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FROM THE *LOCI* OF CICERO TO COGNITIVE BIASES AND 'NOISE'. HOW BIASES DEVELOP AND GROW, INCLUDING IN THE JUDICIAL AREA

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Abstract

[From the *loci* of Cicero to cognitive biases and 'noise'. How biases develop and grow, including in the judicial area] After an introductory analysis of the terms stereotype and prejudice, an attempt will be made to link these concepts (of primarily psychological and sociological scope) to the rhetorical-linguistic and legal areas. It will be confirmed how certain techniques of logical-legal reasoning, in the past, technically and neutrally used certain tools (the *loci*) that represent the forerunners of today's 'prejudices'; and it will be confirmed how cognitive biases and argumentative fallacies have deformed and instrumentalized rhetoric to the point of representing the prevailing tools in the development and dissemination of prejudices, even in the judicial area, even today.

Key Words:

Biases, *loci*, Cicero, argumentative fallacies

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From the *loci* of Cicero to cognitive biases and ‘noise’. How biases develop and grow, including in the judicial area

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1. *Bias and cognitive distortions*¹

The concepts of stereotype and prejudice are not the same thing, but they are closely related: the stereotype is in fact the cognitive core of the prejudice. In the field of psychology, unlike the current language, thinking and cognition are not synonymous. In particular, the thinking corresponds to the inner language and symbols we use. It is often conscious, or at least it is something we might be aware of. The term cognition, on the other hand, has another connotation, since it refers to predominantly unconscious mental processes: cognition is a mental activity through which we process, understand and store intuitive information and through which we plan and program what we say and do. We are not aware of it and only become aware of it by paying attention to it. In this sense, it acts like a *computer* program that is working ‘in the background’.

Related to cognition is the schema (*pattern*): a circumscribed and coherent set of interconnected cognitions such as thoughts, attitudes and beliefs, which enables us to quickly understand a person, place or situation based on limited information. Once activated, schemas facilitate either *top-down*, or deductive, or *bottom-up*, or inductive, processes. Generally, if the consequences of the possible error have high costs, we are

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¹ In the field of psychosocial studies see: AA.VV., *Psicologia del giudizio e della decisione*, (a cura di) N. BONINI, F. DEL MISSIER, R. RUMIATI, Il Mulino, Bologna, 2008; A. CESCHI, R. SARTORI, *Un approccio empirico per una tassonomia dei bias cognitivi*, Chieti, 2012; D. KAHNEMAN, S. FREDERICK, *Heuristics and Biases: The Psychology of Intuitive Judgement*, Cambridge University Press, Cambridge, 2002; M. D. LIEBERMAN, D. ROCK, C. L. COX, *Breaking bias*, in *NeuroLeadership Journal*, 2014, pp. 1 ff.; M. McLuhan, *Dal cliché all’archetipo*, SugarCo, Milano, 1987 (or. ed. 1970); B. R. POSTLE (ed. A. SGOIFO), *Neuroscienze cognitive. L’essenziale*, Edra, Milano, 2016.

more careful about the data and employ accurate schemas (*bottom-up*); conversely, if the costs of indecision are high, people make quick decisions and quickly form their own impressions (*top-down*).

Our behavior results from the patterns we activate; patterns that, however, do not always lead us to the most correct action. Very often, in fact, our everyday inferential processes seem adequate, but sometimes they prove, in practice, to be wrong or unfair.

Social psychology speaks, in this regard, of cognitive bias and distortions (*bias* originates from the Provençal French *biais*, and means 'devious'). Since at the basis of our perception is a cognitive process of observation and interpretation, that is, the construction of reality, there can be precisely cognitive biases induced by a bias of the perceiving subject. None of us is immune to cognitive biases: in fact, a generic component of cognitive biases is present in any judgment, as it is linked to a perceptual factor and thus to a view of reality subjectively filtered by the evaluator.

However, a distinction must be made between heuristics and cognitive *biases*. Heuristics are mental shortcuts that lead to quick conclusions with minimal effort, shortening the decision-making process. Thinking shortcuts that enable us to make quick decisions in situations where we do not have the luxury of overthinking, because we need to act right away; or in situations where it suits us, in general, to avoid 'cognitive effort'. The world is complex, information overabundant, and the time to decide what to do is limited. Heuristics then help us, in the vast majority of cases egregiously, to manage this complexity. We eliminate irrelevant information, give different weights to what interests us versus what may distract us, all to economize on the time and energy each decision requires. But heuristics are not always able to cope with today's society and its incredible speed of change. For this reason, heuristics occasionally, but predictably, lead us astray. These deviations are the *biases*.

Cognitive biases are ineffective heuristics: abstract biases that are not generated on reality data but are acquired *a priori* without criticism or judgment, based on erroneous or distorted perceptions, or outright biases. In other words, cognitive *biases* are the 'dark side' of heuristics, being in practice 'bad' shortcuts that oversimplify reality. They are ineffective, worn-out, and corrupt shortcuts: real dead ends into which we unknowingly enter.

