and the two notions appear to be incompatible one with another. The paper points out that this is not altogether true: modern societies often use law and legislation in order to cast away evil social spells. Lawyers use scientific theories in a totally un-scientific and superstitious way. The judicial procedure is fraught with rituals and non-rational beliefs. At the same time superstition's survival is due to the fact that it has its own very precise rules and may be reconstructed as a legal system of its own. The paper concludes with an analysis of the effects of limited rationality in individual choices having legal consequences, as recently investigated by behavioural economics and neurosciences.*

## TABLE OF CONTENTS

- I. THE LAW, AND THE LAW MAKING PROCESS, AS AN OBJECT OF SUPERSTITION.
- II. SUPERSTITIOUS USE OF SCIENTIFIC EVIDENCE BY LAWYERS
- III. JUSTICE AND SUPERSTITION
- IV. SUPERSTITION AS A LEGAL SYSTEM
- V. A FIRST CONCLUSION: SUPERSTITION IS HERE TO STAY
- VI. THE “SUPERSTITIOUS MAN” ON THE CLAPHAM OMNIBUS

The common definition, found in most dictionaries, describes superstition as

<<1. *excessively credulous belief in and reverence for the supernatural;*  
2. *a widely held but irrational belief in supernatural influences, especially as leading to good or bad luck, or a practice based on such a belief*>>.

Or as:

<<1. *a belief or practice resulting from ignorance, fear of the unknown, trust in magic or chance, or a false conception of causation;*  
2. *an irrational abject attitude of mind toward the supernatural, nature, or God;*  
3. *a notion maintained despite evidence to the contrary* .>>

It is appropriate to precise the last of these definitions adding that the belief should be easily be verified and demonstrated as false. This addition is important because it tries to draw a boundary between religion and superstition.

This paper is surely not the arena in which to debate one of the most complex – and fascinating and ever-lasting – issues in culture and society, *i.e.* the rational basis of religions beliefs.<sup>1</sup>

Suffice it to point out here – and with reference to Western world which has been shaped by the Judaeo-Christian tradition – that the object of this paper are not transcendent beliefs but what could be called the hard-core of superstition: black cats, mirrors, ladders, specific numbers, objects or persons; acts or accidents; certain circumstances. And the common antidotes that are used to drive away the bad luck which is related to them.

Nothing therefore to do with the common accusation of atheists against religion, as been a structured system of superstition.<sup>2</sup>

We are talking here not only of bad luck, but also of good luck, from bird droppings to eating certain food, meeting somebody or finding something.

Lawyers are obviously interested in superstition for a series of reasons which are both intrinsic and historical.<sup>3</sup> The western legal tradition is based on logical

---

\* Vincenzo Zeno Zencovich is Professor of Comparative Law at the University of Roma Tre.

\*\* An abridged version of this article was presented at the “*Ceremonies of Law: Doctrine, Ritual, Ceremonial*” Conference held at the Faculty of Law, University of Wollongong (New South Wales) 7-9 December 2011.

<sup>1</sup> In Plutarch’s *Treaty on Superstition* [1<sup>st</sup> Century A.D.], superstition is a deviation from proper religious beliefs: “*Ignorance and lack of instruction concerning the Gods may be compared to a river divided into two streams: one of which, in stubborn minds, produces Atheism, the other, as in marshy soils, produces Superstition*”.

<sup>2</sup> This is the leitmotiv of a considerable part of 18<sup>th</sup> century literature. For one of the most heated expressions see Paul Henri d’Holbach, *Histoire Naturelle de la Superstition* [Natural History of Superstition] (1769) which bears as subtitle “*Tableau des effets que les opinions Religieuses ont produits sur la terre*” [A description of the effects that religious opinions have determined on earth]: “*Men are superstitious because they live in fear. And they live in fear because they are ignorant*”. The book was immediately proscribed in France, but once published in England, it became one of the manifestos of the Enlightenment movement. This point of view is – as usual – vividly depicted in William Hogarth’s engravings. In *Credulity, Superstition and Fanaticism* the scene is set in a church with a priest preaching and holding strange idols in his hands, while in the stalls all sorts of debaucheries are taking place.

<sup>3</sup> Some of the issues that are here examined can be found in Corcos, C.A. (ed.). *Law and Magic*. Durham: Carolina Academic Press, N.C., 2010. Without embarking in nominalistic discussions, whether we are talking of magic or of superstition the essence is a non-rational attitude towards natural phenomena or circumstances. If one wishes to draw a line, magic is primarily objective in the sense that it requires the intervention of a magician or of some super-natural being; superstition is subjective, in the sense that it is based essentially on self-induced beliefs.

propositions with a rational foundation, which clearly is in contrast with superstitious beliefs which are, in their essence, non rational. Modern law was the result of a painful struggle against such beliefs, especially in the field of criminal law and some typical crimes such as that of sorcery or witchcraft. In the age of enlightenment, the blazing torch of the law - the “Rule of Reason” - was waved against the dark shadows of superstition.<sup>4</sup>

There are therefore many reasons to state that law, in its many facets, is completely removed from superstition, and the two notions appear to be incompatible one with another.

This however is a belief, and just as superstitious beliefs, can be challenged on rational grounds.

## I. THE LAW, AND THE LAW MAKING PROCESS, AS AN OBJECT OF SUPERSTITION

The argument I want to make concerns the use of laws – whether acts of parliamentary bodies or regulations by some administrative entity – as an antidote to social evils or as an instrument of intellectual comfort. Therefore the law is not in itself a form of superstition, but it is the result, in variable degrees, of superstition.<sup>5</sup> Modern societies are subject to many events, which are considered as evils: to the individual, to his property or his assets, to his health, to his possessions; or to the orderly deployment of social activities; or to the land, buildings, and the environment.

One can easily distinguish, within a legal text, those norms which are meant to promote, and those which are meant to prevent. The first create a sense of order, the latter a sense of security. Many communities feel strongly the need to be directed, individuals need to know that what they are doing is right, and fear that they may be contravening some (to them unknown) rule. Legislation, but even more regulations,

---

<sup>4</sup> The intrinsic rationality behind the law, is clearly set out by the main “philosophes”: for all see Rousseau, J.J. *Le contrat social*. chap. VII “*Le législateur est le mécanicien qui invente la machine*” [The legislator is the engineer who invents the machine]

<sup>5</sup> Rudolf Wietholter’s central argument [*Rechtswissenschaft*. Frankfurt: Fischer Bucherei, 1968, especially ch. 2 and 3] is that notions such as “public order and security”, “common good”, “freedom and equality”, “justice”, “good faith” are all examples of “magic formulas”. Not surprisingly the title of the Italian translation of the book is “*Le formule magiche della scienza giuridica*” (Bari: Laterza, 1975).

fill a void (the *horror vacui*) and create a comfort zone. Living by the rule has a reassuring effect, and immunizes from negative (re)actions by those who hold the power to sanction and punish.

