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# 10

# Inferential Authority in Practical Reasoning

**DAMIANO CANALE**

## I. Introduction

In this chapter I aim to examine Robert Brandom's contribution to the understanding of practical reasoning. More precisely, my question will be: how and to what extent does an inferentialist account of linguistic content and reasoning shed light on the features of practical reasoning in a highly institutionalised context such as law?

Generally speaking, a theory of practical reasoning is a theory of how to figure out what to do. As a result, a theory of this sort usually focuses on the question of what inference patterns are legitimate methods of arriving at practical evaluations, intentions, plans and judgments about what one ought to do. I will show that Brandom's inferentialism provides a deflationary picture of practical reasoning, conceived as an exchange of reasons that determines the conditions under which a practical judgement is justified. As a consequence, there can be indefinitely many different kinds of legitimate practical inference, depending on the game of 'giving and asking for reasons' one is engaged in. The unity of practical reasoning is given by the pragmatic process in virtue of which practical judgements, evaluations and plans are socially elaborated.

Legal reasoning, with specific regard to the use of precedents in legal adjudication, plays a distinct role within this theoretical framework. According to Brandom, the use of precedent in legal adjudication provides a general model for how conceptual content acquires determination in both epistemic and practical reasoning. Although Brandom's analysis of the use of precedents provides a novel explanation of the temporal evolution of linguistic content, it does not take into consideration the institutional aspects that enable this model to function effectively. As we will see, in highly institutionalised contexts such as law, the practice of 'giving and asking for reasons' is governed by institutional norms that are not created by those who apply them, and that ensure the determinacy of legal content as a result of judicial decision-making. But if judicial reasoning does not provide

a model of content determination that can be generalised to non-institutional contexts, the problem of indeterminacy remains an open question for the inferentialist project.

The chapter will proceed as follows. I will first outline Brandom's inferentialist approach to language and reasoning (section II) and the form that practical reasoning takes within this framework (section III). I will then critically examine the common law model of content determination proposed by Brandom, and suggest an integration to address its explanatory shortcomings (section IV). Brief conclusions will follow (section V).

## II. Brandom's Inferentialism, in a Nutshell

Robert Brandom presents a view of human rationality as centred on inferential practices.[1] Unlike artifacts and other natural creatures, humans are held responsible for what they say and do: they are supposed to provide reasons justifying their claims and actions when challenged, and to endorse the consequences of them. Furthermore, humans may be granted the authority to perform an action or make a claim based on the actions and claims of others.[2] Brandom argues that these 'normative statuses' – sets of duties and permissions, responsibilities and authorisations – are generated by human attitudes through linguistic interaction. Furthermore, they have an inferential structure. For example, during a trial, if the prosecutor asserts 'The defendant was in Rome on the 14th of April', it is expected that this statement leads the prosecutor to infer 'The defendant was in Italy on that day'. Given the first assertion, she has the discursive duty to endorse the second one. The prosecutor may then support her initial assertion, if challenged, by stating 'The image of the defendant was recorded in Piazza Navona on that day'. This may grant her the authority, barring any contrary evidence, to make the original claim. However, from her initial claim, the prosecutor cannot legitimately infer 'The defendant was in Florence on the 14th of April', and is precluded from claiming that Rome is in Greece or that 14 April comes after 1 May. Even if all that seems pretty obvious, it has relevant consequences for an inferentialist explanation of reasoning and content. First, humans are rational agents in the sense that 'their behaviour can be made intelligible … by attributing to them the capacity to make practical inferences concerning how to get what they want, and theoretical inferences concerning what follows from what'.[3] Second, the contentfulness of human action, including linguistic behaviour, relies on its recognition by others

[1] RB Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge, MA, Harvard University Press, 1994); RB Brandom, *Articulating Reasons: An Introduction to Inferentialism* (Cambridge, MA, Harvard University Press, 2000); RB Brandom, *Between Saying and Doing: Towards an Analytic Pragmatism* (Oxford, Oxford University Press, 2008).

[2] Brandom, *Articulating Reasons* (n 1) 13, 33, 80.

[3] ibid 157.

as something for which one is held responsible or has authority.[4] Both theoretical and practical reasoning can be seen, therefore, as grounded in a practice of giving and asking for reasons which has a normative character, is inferentially articulated, takes place in a social environment, and has a historical dimension relating to the evolution of the practice over time.

These general ideas have been translated by Brandom into the language of pragmatism and analytical philosophy. Brandom's philosophical project is characterised by three claims which specify the general ideas mentioned above: (a) conceptual role semantics; (b) normative pragmatics; and (c) scorekeeping by linguistic practitioners. Let us consider them in some more detail.

(a) *Conceptual Role Semantics*. The content of sentences consists of the role these sentences play in linguistic practice. This is to say that a sentence has a content in so far as it serves as an antecedent and a consequence in inferential relations among sentences. These relations *are* the content that sentence bears: they make explicit the rules governing the use of language in a certain discursive context, which determine the conditions of application of sentential and sub-sentential expressions, and fix their reference.[5] But how are these conditions determined?