For example, because of confirmation *bias* we tend to seek out, consider and value only news, opinions or evidence that confirm what we are already convinced of. Because of confirmation *bias*, we not only try to get our information from those who are most likely to confirm our ideas, but more importantly we persist in ignoring all evidence that contradicts our beliefs.

Confirmation *bias* is related to the frequency illusion *bias*: the brain is not only inclined to think that all news that circulates confirms its own ideas but, even if there is an actual choice among several different pieces of information, it still tends to unconsciously select only the information that relates to what we believe, consequently overestimating the frequency of information akin to us and mistakenly believing it to be more frequent and therefore necessarily more correct than other (considered) less frequent information.

But the list of *biases* is really long: from overconfidence (in our evaluations and judgments), to Gabler's fallacy (i.e., the tendency to give relevance to what has happened in the past, so that current judgments are completely influenced by such past events), as well as the blind spot *bias* (a kind of mother of all cognitive *biases* that consists of the belief that we are more objective than most people, being in fact immune to the cognitive *biases* that everyone else has-in short: an overestimation of one's own judgment abilities).

The research to identify the errors our minds can incur is still very active and evolving today, so much so that the list of cognitive *biases* that have received confirmation is constantly growing. In fact, it has been estimated that the human mind may be subject to more than 100 cognitive biases, some very different from each other in terms of mechanism of genesis and *target* of the error.

It is, therefore, cognitive distortions and *biases* that - according to social psychology - can lead to the formation of judgments or perceptions that turn out to be inaccurate and dysfunctional, which are a problem in interpersonal relationships and activities involving evaluation and judgment, and which we more generically call “prejudices”.

2. Stereotypes and prejudices²

Each of us thinks and acts according to stereotypes and biases that, in some way, guide our actions. In English they are precisely called *biases*, but the same word is used in computer science disciplines to refer to the errors into which AI (artificial intelligence) can fall.

Prejudice is then generally understood - again following the teachings of social psychology - as a negative attitude toward something or someone, and is usually based on a negative stereotype. The term stereotype (from the Greek *stereòs* ‘rigid’ and *tìpos* ‘imprint’) originated in the 1700s in the field of typography: it denotes the papier-mâché molds used for letters. What makes them unique is that they can be used over and over again because they are very rigid and durable.

The first application of the term in the field of psychology occurs in psychiatry to refer to repetitive and obsessive behaviors. It is then introduced into the social sciences in 1922 thanks to journalist Walter Lippmann, according to whom the process of understanding is not direct but mediated by mental images constructed in relation to how each of us perceives and perceives reality (“cognitive molds that reproduce the mental images of people or in other words the mental pictures we have in our heads”). Lippmann uses the concept of stereotype to explain the formation process of public opinion.

Stereotype means a shared belief, taken for granted in a given cultural environment, which is expressed in beliefs that are always generalizing, simplifying and sometimes - but not necessarily - erroneous. The most obvious function of stereotypes is to anchor a set of people to a basic culture, facilitating feelings of belonging and common initiatives. The most typical stereotypes concern not only social realities but also popularized psychological issues (such as the stereotype: “suffering makes one more mature”) or

² In the literature see: G. W. ALLPORT, *La natura del pregiudizio*, Le Monnier, Firenze, 1973 (ed. or. 1954); B. BETTELHEIM, M. B. JANOVITZ, *The nature of prejudice*, Harper and Brothers, New York, 1964; G. COLASANTI, *Il pregiudizio*, FrancoAngeli, Milano, 1994; J. DIXON, M. Levine (eds.), *Beyond prejudice: extending the social psychology of conflict, inequality and social change*, Cambridge University Press, Cambridge, 2012; J. F. DOVIDIO, *On the nature of contemporary prejudice: the third wave*, in *Journal of Social Issues*, 2001, pp. 829 ff.; S. T. FISKE, *Stereotyping, prejudice, and discrimination at the seam between the centuries: evolution, culture, mind, and brain*, in *European Journal of Social Psychology*, 2000, pp. 299 ff.; E. GOFFMAN, *Frame Analysis. L'organizzazione dell'esperienza*, Armando Editore, Roma, 2001 (ed. or. 1974); G. JERVIS, s.v. *Pregiudizio*, in *Enciclopedia delle scienze sociali*, Treccani, Roma, 1996; B. M. MAZZARA, *Stereotipi e pregiudizi*, Il Mulino, Bologna, 2008; P. Villano, *Pregiudizi e stereotipi*, Carocci, Roma, 2013; P. VILLANO, *(Ri)conoscere i pregiudizi: alcune riflessioni psicologiche ed educative*, in *Scuola Ticinese*, 2019, pp. 5 ff.

natural realities ("it is better to cure oneself with herbs than with artificial substances").

A stereotype can become a prejudice when it is not derived from direct knowledge but learned knowledge. More often than not, it involves blunt evaluations always linked to negative judgment that cannot be subjected to criticism. This is not a wrong, erroneous concept, but an actual prejudice. A thought, therefore, becomes prejudice only when it remains irreversible even in the light of new knowledge.