At the same time setting prohibitions and establishing consequences for their violation are seen as a rational reply to the disruption of social order. While this seems quite obvious in the field of traditional crimes (against liberty, life, limb, property) one could ask oneself the sense of the orgy of regulatory sanctions which cover practically every aspect of daily life (from wearing a helmet when driving a motor cycle to the fining the droppings of a dog on the sidewalk; from the “keep of the grass” in a public park to no-parking signs).

There is a further consequence in the expansion of norm setting: those who abide by the law are “normal”, and those who do not are “a-normal”. It is therefore easy to single out those who do not live by the rule. Conformity is therefore not only encouraged but imposed, and it is reassuring to know that those who live in one’s own community are equal in all senses, not only in their rights – it is irrelevant if they exert them – but especially in their duties and obligations which are duly performed. Differences are disturbing, first of all mentally, and subsequently socially. This tendency can be clearly detected in certain small communities, far away from urban havoc, where uniformity is made manifest by the houses in which one lives, built according to precise and detailed regulations.

One could object that this has more to do with social insecurity<sup>6</sup> than with superstition, but what is worth remarking is how these systems are nearly entirely founded on a very tightly woven pattern of norms – written norms, not social norms<sup>7</sup> – which are assisted by effective enforcement measures – and not simply disapproval or shaming.

---

<sup>6</sup> Ogus, A. “The paradoxes of legal paternalism and how to resolve them.” *Legal Studies* 30 (2010): 61, at 66 (with comments on the negative role of the media in urging legislative intervention); C.R. Sunstein, C.R. “Cognition and Cost-Benefit Analysis.” *JLS* 29 (2000): 1059 “The appropriate response to social fear not based on evidence, and to related ripple effects, is education and reassurance rather than increased regulation” (at 1095).

<sup>7</sup> Deakin, S. “Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate.” *Erasmus L. Rev.* 3 (2010): 141, at 144 correctly points out that “there is a continuum between social norms and publicly-expressed legal rules, with the latter tending to crystallise the former”.

Are there superstitious elements in the cry for legislation and regulation?<sup>8</sup>

One could suggest that the first of various indicia is the deeply rooted belief that the more you set rules, the better society works. This belief is particularly embedded in northern European cultures and in the Anglo-Saxon world; much less in the Mediterranean world. Is there evidence that regulation is actually effective? In some cases impact assessment offers interesting data, showing that the goals set by legislators or regulators have been met. But in many other cases there is no significant evidence of the expected improvements.<sup>9</sup> Obviously it is difficult to provide a counter-proof (*i.e.* that things would have gone the same or better without all the regulatory fret). The existence of rules transfers to an abstract level individual or social anxieties, giving an, at least temporary, relief.

A further element that should be considered is that, apparently, norms belong to a near-to-perfect world, and are enacted by enlightened assemblies, such as Parliament. The rituals of law-making increase the notion of law as the product of an entirely rational process: statistics are collected, hearings are made, models compared, costs and benefits analysed,<sup>10</sup> amendments presented and discussed, lengthy explanatory texts produced. But while the complex machinery may effectively dispel many of the risks of irrational decision making, the devil hides in many details, beginning from the premises of the legislative act or the regulation, and ending with the sanctions. Especially when measures are taken in moments of crisis – international, political, financial – the main spur is an “act-react” outcry,<sup>11</sup> and the result is not very different

---

<sup>8</sup> Sunstein, C.R. (“Cognition and Cost-Benefit Analysis.” *JLS* 29 (2000): 1059) provides a polite reply: “The public demand for regulation is often based on misunderstanding of facts” (at 1065).

<sup>9</sup> Similar doubts are expressed by Ogus, A., van Boom, W.H. “Introducing, Defining and Balancing ‘Autonomy v. Paternalism.’” *Erasmus L. Rev.* 3 (2010): 1, at 3.

<sup>10</sup> But if cost-benefit analysis is the main methodology used in public choice it is simply “stupid”: H. S. Richardson, H.S. “The Stupidity of the Cost-Benefit Standard.” *JLS* 929 (2000): 971.

<sup>11</sup> One of the most delicate issues – which European democracies have been confronted with in the Seventies of last century, and which has moved to the US at the beginning of the millennium – is that of the response to terrorist attacks (political or fundamentalist). US scholars use the term “moral or social panic” (see Filler, D.M. “Terrorism, Panic, and Pedophilia.” *Va. J. Soc. Pol’y & L.* 10 (2002): 345). However what is under examination here are not so much the circumstances, but the reactions. A typical example of superstitious anti-terrorist measure is that of increasingly invasive personal security inspections on millions of airplane passengers, bureaucratically imposed and passively accepted. These aspects are examined and thoroughly criticized by Kuran, T., Sunstein, C.R. “Availability Cascades and Risk Regulation.” *Stan. L. Rev.* 51 (1999): 683.

from the ointments a quack doctor applies to his patients purporting that they will have immediate effect.

The reference to rituals – an element common to all anthropological studies – is relevant when one comes to consider the role that procedures have in contemporary law-making and decision-making processes. It is very clear that open, transparent and pre-determined procedures are essential in order to avoid miscarriages and give legitimacy to their outcome. Democracy in itself, in its never ending evolution, is first of all a procedural system. Having this very clearly in mind, it is easy to detect certain obsessive perceptions of procedures, which tend to accept any result provided it has followed a ritual. This is most obvious in what is generally defined as “rule-of-law”,<sup>12</sup> which is something quite different from the continental European *Staatsrecht* or *Etat de droit*, inasmuch as the political theories behind it are historically and substantially quite different. Apart from its wishful intent to measure the world with only one yardstick made in London or Washington, D.C., rule-of-law, as often applied by international financial institutions and based on pre-determined common law-type procedures,<sup>13</sup> tends to obliterate the simple consideration that just as an end does not justify the means used to reach it, the means in themselves do not necessarily justify the result which has been reached. Using procedures – and the evaluation of procedures – as if they were magic formulas tends to distract one’s attention from the essence of the problem and to imagine things how one would like them to be,<sup>14</sup> and not as they actually are.

---

<sup>12</sup> Nearly 80 years ago similar concepts had been already expressed: “The traditions of America give a mystical significance to a ‘rule of law’ rather than to a ‘personality’ as a symbol of the unity of our institutions. We feel safer thinking in this way. We dramatize that rule of law in our judicial system and in our constitution”: Arnold, T.W. “Institute Priests and Yale Observers. A Reply to Dean Goodrich.” *U. Pa. L. Rev.* 84 (1936): 811, at p. 814.