Prejudices arise from the erroneous generalization caused by stereotypes and categorization in general. And so, simplifying: a) stereotype is the cognitive component and is the basis of prejudice; b) prejudice is the evaluative component; c) discrimination is the behavioral component (prejudice based on stereotypes changes the individual's behavior).

To simplify: 1) "I feel revulsion for a Muslim" (i.e., just because he is a Muslim - prejudice); 2) "I think that because he is a Muslim, he is surely violent" (stereotype); 3) "in friendships I avoid hanging out with Muslims" (discrimination).

In this context, prejudice -according to a famous definition by Gordon Allport - is a "judgment in advance of the assessment of facts. Unfavorable or hostile attitude that exhibits characters of superficiality, undue generalization and rigidity, implying a refusal to question the soundness of the attitude itself and persistence to check its consistency and coherence."

Bias thus stems from those cognitive shortcuts of which we are hardly aware and which are certainly not easy to eliminate. These shortcuts can be considered a double-edged sword, because on the one hand, they are not necessarily to be eliminated: our organism needs energy to be able to perform any function, and prejudice allows us to avoid our organism handling too many 'operations' at a time, relying on prejudices developed on the basis of stereotypes (which, therefore, save time and energy). On the other hand, however, prejudices are either turned into unhealthy or even destructive attitudes (racial discrimination), or totally inappropriate for use in certain contexts (e.g., the judiciary).

The idea that prejudices can become an obstacle to true knowledge or, more generally, pose a problem in certain evaluative activities can be found in early studies of social psychology. Due to the lack of empirical research, around the 1930s a prejudice was considered an unfounded judgment, not corresponding to objective reality, and many social psychologists thought of it as inaccurate: a hostile thought about others, formulated without sufficiently valid reasons.

In a review conducted by American social psychologist John Dovidio, three main phases of the study of prejudice are identified. The first (1920s to 1950s) is characterized by an individualist perspective and a consideration of the prejudice as a psychopathological phenomenon. Belonging to this strand of studies is Adorno and colleagues' 1950 research on the authoritarian personality, according to which the prejudice is an attitude resulting from a very authoritarian upbringing received as a child. The personality developed as a result of this upbringing would be characterized by a rigid and dogmatic style of thinking, a tendency to unconditionally follow superior orders, superstition, and the possession of ethnocentric, anti-Semitic, fascist, and strongly conservative beliefs.

Subsequently (1960-90) there is a second phase of studies, during which the prejudice takes on the dignity of a psychological process and would reflect the normal functioning of the human mind. Specifically, the psychological process that would underlie stereotypes and prejudice is social categorization, that is, a normal cognitive process of sorting the environment in terms of categories and grouping similar or

equivalent people, objects and events according to their relevance to individual actions, intentions or attitudes. But in the case of stereotypes and prejudices we go further, for we extend the basic characteristics that unite members of a category with other requirements of a psychological nature or pertaining to moral qualities or value judgments, thus ‘mixing’ inhomogeneous elements. In this view, the prejudice would be a kind of ‘original sin’ that we all carry around with us, also influenced by our upbringing, contexts of growth and socialization, and experiences: no one is immune to prejudice.

Continuing the brief *excursus* on the history of studies on prejudices, as a result of the social and cultural changes that have taken place mainly in the United States in the context of the struggle for civil rights and social equality, there has been an attenuation and change in the prevalence and pervasiveness of the prejudice, seemingly less open and hostile. From the mid-1980s onward, several theories have been developed to understand the paradox of ethnic attitudes. This means that phenomenon for which, in the face of a clear rejection - in principle - of social injustices toward certain groups (such as, for example, *gays* or African Americans), there is not concrete willingness in people towards the measures necessary for their elimination. Indeed, contemporary multiethnic societies end up being characterized both by a general “rejection of racism” in the name of “we are all the same” and by the development of indirect and penetrating barriers that, paradoxically, obstruct policies on equality, maintain social stratification, defend cultural values (strictly of the majority) and reveal themselves in emotional indifference toward others (“I don’t feel hatred, but neither do I feel sympathy”), as Emerson and Yancey note.

Therefore, a fourth phase of studies has been set in motion in recent years, focusing on the processes of globalization and post-globalization. The issue today is no longer about racism *per se*: everyone (in principle) is ‘against’ it. Prejudices must then be seen and analyzed much more broadly, not only as a perception of others, but more importantly as an element within the social relations that constitute our world.

3. The transmission of prejudice through discursive forms

A particularly interesting area of study relates to the transmission of prejudices through discursive forms. Teun van Dijk, among the leading experts on this topic, points out how prejudices and racism, in particular, can be precise structures, both explicitly and indirectly, implicitly, covertly (for example in calling someone a ‘freedom fighter’ or ‘terrorist’). This is because ideologies organize people and society according to polarized terms, and this is enacted through the strategy of ideological discourse, which can be summarized in the following four principles: a) emphasizing our own and our group’s positive actions (*ingroup*, in social psychology); b) emphasizing the other group’s or groups’ negative actions (*outgroup*); c) de-emphasizing our own negative behaviors; and d) de-emphasizing others’ positive behaviors.

These four possibilities form an ideological framework that can be applied to the analysis of all levels of discourse structures: for example, we can talk about our good or bad actions with hyperbole and euphemisms. We can use quantification techniques (i.e., giving the idea that there are, for example, vast waves of migration, rather than using percentages of the total population), or use vague and indeterminate terms (such as ‘many’), analogies (talking about immigration using the metaphor of invasion), ambiguities (referring to a group as ‘the problem’), and argumentative fallacies (i.e., veritable verbal - and other - illusions based on only apparent logicity). The mechanism that is set in

motion, Paola Villano explains, is basically that of the progressive exclusion of people who do not belong to 'our' group from the boundaries of what we call 'civilization,' in order to marginalize, delegitimize and finally even de-humanize them.

In essence, one may be formally against prejudices (at least the wrong ones), but there is a real risk of continuing to feed them (often instrumentally) by using certain linguistic and rhetorical strategies. And all this does not only concern the area of 'racism' but any context in which stereotypes and prejudices can be created or used.

4. From psychology to rhetoric: commonplaces³

Using metaphors, analogies, semantic and structural ambiguities, if not outright argumentative fallacies, to emphasize or de-emphasize our own thoughts and actions (or those of others), and to realize or exploit - consciously or unintentionally - a bias, has to do with rhetoric. Because, for example, metaphor, emphasis, and analogy are rhetorical figures, with varying functions depending on the context and the strategic purpose.

But the paths of prejudices and rhetoric are intertwined even before the reflection on the transmission of prejudices through discursive forms, that is, already with regard to the very origin of the concept of prejudices. We talk, however, about a 'positive' prejudice as a facilitator of certain discursive and decision-making mechanisms, which lighten the everyday life of each of us in very different areas.

To understand this, let's start with a very simple concept: that of a commonplace. What is, in everyday language, a prejudice if not a hasty judgment, sometimes developed on the basis of a real 'commonplace'? The commonplace is precisely that concept which the listener or reader feels does not need any further study or proof, because it is known and undisputed.

However, the apparent triviality of the concept of 'commonplace' hides a noble and ancient philosophical origin, indeed a veritable technique of rhetorical discourse: topics. If the term 'place' derives from the Latin *locus*, the latter derives in turn from the Greek *tópos*; and 'topica' is in fact the art of disputation, that is, the method of easily finding valid (i.e., plausible and persuasive) arguments around any topic under discussion. In short, *tópoi* represent the philosophical and technically correct version of prejudices, because they are aimed at constructing a discourse by precisely identifying the arguments that are most relevant and will be accepted by the audience.

Topics as the art of pulling arguments from commonplaces originated in Greece along with rhetoric. Aristotle dedicates to topics in the *Organon* the eight books of the *Topici*, and Cicero dedicates the *Topica ad Trebatium*. *Tópoi* (later *loci*) were used to form the

³ In literature see: R. BARTHES, *Elementi di semiologia*, Einaudi, Torino, 1966 (or. ed. 1964); R. BARTHES, J.-L. BOUTTES, s.v. *Luogo comune*, in *Enciclopedia*, vol. VIII, Einaudi, Torino, 1979, pp. 578 ff.; GRUPPO μ, *Retorica generale. Le figure della comunicazione*, Bompiani, Milano, 1976 (or. ed. 1970); H. LAUSBERG, *Elementi di retorica*, il Mulino, Bologna, 1969 (or. ed. 1949); B. MORTARA GARAVELLI, *Manuale di retorica*, Bompiani, Milano, 2019 (prima ed. 1988); C. PERELMAN, L. OLBRECHTS-TYTECA, *Trattato dell'argomentazione. La nuova retorica*, Einaudi, Torino, 1966 (or. ed. 1958); O. REBOUL, *Introduzione alla retorica*, il Mulino, Bologna, 2002 (or. ed. 1996); G. SPOSITO, *Il luogo dell'oratore. Argomentazione topica e retorica forense in Cicerone*, ESI, Napoli, 2001; G. SPOSITO, *Dizionario di retorica. Con elementi di linguistica, fonetica, stilistica e narratologia per l'oratore quotidiano*, Intra, Pesaro, 2020; G. SPOSITO, *Manuale di retorica forense*, Intra, Pesaro, 2020; G. SPOSITO, *The Keys of Legal Rhetoric. A Handbook for Lawyers*, Intra, Pesaro, 2020.

premises of enthymemes, that is, proofs of rhetorical reasoning. Concretely, enthymemes are syllogisms whose premises are not necessarily 'true' but 'verisimilar.' For the Aristotelians, the enthymeme is precisely a syllogism that starts from 'probable' premises or 'signs' (today, for example, we would include among the latter 'blood traces').

The syllogism - it should be remembered - is the fundamental form of logical argument, consisting of three declarative propositions connected in such a way that from the first two, taken as premises, a conclusion can be deduced: 1) all men are mortal; 2) all Greeks are men; 3) therefore all Greeks are mortal. The correctness of the argument depends on its structure (form) and not on the meaning of the words (such as man, mortal, etc.). In particular, the subject and predicate of the conclusion are called the minor term (or extreme) and the major term (or extreme), respectively, while the notion that appears only and, in both premises, (in the example given, 'men') is called the middle term.