<sup>13</sup> For a thorough criticism of this practical use of the “rule-of-law” theory see Upham, F. “Mythmaking in the Rule of Law Orthodoxy.” *Carnegie Endowment Working Papers* n. 30 (2002) [available on-line at <http://www.carnegieendowment.org/files/wp30.pdf>]

<sup>14</sup> Amartya Sen speaks – not altogether in a disparaging way – of “daydreams”; Sen, A. “The Discipline of Cost-Benefit Analysis.” *JLS* 29 (2000): 931, at 952.

## II. SUPERSTITIOUS USE OF SCIENTIFIC EVIDENCE BY LAWYERS

Together with law and education, science was the great antidote Enlightenment launched against the darkness of ignorance and superstition. After having fought a strenuous battle against theology and Aristotelic philosophy during the 17<sup>th</sup> Century, scientific thought made its official entrance into the Western way of mind during the age of Enlightenment as a form – the form – of correct reasoning. Inductive logic based on experience as opposed to deductions stemming from preconceptions. Step-by-step development as opposed to unmodifiable tenets. Experimentalism as opposed to dogmas. It is not surprising, therefore, that also lawyers felt the need for a strong intellectual alliance with the scientific way of thinking. It is significant that in 18<sup>th</sup> Century the idea of a “legal [or juridical] science” starts to evolve. In retrospect it is easy to detect the fallacy of the neologism,<sup>15</sup> because the law – quite to the contrary of science – is (and must be) based on deontic pre-conceptions and tells us not what is, but what should be.<sup>16</sup>

However, what falls here under scrutiny is not the self-promoting representation of law as a science, but rather its widely present corollary: if law is a science, lawyers are naturally able to understand and use scientific reasoning outside their own boundaries, not unlike a chemist understands medicine, or an engineer understands physics.

As a consequence of such enhanced self-esteem (which has never been lacking among lawyers), scientific methods, data and reasoning are commonly used by lawyers in order to prove or disprove arguments, to ground broad-sweeping decisions, or to explain why certain natural events trigger the enforcement of a rule.

---

<sup>15</sup> There were, however, dissents in the homeland of the theory of “legal science”. J.H. von Kirchmann entitled his 1847 lecture *‘Die Wertlosigkeit der Jurisprudenz als Wissenschaft’* [‘The fallacy of law as science’] which had enormous success in readership but hardly any following among the dominant Pandectist movement (a recent re-edition of the lecture is published by Manutius Verlag, Heidelberg 2000).

<sup>16</sup> This is one of the main points made by Berkowitz, R. “The Gift of Science. Leibniz and the Modern Legal Tradition.” New York: Fordham U.P., 2010 : “ Once law seeks to reassert its rightful authority through scientific guarantees of its certainty, the technique of law comes to overwhelm its morality” (at 6).

Lawyers play with the greatest of ease with science, use its terminology, and infer consequences, sometimes supported by experts, other times as do-it-yourself scientists.

The undisclosed – but implicit – understanding is that while the law is always debatable, science is not, because it offers preciseness and certainty. Therefore decisions taken on the basis of scientific data and arguments are intrinsically rational and appropriate.

Anybody familiar with the development of scientific thought and epistemology in the last four centuries realizes that this is – at its best – a caricatured version of what science is really about, and, in fact, its opposite. Scientific rules always discount a margin – sometimes narrow, other times wider – of uncertainty, and doubt is a mental disposition even before being a protocol, especially when one faces different or new circumstances<sup>17</sup>. While a lawyer will tend to expand, through analogy, a rule in order that it may embrace more and more cases, the casuistry of natural laws is not some kind of weird exception, but simply the confirmation of the infinity of events that can happen and of the rules that govern them.

One can therefore suggest that the use that generally lawyers – wherever placed – make of science is substantially superstitious, trying to explain the facts of life and society through theories and arguments they do not really grasp, and which could easily be disproved.

A few examples will be of aid.

The first is the never ending debate on causation.<sup>18</sup> The intent of the theories of causation is noble, and so are their forefathers. One of the main settings is 19<sup>th</sup> Century Germany and the implementation (deeply felt in continental European legal doctrine) of the principle of personal responsibility in criminal law. In order to establish liability it is necessary to link the act ascribed to the defendant to a certain event, which is the essential element of the crime. In the strong scientist atmosphere of that century, when Germany was emerging as the industrial power of the Western

---

<sup>17</sup> Without having to reach the excesses denounced by Ben-yehuda, N. “Deviance in Science. Towards the Criminology of Science.” *Brit. J. Crim.* 26 (1986): 1.

<sup>18</sup> The obvious reference is to Hart, H.L.A., Honoré, T. *Causation in the Law*. Oxford: Clarendon Press, 1985: 9 ff.



world, it seemed obvious to transplant scientific concepts into the legal system.<sup>19</sup> There could be no doubts on the liability of the culprit, and the way to ensure this was to establish scientific certainty as to causal relationship.

However – as the thousands of pages devoted to the subject demonstrate – the implant of scientific theories in the millenary body of the law rapidly brought to a Frankenstein effect, and the creation of a dual identity (the sophisticated distinction between “causation in fact” and “causation at law”) and the multiplication of causal theories.

Things got even worse when concepts conceived in order to establish criminal liability were imported in the fields of contract and tort, where liability has little to do with individual responsibility and is, much more simply, an efficient way of allocating damages, often on the basis of objective standards or vicarious responsibility (the *res ipsa loquitur* and *respondeat superior* principles).

This clearly is not the site where to outline the development of the theories on causation. What should be pointed out is how heavily lawyers lean on to pseudo-scientific arguments and magic formulas (*condicio sine qua non*, *adäquate Kausalität*, *cause suffisante*, *et caetera*) in order to justify their decisions. One underlines ‘pseudo-scientific’ because no real scientist would find any relation between all the producers of a certain drug and the patient that has used it but cannot prove with certainty the identity of the actual producer. Or would establish a link on the basis of the highly subjective element of foreseeability. Or apply all-or-nothing criteria in reconstructing a chain of events.

A further example of the misunderstandings between lawyers and scientists is the so-called principle of precaution. In this case it is the lack of consolidated scientific data or conclusions that prompt a decision – legislative or regulatory – in one sense, action, or in its opposite, inaction. The principle of precaution brings to light a deep mistrust in widely accepted scientific theories,<sup>20</sup> and gives the same importance, if not

---

<sup>19</sup> Hart, H.L.A., Honoré, T. *Causation in the Law*. 433 ff.