The premises of enthymemes are precisely sought in general ideas, intended to form the basis of more complex reasoning and to facilitate the acceptance of a conclusion that one wishes to formulate and propose to the listener or reader (the so-called audience). It must therefore be a matter of generally accepted ideas and opinions registered in the collective memory. Therefore, the places where they are found, namely the *tópoi* or *loci*, are used to trace them. That of a 'commonplace' thus becomes a spatial metaphor to indicate that, in the construction of a discourse (of any kind), it will suffice to 'search' adequately (through the *inventio*, which is one of the parts of rhetoric) to (re)find what already exists and can be adequately used as the premise of a rhetorical syllogism (or enthymeme).

These are, on closer inspection, specific patterns consisting of grids of questions that in fact represent 'circumstances' to be taken into account in the exposition of facts and thus in the construction of any discourse. Grids of 'empty' forms, to be filled with the specific elements of the discourse to be constructed.

From the catalog of "empty forms" we move, then, to that of "full forms," that is, stereotypes, consecrated themes that have already appeared and are widely accepted among interlocutors and to which the speaker can safely refer and rely.

Every discourse (and rhetorical syllogism) will need, therefore, a specific topical grid (first empty and then full) from which to start. A grid-base is what the Latin sources identify in this list: *quis?* (who?), *quid?* (what?), *cur?* (why?), *ubi?* (where?), *quando?* (when?), *quomodo?* (in what way?), *quibus auxiliis?* (by what means?). A classic grid that recalls the "5 W rule" of Anglo-Saxon journalism, given to aspiring journalists and a tool-base to be applied (by answering the grid of questions) in crafting a news piece (discourse): *who?* - *what?* - *why?* - *where?* - *when?*

However, it would be impossible to list (much less deal with) 'grids' and 'places' introduced by classical rhetoric and then revisited by later studies, up to the 20th century. At most, one can mention six main groupings (proposed since the second half of the last century): places of quantity (what is more frequent, believed by most, and it is better and more reliable); places of quality (which value the 'unique' in all its possible forms - what is unique, subjective, personal, unrepeatable, and it is better than the conventional and collective); places of order (what comes first, or constitutes the cause, and it is hierarchically superior to what comes next and is a consequence of it); places of the existent (what 'is' has greater force than what is merely possible); places of essence (what is typical of the genre is superior to what describes the genre in an occasional and episodic way); places of the person.

The latter are particularly used, since the Roman times, as the basis of judicial

arguments aimed, indifferently, at the prosecution or the defense. *Loci* (or *argumenta*) *a persona* are those that are deduced from accused person or from other subjects (e.g., witnesses or offended parties), and the 'places' where they are found are numerous. Quintilian, for example, describes the *locus* of *sexus* (sex) as that which allows us to consider it more likely that a robbery by a man and a poisoning by a woman will occur. In the same way, *aetas* (age) constitutes another particularly useful *locus*: each age is in fact characterized by different behaviors and habits; just as the *educatio et disciplina* (education and instruction) received may be relevant in the evaluation of subjects. But physical appearance (*habitus corporis*) also plays a role, the strength is often considered as evidence of bullying. Of course, *fortune*, the difference in social status (*condicionis distantia*) and the activity performed (*studia*) also distinguish, according to classical rhetoric, the behavior of individuals (it would not be credible that poor and rich, free and slave, executive and simple citizen, lawyer and farmer would act in the same way). Particularly, *animi natura*, or temperament, and an *animi motus*, or temporary disturbance (such as wrath) would make it possible to assess the degree to which a subject can be trusted or a fact can be attributed to him or her.

In short, we are at the origin of the concept of 'commonplace,' with a technical-rhetorical meaning and scope, but also a legal one because with Cicero the Aristotelian topics is pragmatically stated in order to convince and win in court. Not only that: it is clear the appearance of concepts that are part of the criminal justice system today and that we identify with obvious simplicity (e.g., the circumstances of the crime), but which in the past had an exclusively rhetorical use in order to 'convince' the audience to absolve or convict (and not to gradate the punishment on the basis of circumstances not yet typified).

5. From the persuasive argumentation of commonplaces to the realization and dissemination of prejudices⁴

A 'commonplace' in rhetoric and logic, indicates the general arguments or themes applicable to particular instances of argumentation, or the syllogism that everyone accepts. In current usage, on the other hand, it identifies an opinion made trivial and annoying by general misuse. This is, on closer inspection, not simply a difference of discursive areas, but a semantic and of value transformation from the former to the latter area.

In the first case (original meaning), the commonplace is, as a persuasive tool, easily usable and certainly effective: in addressing a particular topic, the speaker - perhaps lacking specific knowledge on that topic - resorts to other general topics; the audience, recognizing that general topic as a particular theme, will be willing to believe it to be true.

The current meaning of the expression 'commonplace', on the other hand, is typical of modernity: in this context, the fact of using arguments known to everyone is no longer a guarantee of acceptability and truthfulness but, on the contrary, a clear symptom of banality. Entirety, in short, becomes generality; nevertheless, it can still have communicative persuasiveness and even create harmony with that audience that is likely

⁴ Cf. G. MARRONE, *Le solite cose. Appunti sul cliché nel testo letterario*, in G. PUGLISI (ed.), *La traccia letteraria*, Marsilio, Venezia, 1988; G. MARRONE, *Laoghi comuni. Un'ipotesi semiotica*, in *Il telo di Pangloss. Linguaggio, lingue, testi*, Nunzio La Fauci, Palermo, 1994; F. PENNACCHIO, review to Calabrese Stefano, *Retorica e scienze neurocognitive*, in *Enthymema*, 2014, pp. 258 ff.; A. PRATO, *Il peso delle parole. Un terreno comune tra retorica e antropologia*, in *Dialoghi Mediterranei*, 2020.

to appreciate it. And in fact, the commonplace, according to Barthes, is not an objectively ascertainable linguistic reality, but a communicative phenomenon that can be subjectively ascertained.

It should therefore be emphasized that the notion of a commonplace is present, albeit in different ways and with different accents, in many disciplines: rhetoric, logic, dialectics, philosophy of law, linguistics, semantics, sociology, and so on. If in Aristotelian rhetoric and dialectic the commonplace is the space, abstract and artificial, within which to go for possible arguments and opinions, in sociology it is the linguistic expression of the feeling of a given community; just as in literary studies it is a phenomenon of style with specific poetic functions. And again: if in linguistics it is the syntagmatic aggregation of certain morphemes, for some *mass media* scholars it is the signifying form of ideology signified in many messages.

We could also call the poetic commonplace *cliché* and the semantic commonplace ‘stereotype,’ the linguistic commonplace ‘crystallized syntagma’ and the rhetorical commonplace *tópos*. However, we will have to admit that the repetition of the same idea (*tópos*) is one thing, the repetition of the same words (*cliché*) is another, and the properties of the thing we all have in mind when we attribute a certain meaning to a certain term (stereotype) is yet another.

Yet, whether linguistic forms or semantic content, signifiers or meanings, *clichés* and *tópoi* both depend on the phenomenon of repetition and, above all, its recognition. It thus happens, very often, that ‘catch phrases’ convey ‘received ideas’ and, in parallel, that common opinions are expressed through recurrent idioms. Similarly, if the stereotype is implicitly necessary for the understanding of meaning, the *cliché-tópos* pair is nothing but an explicit stereotype, that is, concretely express in the discourse.

And all these terms, though formally different, end up meaning the same thing; but, more importantly, they all end up being able to contribute to the realization and spread of ‘prejudices,’ which can be used (and instrumentalized) wherever it is necessary to persuade by making the reader’s or listener’s path more comfortable (and perhaps hiding something uncomfortable).

6. Stereotypes and prejudices outside and inside courtrooms

It is in the judicial context that the shift from a technical-rhetorical use of the concept of ‘place’ to that of a vehicle for the dissemination of stereotypes and prejudices appears even more paradoxical. A context often contaminated and fueled - sometimes in a bilateral and equal form - by the journalistic context, generating a kind of argumentative short-circuit to the detriment of the administration of justice and the many people who come into contact with it.

The history of Italian jurisprudence has never ceased to produce incredible examples of such distortions. Wanting to limit the review to rather well-known news cases that followed the establishment of a democratic and republican regime, one can only start with the case of the Montesi murder and the trial of Piero Piccioni⁵. The investigation

⁵ On Saturday, April 11, 1953, Easter Eve, the body of 21-year-old Wilma Montesi is found on the beach at Torvajonica in Capocotta, a beach area not far from Rome. The body shows no signs of violence and is fully clothed (except for garters, stockings and shoes). The causes of death are

(including the formal indictment) is an incredible summation of stereotypes and prejudices, transformed into clues if not actual evidence. This is always said by a court, in the grounds of the acquittal verdict. The judges explain how the absolute protagonist of the trial was, precisely, 'prejudice':

"The rumors against Piero Piccioni arose after others [...] there was a tendency, without any foundation, to strike at any personality of the ruling class, without choice of a sure target, arriving, after various attempts, to pin it on the person of those who, like Piccioni, because of the pre-eminent figure of his father and the life he led after his introduction into the world of jazz and cinema, better lent themselves to the purpose than others. The rumors began in the first days of May, that is, long after Montesi's death, and had for their cradle the press room of Montecitorio: which explains their purely political purpose."

In the subsequent and equally famous trial of Giovanni Fenaroli, a defendant in the death of his wife Maria Martirano, the investigating judge Roberto Modigliani wrote (in late 1959) in the indictment thus:

"Born in Como, among an active and hard-working population, in an area among the richest and most industrialized in the peninsula, Giovanni Fenaroli, who in his youthful dreams certainly aspired to become a powerful captain of industry, acquired, or perhaps had innately, the deterrent side of the mentality of his countrymen, that of considering wealth as the highest aspiration of man, of seeing money as the only instrument of power and consideration, and of evaluating men and things by the yardstick of money."