<sup>20</sup> *Ex multis* Arnoldussen, T. “Precautionary Logic and a Policy of Moderation.” *Erasmus L. Rev.* 2 (2009): 259 (“Precautionary logic appeals to a sense of fragility of humankind and the environment, the uncertainty of scientific knowledge, the destructive tendencies of technology [...] Precautionary logic shares assumptions with early and medieval Christian thought”).

more, to minority views which are able to paralyze decision-making processes and impose extraordinary security measures.<sup>21</sup>

Quite clearly the reasons behind this approach are not, *per se*, irrational but political: governments and local authorities must dispel anxieties and fears of their voters and do so giving heed to very vocal anti-scientific movements.<sup>22</sup> But at the same time the measures which are introduced are dressed up in scientific garments suggesting that the norms embody the appropriate therapy.<sup>23</sup>

Other examples come from the use that often is made of data drawn from social sciences. There is no doubt that statistics are essential in order to make informed decisions. But statistics are only one of many facets of complex social and economic realities and have to be put in their appropriate context, starting from who, how, when and where the data have been collected. When decisions are based only on numbers and there is no significant evidence over a reasonable time period that such decisions bring the desired effect, more often than not statistics are used to conceal motivations than cannot be publicly expressed.

In other cases these same motivations are objectified through the use of opinion polls, which, in theory, should be able to turn an irrational social tension into a rational legal decision.

But maybe the most common (mis)use of scientific formulas is in the field of financial markets and of competition, where the inter-relationship between law and economics is particularly tight. Econometric models are expressed by mathematical formulas which are the initiatic language of economists which enables them to

---

<sup>21</sup> This argument is amply developed by Sunstein, C.R. *Laws of Fear: Beyond the Precautionary Principle*, Cambridge: Cambridge U.P., 2005 (especially Ch. 3), a title which by itself says everything. Behind all lurks a nihilist ideology: "The link between cause and negative outcome is continually contested. Confusion about causation encourages speculation, rumours, and mistrust. As a result, events often appear as incomprehensible and beyond human control"; Furedi, F. "Precautionary Culture and the Rise of Possibilistic Risk Assessment." *Erasmus L. Rev.* 2 (2009): 197, at p. 201.

<sup>22</sup> Sunstein, C.R. "Cognition and Cost-Benefit Analysis." *JLS* 29 (2000): 1059 speaks of "a controversial and even unacceptable conception of democracy, one that sees responsiveness to citizens' demands, whatever their factual basis, as the foundation of political legitimacy" (at 1074).

<sup>23</sup> According to Vlek, C. "A Precautionary-Principled Approach Towards Uncertain Risks: Review and Decision-Theoretic Elaboration." *Erasmus L. Rev.* 2 (2009): 129, the precautionary principle "is a rational (survival) rather than a normative (ideological) principle". The EU Commission in its 2000 Communication n. 1 on the "precautionary principles" tries to dispel the various accusations stating that the p.p. is to be used when there are "reasonable grounds for concern".

exclude from their discussion those who do not belong to profession,<sup>24</sup> in a way not dissimilar from how lawyers used (and still use) Latin maxims. Once lawyers get a grasp on these formulas – or, more easily, on their acronyms – they brandish them as swords in order to press irrefutable conclusions: SSNIP [small but significant and non transitory increase in price], FOC [first-order condition], AIDS [almost ideal demand system], DID [difference-in- differences], *et caetera*. What they are founded on, and their extremely high level of relativity is left behind. The experimentalism of social sciences (such as economics) is transformed into a normative totem.

### III. JUSTICE AND SUPERSTITION

What we now call the administration of justice is anthropologically inextricably interwoven with magic. This is quite evident when we look at the few primitive societies still existing (in South America, in Central Africa, in some distant islands of Asia and Polynesia. One would commit a great mistake if one thought that these are far fetched cases. It is sufficient to retrace the history of early Roman law or of Germanic wagers and ordeals<sup>25</sup> to be aware of the fact that magic and superstition are at the roots of Western legal systems and manifest themselves in many ways.

The first, and most, obvious are rituals that govern judicial procedures, and which, through the ages, have transformed themselves into rules of procedure, but still maintain elements of magic: the robes, the garments, the wigs, the gavel or the ceremonial mace which are worn or used by the various actors of the judicial play have a profound symbolic sense which is embodied by them and transferred to the parties of the proceedings and to the community.<sup>26</sup>

---

<sup>24</sup> “Mathematical elegance often becomes the primary goal” (referred to the recent developments of economic analysis of the law): Korobkin, R.B., Ulen, T.S. “Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics.” *Cal. L. Rev.* 88 (2000): 1053, at 1054.

<sup>25</sup> “The early modes of trial (the ordeal, the judicial duel, the oath, the compurgators) are substitutes for private war. But these substituted arbitrations are considered to involve no human element. The judgment is the judgment of the supernatural, or the ‘judgment of God’. The appeal is to magic or to Heaven. The decision is the infallible decision of the superhuman power” (Frank, J. “Mr. Justice Holmes and Non-Euclidean Legal Thinking.” *Cornell L. Q.* 17 (1931): 568, at 582.

<sup>26</sup> “The symbols of the law, both primitive and modern, arise out of a series of contests which dramatize the various conflicting ideals hidden under the term ‘justice’”: (Arnold, T.W. “Institute Priests and Yale Observers. A Reply to Dean Goodrich.” *U. Pa. L. Rev.* 84 (1936): 811, at 813.

The ritual is reinforced by the organization of the space in the court-room. The bench overlooking everything, the position of the public prosecutor, of the lawyers, of the accused, of the jury, of the public. The space in front of the judge where only the lawyers are admitted. The solemn words engraved in the court-room. The oath sworn by the witnesses. The preamble when the verdict is read out.

Only towards the 18<sup>th</sup> Century does motivation of judicial decisions become usual, and in the 19<sup>th</sup> Century a constitutional principle. This is an attempt, essential to our contemporary eyes, to render less arcane the output of the judicial machinery.<sup>27</sup> It would appear often that the motivation is meant primarily to obtain the consent of the community towards a decision which in itself is unexplainable.

Similar considerations might be applied to some noticeable aspects of judicial law making, especially when the legislature prefers not to tackle a controversial issue, and asks the support of the magician/witch dressed in the judge's robes to find a solution.

But even more shrouded in mystery is the role of the jury, whose decision is, in the system where it is a constitutional requirement, simply a "Yes" or a "No" with no need to motivate or justify, and whose deliberation process is protected by procedural secret. Again this is not the lieu to investigate on the function of the jury in the US judicial – federal or state – system, and the vast literature which debates its virtues or its misgivings. What should be pointed out that there is a widespread belief that it is still the most acceptable form of justice. By no means rational, but made mostly of feelings, beliefs, passions, taking the place that in the most ancient form of drama belongs to the chorus, which is placed as an interpreter between the gods and the individual's fate.<sup>28</sup>

---

<sup>27</sup> This aspect, which is strictly related to linguistics, has been amply discussed – and criticized – by US legal realists: see Green, L. "The Duty Problem in Negligence Cases." *Colum. L. Rev.* 28 (1928). 1014, at 1016 ff; Cohen, M.S. "Transcendental Nonsense and the Functional Approach." *Colum. L. Rev.* 35 (1935): 809, at 844. For a recent summary see Allen, J. "Magical Realism." *Law and Magic*. Ed. C.A. Corcos: at 195.