A questionable stereotype that turns into a real prejudice, ending up being the subject of a court order. That's enough for the 'opinion' to be taken up by the *Corriere della sera* on February 1, 1961, just days before the start of one of Italy's most famous trials, and gradually by all the other newspapers.

But the famous court cases, marked by the indifferent use of stereotypes and prejudices (and many, many argumentative fallacies), continue. There will still be the case of the anchorman, a real TV *star* of the time, Lelio Luttazzi (the subject of a resounding judicial 'mistake' in 1970, complete with arrest and solitary confinement), and the 1978 'rape trial' (videotaped and the subject of an extraordinary documentary in 1979). It is from the latter that male chauvinist and sexist stereotypes still echo, used by the defendants' advocates in 'argumentative' mode, and fortunately not used by the sentencing drafters (among the many stereotypes used, that of the woman who "devotes her life to giving pleasure to others").

In this quick *excursus* we need, of course, to mention the Tortora case (1983-1987); a case that - due to the fame of the artist accused of being a "merchant of death" through drug dealing - will become the most egregious Italian miscarriage of justice, to which many names in Italian journalism will contribute with heavy responsibility. It is precisely on the journalistic level that the use of the stereotype of the TV 'star' will prevail, only for this

unclear: the autopsy speaks, generically, of syncope due to a footbath. But newspaper editorial offices are shot through with 'rumors,' 'rumores' that do not immediately get published: Wilma Montesi is said to have died perhaps from a drug *overdose* or a simple illness, but during an orgy at a villa of Marquis Ugo Montagna. An orgy in which the musician Piero Piccioni is said to have taken part: this was the son of a prominent Christian Democrat notable, the former Foreign Minister Attilio Piccioni, destined to inherit from Alcide De Gasperi the *leadership* of the Christian Democrats (at the time the most important governing party).

one to be devoted to any vice - a stereotype to which will be added the fallacy of circular reasoning (“you don’t go handcuffing someone in the middle of the night if there are no good reasons”⁶; “The defendant has not been able to explain to us why there was a conspiracy against him”⁷).

Many newspapers use his arrest to basically say, “It is not true that there are no untouchables.” That is: Tortora is certainly guilty and becomes the icon of the efficiency of “blindfolded goddess.” One erroneous prejudice is thus used (even by the magistrates) to counter another (that justice is not then really equal for all). The two investigating magistrates, Lucio Di Pietro and Felice Di Persia, are well aware that Tortora’s capture (and conviction) is the litmus test of their professional seriousness, and they intervene in the newspapers, after the arrest, to reassure public opinion with the same bias about prejudice:

“We couldn’t have eyes on it; notoriety does not mean impunity for anyone” (*L’Unità*, June 20, 1983, p. 4).

In addition, we come across the case of Via Poma and the Cesaroni murder (1990), with investigations carried out by enhancing at times real social stereotypes; as well as, similarly, in the case of the Knox-Sollecito trial for the murder of Meredith Kercher (2007-2012), the subject of exceptional attention by the American media also because of the pre-judicial and journalistic context that sketches the defendants (not unlike what the prosecution will also do) by leveraging elements that are the result of obvious prejudice based on stereotypes, including sexual ones.

However, it should always be reiterated that, in the cases just mentioned, the use of stereotypes is almost always accompanied by the use of argumentative fallacies; above all, that of the circular argument, a real *star* even today in many judicial decisions that are not accorded the honor of the chronicles but nevertheless capable of indelibly marking facts and people.

7. Mental traps for judges

The following question then arises: what are the most frequent problems found in judicial decisions? In the field of logic and philosophy of science, some authors⁸ have recently and effectively summarized the results of nearly two decades of empirical studies on judges’ behavior (observing cases and evaluating decisions), concluding that “judges rely heavily on intuitive reasoning to evaluate legal disputes,” routinely use “simple mental shortcuts as a guide to reasoning about legal materials,” and for this reason, while occasionally employing more deliberative forms of reasoning, “remain exposed to errors in judgment.” Moreover, the data indicate that these errors do not decrease “with experience or specialization” of the judge.

This assessment of judges’ cognitive performance, Cevolani and Crupi note⁹, is not surprising considering what psychologists and behavioral economists tell us about how humans judge, reason and make decisions. From this perspective, judges behave no

⁶ C. CEDERNA in *La Domenica del Corriere*, July 2, 1983, p. 8.

⁷ Judgment Trib. Naples, Sept. 17, 1985.

⁸ J. J. RACHLINSKI - A. J. WISTRICH, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, in *Annual Review of Law and Social Science*, 2017, pp. 203 ff.

⁹ G. CEVOLANI - V. CRUPI, *Come ragionano i giudici: razionalità, euristiche e illusioni cognitive*, in *Criminalia*, 2017, pp. 181 ff.

differently from other professionals, such as doctors, managers, financial advisers, politicians and, ultimately, ordinary people. The data analyzed show how judges consistently turn out to be influenced by irrelevant information and routinely misjudge risks and probabilities associated with uncertain events.