<sup>28</sup> Consider J. Frank's scorching comment in "Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings." *Pa. L. Rev.* 80 (1931): 17 "*The jury system is the 'Cadi' system at its maximum. We use twelve uninstructed, haphazardly selected 'Cadis' instead of one*" at p. 27 [italics in original]. The same concepts are expressed in "Mr. Justice Holmes and Non-Euclidean Legal Thinking." *Cornell L. Q.* 17 (1931): 568, at 595. But see M.S. Cohen's indirect reply: "Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of governmental controls" (Cohen, M.S. "Transcendental Nonsense and the Functional Approach." *Colum. L. Rev.* 35 (1935): 809, at 843.

The most irrational judicial decision – which was exposed over 250 years ago by Cesare Beccaria in his milestone work “*Dei delitti e delle pene*” – is the death penalty. One does not have to spend further words on the fact that retribution, social appeasement, general prevention which should ensue from the execution of the culprit have little to do with rationality. State administered vengeance is still, in its substance, vengeance, conforming to the biblical quote of “eye for eye, tooth for tooth”.

This brings us back to the starting point of this paragraph: the law – in the Western legal tradition – is or aspires to be rational. But is Justice rational? And can it be entirely rational? To what extent is it, in its essence, a highly sophisticated ethical, political, and cultural product specific to Western civilization in which transcending values are deeply embedded and which do not fit in a rigorous logical system?<sup>29</sup>

#### IV. SUPERSTITION AS A LEGAL SYSTEM

We have so far seen a few aspects where the boundaries between rational law and irrational beliefs are extremely blurred, giving us the impression that lawyers, notwithstanding several centuries of intellectual efforts have not managed to dispel the dark shadow of superstition.

One can, however, see things from an opposite perspective, that of a would-be advocate of superstition. The reason why lawyers are still, and always will be, subject to the influence of superstition is because superstition can largely be described as a legal system.

Superstition is by definition non rational but this does not mean it does not follow strict rules. First of all it is mostly typical: colours, numbers, circumstances, objects are well, and previously, defined. If the factual elements change the bad (or good) luck will not ensue: a black cat on the sidewalk, sitting at table in fourteen, breaking a window-pane are not contemplated among those event which forbear ill

---

<sup>29</sup> These doubts are expanded in many writings by US legal realists: see Green, L. “The Duty Problem in Negligence Cases.” *Colum. L. Rev.* 28 (1928): 1014 ( “How do judges employ this power we call law? How do judges pass judgment? Has any one ever disclosed? [...] The processes of judgment are as obscure as the processes of thought”, at p. 1021). And Frank, J. “Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings.” *Pa. L. Rev.* 80 (1931): 17.

consequences. The rules are known in order that persons may avoid falling victim of the spell, or that they may take appropriate precautions or counter-measures.

All this is elevated to the maximum degree in sorcery and witchcraft, but without reaching such heights even if the event with a superstitious meaning may be relatively free in its development, the reaction to it, in order to be effective and dispel its negative consequences must follow an extremely formalistic ritual which often includes standard form(ula)s.<sup>30</sup>

Formalism is the main entrance to a further similarity with legal systems, and that is, in certain fields, what might be called a *numerus clausus* of superstitions in the sense that although a single individual may have his own superstitions (the first thing one does in morning, or before going to sleep; wearing a specific tie on certain occasions; taking a certain seat on the train or on the bus; *et caetera*) these are of little significance and become relevant only when they receive wide adhesion in the community (*e.g.* how many people would willingly accept to sit at a table of thirteen? And how many hosts would disregard this point when organizing a dinner? How many people would carefreely walk underneath an open ladder or voluntarily break a mirror?)

Superstitions are typical social norms which develop in a community and are abided by it.<sup>31</sup> They require a spontaneous adherence and an intimate convincement that to follow the rule is appropriate or, at least, prudent (“I don’t believe in superstitions, however ...”).

The strong relationship with a community offers the opportunity of what might be called “comparative superstitions”: numbers, colours, circumstances change from one place to another and may be the occasion of serious embarrassment, if not of open conflict. In order to establish a common core of different superstitions one can group them as to the facts, as to their consequences, as to the persons involved, as

---

<sup>30</sup> “Touch wood” in Anglo-Saxon contexts; but “touch iron” in other cultures.

<sup>31</sup> Maybe the most instructive book on the subject is by the Italian anthropologist De Martino, E. *Sud e magia* [“Southern Italy and magic”]. Milano: Feltrinelli, 2002 (for a French translation see *Italie du Sud et Magie*. Les Empecheurs, 1999) which analyses the role of superstition in Southern Italian culture, not only popular. Other works by the same author on surrounding topics have been translated in English: De Martino, E. *The World of Magic*. New York: Pyramid Communications 1972; De Martino, E., Zinn, D. *The Land of Remorse*. London: Free Association Books, 2005. For a vivid depiction of superstitious practices in the same region see the acclaimed novel by writer and painter Levi, C. *Christ Stopped at Eboli*. London: Penguin Modern Classics, 2000.

to their degree of social acceptance. This enables us to detect patterns of regularity and especially the function which is ensured in the various communities.

One should also consider the role played by certain individuals, which we might call the “officials of (the law of) superstition”. In certain cultures the soothsayer has a very important societal position, of which he or she is well aware of.<sup>32</sup> This person may present some particular physical aspects which by themselves help single he/she out. But the soothsayer is generally clad in black and spells are generally transmitted by his/her facial expressions or by his/her hands. As in any legal system this brings us to the distinction between private acts of superstition (spilling the salt, opening an umbrella at home, *et caetera*), and official acts of superstition which require a minister and whose relevance is decidedly superior. This “public (or administrative) law” of superstition sets out the importance of the (social) bestowal of powers to certain persons which enable them to produce effects through simple acts (presence, glances, pronouncing some words).

A further aspect of the “legal” system of superstition should be considered. Although to rational eyes it is easy to disprove any of the elements of superstition (and this is intrinsic with its definition) one has to admit that it is not without a, albeit rudimentary, law of causation. People believe in superstitions not because they are totally irrational, but because they fit into a very limited and simplified rationality, which is easily grasped by simple and non-educated minds. The strength of superstition is in its *post hoc, ergo propter hoc* logic which allows to explain what otherwise would appear to be inexplicable. It would be a mistake to imagine that this could be an idea acceptable in the past, and not in modern, technologically and scientifically dominated, ages.