Judges today turn out to be susceptible to many cognitive illusions or *biases*: in particular, the anchoring bias (making decisions based on the first information found or provided), the hindsight bias (considering a given event more likely when it has already occurred), the confirmation bias (selecting the information possessed so as to place more attention, and thus more credibility, on those that confirm one's beliefs), the *framing* effect (the effect, on choices, of the way alternatives are presented or 'framed'), the contrast effect in sequential decision-making contexts, dependence on the numerical format in which relevant information is requested or presented, and others. As worrisome as the picture already appears, it is actually even more so when one considers that the studies that have been carried out have focused exclusively on errors, distortions, and failures of cognitive rationality, that is, originating in systematic and predictable deviations from the canons of rationality due to what we might call the architecture of our brains. However, there is an extensive literature on several other potential sources of error in judicial reasoning: namely, ideological biases (especially political, but also religious, racial or gender biases), strategic behavior induced by pressure from the *media*, politics or other legal authorities (e.g., superiors - the Court of Appeals, the Court of Cassation, etc.), distortions introduced by procedural constraints, bureaucracy and the legal environment, and emotions and other psychological factors that influence judges' decisions. Cognitive illusions constitute only one of the possible sources of error in the legal field, which coexists and interacts with many others of a different nature.

For example, other studies have shown that judges' decisions are subject to 'noise'¹⁰. For example, judges have been found to be more likely to grant probation early in the day or immediately after a lunch break than immediately-before a break (a hungry judge might be harsher). Another study of thousands of juvenile court sentences found that when the local football team loses a game on the weekend, judges make harsher decisions on Monday, and that black defendants are much more adversely affected by this increase in severity. Yet another study analyzed 1.5 million court decisions issued over a 30-year period coming to a similar conclusion. An analysis of 6 million rulings made by French judges over 12 years showed that they are more lenient with defendants on their (the defendants') birthday, but it is suspected that it may be the same for judges' birthdays as well. According to another survey, judges could be influenced even by a seemingly irrelevant factor such as outdoor temperature.

In essence, while *bias* pushes us all in the same, wrong direction, noise describes the great variability in our decisions and judgments. The combination of *bias* and *noise*, of course, can only further deteriorate the quality of our choices, even in a judicial context.

8. Inevitably irrational justice?

The area that was only briefly outlined in the previous paragraph has been the subject of

¹⁰ See D. KAHNEMAN, O. SIBONY, C. R. SUNSTEIN, *Rumore: Un difetto del ragionamento umano*, UTET, Torino, 2021 (or. ed. *Noise: A Flaw in Human Judgment*, 2021).

much attention and development in recent years¹¹. As much as the absolute elimination of the ‘noise’ that conditions the lives and decisions of each of us is objectively impossible, it is nevertheless possible to think that we can gain a better understanding of both the functioning of our minds and the appropriate approach to decision-making moments and contexts, limiting at least some heuristics and cognitive *biases*. Great attention is therefore also being paid by many scholars to so-called *debiasing*, that is, the analysis and design of procedures and techniques that can counteract the influence of cognitive illusions and reduce their negative impact, both in general and relative to specific situations and tasks.

For that matter, the general and ongoing decay of judicial argumentative logic, which makes use no longer of technical ‘places’ to support its argument but of faster heuristics if not outright cognitive *biases* and stereotypes, appears particularly dangerous and harmful. There are of course also beautiful judgments by which the Court of Cassation ‘sometimes’ effectively succeeds in stigmatizing the erroneous paths and approaches of the jurisprudence, even the stereotypes and fallacies, but these cannot be a consolation price. There may be a judge in Berlin, but Berlin appears objectively too far away for citizens.

If the degeneration of *loci* into *bias*, and the risks forensic activities take, are evident only to a few practitioners equipped with good general knowledge and adequate curiosity, it means that there is a problem regarding the training. It is necessary for a judge and a lawyer to know, as early as at university or no later than the initial apprenticeship, not only how a procedural code is structured but also how the human mind is structured and functions, what the basic mechanisms are with regard to logic and argumentation (particularly legal), what applied rhetoric is, and what visual rhetoric is also. Aspiring magistrates and lawyers who are better trained and competent even in seemingly distant disciplines (linguistics, rhetoric, psychology, but also neuroscience) will be able to be knowledgeable forensic practitioners and certainly less accustomed than those of today to being perpetrators or victims of cognitive (and other) distortions. “Those who are highly skilled are less prone to noise, and also less prone to *bias*”; in other words, “the goodness of a judgment depends on what you know, how well you reason, and how you reason.”¹².

Because (predictably) irrational justice is not an acceptable concept.

¹¹ Just think of the attention to decision-making *biases* especially in economics (*behavioral finance*), fueled in recent years by Nobel laureate Daniel Kahneman (*Pensieri lenti e veloci*, Mondadori, Milano, 2019; or. ed. *Thinking, Fast and Slow*, 2011).

¹² D. D. KAHNEMAN, O. SIBONY, C. R. SUNSTEIN, *Rumore: Un difetto del ragionamento umano* cit., pp. 259-260. And, continuing the quote, “good judges tend to be bright and competent, but they also have an open mind and are willing to learn from new information.”

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