It is sufficient to consider the amount of, often highly educated, persons who believe in horoscopes and astrology notwithstanding it has been amply and since long ago demonstrated that they lack any scientific foundation.

---

<sup>32</sup> In his short story “*La patente*” (“*The Licence*”) the 1934 Nobel-prize laureate Luigi Pirandello depicts the vain attempt of a poor wretch who is considered in his community as a soothsayer (in Italian “jettatore”= he who throws [evil spells]) to obtain an official recognition of his status. The short story was transposed to the movie screen in 1954, by Giorgio Pastina. The soothsayer was interpreted by Antonio de Curtis (“Totò”).

## V. A FIRST CONCLUSION: SUPERSTITION IS HERE TO STAY

If three centuries have passed since the Enlightenment waged its war against Superstition, and elected the Law as one of its champions, and the battle still goes on, the reason is surely not in the want of intelligence and effort by lawyers.

If any legal system in the Western tradition is still fraught with irrational elements<sup>33</sup> the fact cannot be simplistically shrugged off. It suggests that maybe the premise of the discussion was too rigidly expressed and not sufficiently nuanced.<sup>34</sup>

The truth is that, as in any war, there was (and is) no complete and total opposition between Law and Superstition, and the latter can claim, on its own right, to be a legal system, albeit *sui generis*.

But the main point is that no matter how much the law stresses its rational structure and, for this reason, its superiority over other forms of social government, those to whom the law is addressed, and even before them, those who frame it, enact it and put it into place, are not totally won to the cause. Superstition is deeply embedded and belongs to mankind. It cannot be simply dispelled by law's majesty. The two aspects – together with many others – coexist and it is illusionary to believe one can eradicate what belongs, because it has always belonged, to the human being. Superstition is in the eyes (and the mind) of the beholder.

A defiant statement therefore could be: The law is superstitious.<sup>35</sup> What's wrong with that?

## VI. THE “SUPERSTITIOUS MAN” ON THE CLAPHAM OMNIBUS

If these first conclusions may appear to be platitudes, one can try to see things from a different perspective. The research for superstitious elements in the various

---

<sup>33</sup> “Lawyers [are] trained by long practice in believing what is impossible”; Cohen, M.S. “Transcendental Nonsense and the Functional Approach.” *Colum. L. Rev.* 35 (1935): 809, at 811, with a delightful quote at fn. 7 from *Alice in Wonderland*.

<sup>34</sup> “Why do many lawyers and non-lawyers insist that legal certainty now does or can be made to exist to a far greater extent than it does or ever possibly could? Why this persistent longing for a patently unachievable legal stability?” (Frank, J. “Legal Thinking in Three Dimensions.” *Syracuse L. Rev.* 9 1 (1949): 9, at 20.

<sup>35</sup> “*Legal concepts* [...] are supernatural entities which have no verifiable existence except to the eyes of faith” (Cohen, M.S. “Transcendental Nonsense and the Functional Approach.” *Colum. L. Rev.* 35 (1935): 809, at 821 [*italics in original*])



aspects of the law can be considered as an exercise to see how far one can stretch notions that appear to be in complete opposition. A lawyer – who is not a sociologist – is not interested in superstition and superstitious practices *per se*, but uses this external element in order to understand better his own subject, its various components, its boundaries, its measures.

The real question is more profound and much less provocative: To what extent is the law rational? When do we cease to consider a rule or an order intrinsically legal and we find it arbitrary and irrational? In other words, illegitimate? And, instead, when do we consider correct, and therefore naturally and intrinsically lawful, to follow feelings, passions, instincts?

The question, which goes to the foundations of our civilization (the emblem is Sophocle's *Antigone*), has been investigated for centuries by philosophers and legal theorists. A brief essay is only an occasion to focus on one aspect which is of widening investigation in other sciences and social sciences, and more recently has interested also lawyers.

Every lawyer is familiar with the metaphor of the “reasonable man on the Clapham omnibus” and its infinite variations, also humoristic or caricatured. As all *clichés* (the civil law version being the *bonus paterfamilias*) from time to time it needs to be re-discussed in order to give it a contemporary sense.

The exercise therefore is: if the man (or the lady) on the subway taking them home to Clapham were only partially “reasonable” and mostly “unreasonable”, “irrational” or even superstitious, how are we to interpret the law?<sup>36</sup>

This hypothesis is no *divertissement* and is the one of the starting points of the line of thought defined as behavioural economics, and which is attracting growing attention by economists. The most significant aspect is that this relatively new branch of social sciences is strongly interwoven with the developing field of neuroscience, which attempts to understand the biological underpinnings of human nature and

---

<sup>36</sup> “[T]o reform our judicial system, to inject, so far as feasible, more reason and more justice in its daily workings [...] one needs to look at, not away from, the non-rational and non-idealistic elements at play now in court-house government” (Frank, J. “Legal Thinking in Three Dimensions.” *Syracuse L. Rev.* 1 (1949): 9 at 24.

behaviour.<sup>37</sup> In opposition to the entirely abstract idea of the rational *homo oeconomicus* which dominates neo-classic economics and its successors, the new trends consider that in their economic choices men and women, professionals and firms are very often and deliberately not rational (in the neo-classic sense)<sup>38</sup> and make their choices using different sets of values which do not bring to a maximization of utilities (in the economic sense), but provide a more satisfactory result.<sup>39</sup>

In following this approach there is an important *caveat* that needs to be set forth. One of the main reasons of the recurrent misunderstandings between lawyers and economists is that while the law is prescriptive, economics are descriptive. The law is primarily deontic, and secondarily functionalist. It pre-exists social behaviour, although its aim is to steer it or prevent it. Observation of social and economic facts is important but not necessarily – on the contrary, very rarely – is there a correspondence between what happens and the law which is enacted.<sup>40</sup> A law that simply and realistically photographs the existing state of things is of little use. We do not use the law primarily as an instrument to know how things are, but to state how they should be.

Economic ‘laws’, instead, describe the functioning of markets and are relevant inasmuch they faithfully represent what ordinarily happens, and should happen in certain circumstances. They are correct if and when the data on which they are based

---

<sup>37</sup> Waldbauer, J.R., Gazzaniga, M.S. “The Divergence of Neuroscience and Law.” *Jurimetrics* 41 (2001): 357.

<sup>38</sup> “Economic analysis of law usually proceeds under the assumptions of neo-classical economics. But empirical evidence gives much reason to doubt these assumptions; people exhibit bounded rationality, bounded self-interest, and bounded willpower”: This is the opening statement of the summary of the article by Jolls, C., Sunstein, C.R., Thaler, R. “A Behavioral Approach to Law and Economics.” *Stan. L. Rev.* 50 (1998): 1471. And the conclusions of Hayden, G. M., Ellis, S.E. “Law and Economics After Behavioral Economics.” *U. Kan. L. Rev.* 55 (2007): 674 are: “The empirical findings of behavioral economics are sufficiently robust for us to conclude that some of the assumptions of standard economic theory are mistaken”, at 675). One could comment adapting J.H. von Kirchmann’s famous quote [see his work cited at fn. 15, § 29: “Three lines of empirical evidence and entire libraries [of law & economics] become waste paper”. No wonder that one of the main ‘owners’ of the library R. Posner expresses a negative comment on the article; Posner, R. “Rational Choice, Behavioral Economics and the Law.” *Stan. L. Rev.* 50 (1998): 1551.

<sup>39</sup> For a strong critique of the theory according to which this outcome can be explained by neuroscience see Pardo, M.S., Patterson, D. “Philosophical Foundations of Law and Neuroscience.” *U. Ill. L. Rev.* (2010): 1211, at 1235 ff. For a different view, which the writer finds more convincing, see Deakin, S. “Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate.” *Erasmus L. Rev.* 3 (2010): 142, at 149.

<sup>40</sup> With regards to neurosciences the point is made by Waldbauer, J.R. Gazzaniga, M.S. “The Divergence of Neuroscience and Law.” *Jurimetrics* 41 (2001): 357: “Arguments concerning individual agency and legal responsibility are products of our moral sensibilities, not results of empirical investigation”(at 358).

on have been correctly collected and interpreted. One can reasonably assume that given a certain set of fixed facts the behaviour of the economic actors (governments, firms, families, individuals) will be similar to the past and produce similar effects. Economics, therefore, as all social sciences does not set rules, but detects them.<sup>41</sup>

This is why on the one hand lawyers are uneasy in understanding and describing social phenomena. And economists are not equipped to establish norms. This difference emerges clearly in competition law where both competencies are necessary, but they tend to overlap and each actor wants to steal the first role in the play.

Having clarified that the “rational person” in economic theory may not be exactly the same as the “reasonable man” at law, the ample studies that have been made in the first field should help us reconsider, at least at a very general level, the sense one should give to the second notion, which is a typical general principle present in every legal system.

One of the most obvious examples is that of consumer contracts and the ever expanding legislation that has been enacted by the EU in the last 25 years. To express the problem simply, traditional contract law posits equality among the parties which are able to mind their own interests and reach any bargain – provided not illegal or immoral – they feel satisfies their own interests. The law will offer to the parties a framework of rules and enforcement by the courts. Only in exceptional cases will it intervene to set aside what has been freely agreed. Consumer contracts theory posits – at the opposite – a substantial inequality of the parties which needs to be redressed through a very tight set of imperative norms which are meant to protect the consumer from the prevarication of the professional and from his or hers inexperience and irrational decisions.<sup>42</sup>

---

<sup>41</sup> And applied to neurosciences this implies that “the cognitive rules neuroscience talks about are not guides for rational analysis; rather they replace such analysis”. “In taking this position, neuroscience diverges irreconcilably from the law with regard to human behavior”; Waldbauer, J.R., Gazzaniga, M.S. “The Divergence of Neuroscience and Law.” *Jurimetrics* 41 (2001): 357, at 362.

<sup>42</sup> See however Deakin, S. “Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate.”, according to whom in consumer contracts consumers generally do not act irrationally, but imply because on the basis of limited information or inequality of bargaining power. The law intervenes to overcome externalities and information asymmetries (at 142).

Consumer contracts are no longer an isolated sector of the law and expand their basic principles to pre-contractual relations (advertising) and to tort (product liability).<sup>43</sup>

Let us consider the basic rules of neo-classic microeconomics, which assume that at the retail market level agents are rational and make their choices freely on the basis of objective and measurable, and therefore rational, elements (price, quality, convenience). Assuming this starting point, one can readily understand the hiatus between economic theory and normative system. The latter assumes instead that consumers are not rational – or at any rate they are likely to make irrational choices, from which they need to be protected.

On this basis the various EU Directives make often reference to highly subjective elements, which are objectivised through normative provisions. A few examples can be easily extracted:

- i. the “*expectations*” of consumers regarding the product<sup>44</sup>
- ii. commercial information which “*is likely to deceive*”, or “*is likely to affect their [the consumer’s] economic behaviour*”<sup>45</sup>
- iii. advertisements should not “*exploit[ing] their [viz. minors] inexperience or credulity*”<sup>46</sup>
- iv. advertisements “*shall not exploit the special trust minors place in parents*”<sup>47</sup>

---

<sup>43</sup> In tort law the issues may be significantly different from contract law: see Faure, M. G. “Calabresi and Behavioural Tort Law and Economics.” *Erasmus L. Rev.* 1 (2008): 75. One should however consider that, when seen from a remedial point of view, tort and contract often overlap. And the growing tendency to establish, in the EU, special tortious liability rules in areas of prominent consumer interest (e.g. product liability, aviation disasters).

<sup>44</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

<sup>45</sup> Article 2, para. 2, Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

<sup>46</sup> Article 16, letter a) Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

<sup>47</sup> Article 16, letter c) Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

- v. protection is required for “*consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity*”.<sup>48</sup>

All this is condensed in the definition of “*the benchmark for the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors*”.<sup>49</sup>

The various aspects can now be put into order:

- a) Private law assumes that all natural persons are rational, and act rationally. Therefore they bear upon themselves the consequences, factual and legal, of their behaviour, especially when it comes to patrimonial dealings.
- b) Behavioural economics, backed by neuroscience, tells us, instead that there is a vast class of natural persons called consumers which possesses a limited rationality,<sup>50</sup> mostly because it tends to under-estimate the risks that its economic acts entail, or because it prizes non-rational elements.<sup>51</sup>
- c) The reaction of the law-makers – in the EU – is only partially meant to dispel irrational economic behaviour (consumer education and information<sup>52</sup>), and instead primarily they take it for granted that these non-rational conducts exist and are permanent. Therefore appropriate legislation is enacted to prevent or reduce the negative (for the consumer) effects of his/her

---

<sup>48</sup> Article 5, para. 3 Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

<sup>49</sup> Preamble 18 to Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (an apparent paraphrase of the ‘Clapham omnibus’ rule set down in *Hall v. Brooklands Auto-Racing Club* (1933) 1 KB 205).

<sup>50</sup> Only natural persons act irrationally? Can corporations be “irrational” or are they simply greedy? See N. Huls, N. “Consumer Bankruptcy: A Third Way Between Autonomy and Paternalism in Private Law.” *Erasmus L. Rev.* 3 (2010): 8 (at 16, regarding the sub-prime crisis in the US); Vandenberghe, A-S. “The Role of Information Deficiencies in Contractual Enforcement.” *Erasmus L. Rev.* 3 (2010): 71 (at 80).

<sup>51</sup> However there are some authors who deny behavioural economics can tell us anything more significant than traditional price theory: Wright, J.D. “Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective.” *NYU J.L. & Liberty* 2 (2006): 470.

<sup>52</sup> Bar-Gill, O., Ferrari, F. “Informing consumers about themselves.” *Erasmus L. Rev.* 3 (2010): 93 insist particularly on the need for more individualised information regarding the use of product or of the service. One might remark that this suggestion was put into English contract law 40 year ago by Lord Denning’s notion of undue influence and independent advice in *Lloyds Bank v. Bundy* [1975] QB 326 (CA); and in French law 30 years ago through the notion of “*devoir de conseil*”, which is much more than a general duty of disclosure.

economic activity.<sup>53</sup> Returning to the starting point of this article, we no longer attempt to defeat superstition, but instead we consider it as inherent element of our society and try, through legislation, to protect a certain class of persons from their gullibility.

- d) This brings us to a final consideration on legal paternalism,<sup>54</sup> which is extremely developed in Europe and dates back to the Enlightenment and to enlightened monarchies of the 18<sup>th</sup> Century.<sup>55</sup> Once non-rational behaviours are objectivised in economic theory and neuro-scientific research and even limited data is provided on the (purportedly undue) advantage some economic

<sup>53</sup> Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, at Article 5, para. 2 sanctions a business practice when “it materially distorts or is likely to materially *distort the economic behaviour* with regard to the product of the average consumer whom it reaches or to whom it is addressed” (italics added). The provision is amply analyzed by Caterina, R. “Processi cognitivi e regole giuridiche.” *Sistemi Intelligenti*, 2007: vol. 3, at 381.

<sup>54</sup> For a recent re-appraisal (and reference to main theoretical works on the subject) see Ogus, A., van Boom, W.H. “Introducing, Defining and Balancing ‘Autonomy v. Paternalism.’” *Erasmus L. Rev.* 3 (2010): 1; and numerous other writings by A. Ogus, among which “The paradoxes of legal paternalism and how to resolve them.” *Legal Studies* 30 (2010): 61.

The debate among US scholars is reflected by an impressive list of articles. For a few starting points: moderately in favour Jolls, C., Sunstein, C.R., Thaler, R. “A Behavioral Approach to Law and Economics.” *Stan. L. Rev.* 50 (1998): 1471, at 1543 ff; and mixed conclusions at 1546; Sunstein, C. R. “Boundedly Rational Borrowing.” *U. Chi. L. Rev.* 73 (2006): 249; Camerer, C.F. “Wanting, Liking and Learning: Neuroscience and Paternalism.” *U. Chi. L. Rev.* 73 (2006): 87; Bar-Gill, O. “The Behavioral Economics of Consumer Contracts.” *Minn. L. Rev.* 92 (2008): 749. Positively against Posner, R. “Rational Choice, Behavioral Economics and the Law.” *Stan. L. Rev.* 50 (1998): 1551; Issacharoff, S. “Can There Be a Behavioral Law and Economics?” *Vand. L. Rev.* 51 (1998): 1729 (“It would indeed be ironic if greater insight into the complexity of human decision making became the justification for taking the freedom to decide, even if imperfectly, from those very individuals” at p. 1745); Epstein, R.A. “Behavioral Economics: Human Errors and Market Corrections.” *U. Chi. L. Rev.* 73 (2006): 111; a wait-and-see attitude can be found in Edwards, M.A. “The Law, Marketing and Behavioral Economics of Consumer Rebates.” *Stan. J. L. Bus. & Fin.* 12 (2006): 422.

The highly ideological and abstract level of the US debate (paternalism yes/paternalism no) can be understood reading the opening lines of Deakin, S. “Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate.” *Erasmus L. Rev.* 3 (2010): 141 (“Paternalistic justifications form a part, but only a part, of contract’s law selective approach to enforcement. Selective enforcement has been a feature of all modern contract law systems, even at the height of nineteenth century ‘laissez faire.’”) Similar concepts, based on solid historical grounds of English case law, are expressed by Waddams, S. “Autonomy and Paternalism from a Common Law Perspective: Setting Aside Disadvantageous Transactions.” *Erasmus L. Rev.* 3 (2010): 121.

<sup>55</sup> See *ex multis* Jean-Jacques Rousseau. *Le contrat social*, chap.VI: “*La volonté générale est toujours droite, mais le jugement qui la guide n’est pas toujours éclairé. Il faut lui faire voir les objets tels qu’ils sont, quelquefois tels qu’ils doivent lui paraître, lui montrer le bon chemin qu’elle cherche* » etc. [The general will is always right, but the judgment that guides it is not always enlightened. It is necessary to show objects how they actually are, sometimes how they should appear, show the correct path it is looking for.] The point is made by Ogus, A. “The paradoxes of legal paternalism and how to resolve them.” *Legal Studies* 30 (2010): 61, at 65.

actors take of this situation, legislation steps in and saves the day.<sup>56</sup> A new form of “superstition” – the law saviour – takes the place of another one.<sup>57</sup>

---

<sup>56</sup> This widespread opinion is expressed, *ex multis*, by Wagner, G. “Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights.” *Erasmus L. Rev* 3 (2010): 47 (regulatory interventions are justified not “by the fact that there is a ‘weak’ party involved, but rather that rational self-determination is impaired or at risk”, at. p. 70).

<sup>57</sup> A final note: while one remains always in admiration looking at the richness and ingenuity of the debate among US legal scholars, and one wishes one had the same intellectual stamina, one is, at the same time and in contrast, dismayed at how parochial the debate often is, confined within the walled (and beautiful) garden enclosed by eleven Circuits, the Supreme Court and a few dozen prestigious law reviews. While any educated European lawyer feels it a duty to (at least) try to understand what is going on across the Atlantic, it rarely dawns upon even eminent US scholars that there is legal life outside their nation, and that, with regards to certain aspects, there might be lessons yet to learn from the European legal systems. The topic of consumer contracts and paternalistic regulation is an obvious example: instead of living in quandaries as to whether it would be preferable to regulate them or not, probably a thorough and clear-minded comparison with the EU model might be of some assistance [the noticeable exception being Whitman, J.Q. “Consumerism versus Producerism: A Study in Comparative Law.” *Yale L. J.* 117 (2007): 340] . Obviously this is not at all an assertion of the superiority of EU law (the writer has expressed his serious doubts about it back in para. 1 and previously in Zeno-Zencovich, Vardi, V. N. “EU Law As a Legal System in a Comparative Perspective.” *Eur. Bus. L. Rev.* 19 (2008): 234, but rather the assessment that comparative methodology is still scarcely considered in US legal scholarship.