(b) *Normative Pragmatics*. The inferential role of a sentence (how it is used in reasoning) is a function of the normative statuses that speakers assign to one another when performing a speech act in a discursive practice. As noted above, Brandom's idea is that being a participant in a linguistic practice is to be responsible for the claims one makes, and to be responsible is to be considered responsible by the other participants. Inferentialism qualifies these normative statuses as *commitments* and *entitlements*. These terms express, respectively, the obligation to accept the antecedents and the consequences one is committed to, and the permission to claim the antecedents and to draw the consequences one is entitled to. These normative statuses depend, in turn, on normative attitudes of the participant in linguistic practice. In Brandom's view, there are three basic kinds of normative attitude in an exchange of reasons: *attributing*, *undertaking* and *acknowledging*.[6] Each participant attributes (takes another to adopt), undertakes (implicitly adopts) and acknowledges (explicitly adopts) commitments and entitlements in a linguistic intercourse. These distinctions shed light on the source of the inferential relations considered above. According to Brandom, semantics depends on pragmatics: the content of a sentence is a function of how people use that sentence. Besides, the inferential relation among sentences accounts for

[4] 'Content is understood in terms of properties of inference, and those are understood in terms of the norm-instituting attitudes of taking or treating moves [in linguistic interaction] as appropriate or inappropriate in practice. A theoretical route is accordingly made available from what people do to what they mean, from their practice to the contents of their states and expressions': Brandom, *Making It Explicit* (n 1) 134.

[5] In Brandom's lexicon, the conceptual content of a term or expression is the set of inferential rules this term or expression is involved in, in linguistic practice. *cf* Brandom, *Articulating Reasons* (n 1) 4 ff.

[6] Brandom, *Articulating Reasons* (n 1) 173 ff.

the status that speakers attribute, acknowledge or undertake to one another on the basis of what they say in an exchange of reasons. More precisely, content *P* is determined by three sorts of inferential relations:[7]

> *Commitment-preserving relations*: if one is committed to *P*, then is committed to *Q*.
>
> *Entitlement-preserving relation*: if one is entitled to *P*, then is prima facie entitled to *Q*.
>
> *Incompatibility relations*: if one is committed to *P*, then is not entitled to *Q*.

(c) *Scorekeeping by Linguistic Practitioners*. The way in which the content of language and thought is determined can be explained by considering the participants in a discursive practice as the scorekeepers of each other's commitments and entitlements. In the scorekeeping picture of language use, that Brandom draws from David Lewis, every time one utters a sentence token, and so undertakes, acknowledges or attributes commitments and entitlements, the score changes in a rule-governed way.[8] At a given moment in an exchange of reasons, the score is just the ordered set of commitments and entitlements associated with each participant by the others. So, content can be seen as a 'scoreboard' which registers the linguistic behaviour of the practitioners, the antecedents and consequence of each sentence token, and the inferential rules explaining practitioners' behaviour. The evolution of the scoreboard over time determines the *inferential authority* of participants: in practical reasoning, who is conclusively entitled to a certain normative evaluation, judgement or plan about what ought to be done.

Based on this reconstruction, it is apparent that Brandom's framework exemplifies one of the most important trends in contemporary pragmatism, a trend characterised by two methodological principles: linguistic priority and anti-representationalism.[9] The principle of linguistic priority suggests that when addressing metaphysical issues – such as the fundamentals of practical reasoning, the source of morality or the nature of law – one should not begin by seeking the distinctive properties of these phenomena. Instead, the focus should be on 'the words, concepts, and thoughts in terms of which we talk and think *about* such things and properties'.[10] The attention for linguistic behaviour is not seen here as a sort of lexicographical exercise or old-fashioned form of conceptual analysis. It is rather a privileged access point to anthropological questions such as: how are we to explain the functions of the behaviour under scrutiny? What is its role in the lives of human creatures? What is its genealogy and practical significance?

The second principle, anti-representationalism, rejects the primacy of semantic notions, such as meaning and reference, in explaining content and the proper

[7] Brandom, *Making It Explicit* (n 1) 132; Brandom, *Articulating Reasons* (n 1) 194; Brandom, *Between Saying and Doing* (n 1) 120.

[8] D Lewis, 'Scorekeeping in a Language Game' (1979) 8 *Journal of Philosophical Logic* 339.

[9] *cf* D Macarthur and H Price, 'Pragmatism, Quasi-realism, and the Global Challenge' in C Misak (ed), *New Pragmatists* (Oxford, Oxford University Press, 2007) 94. See also, RB Brandom, 'Global Anti-representationalism?' in H Price (ed), *Expressivism, Pragmatism and Representationalism* (Cambridge, Cambridge University Press, 2013).

[10] Macarthur and Price (n 9) 94.

use of linguistic expressions. Rather, it advocates for a functional explanation of all vocabularies (including semantic vocabulary) based on their usage in a given context. Consistent with this stance, Brandom assumes that the content of a linguistic expression is made up by the inferential rules governing its use within linguistic practice.

However, Brandom's philosophical proposal is highly controversial. According to standard logic, for instance, a sentence can enter a number of good or bad inferences but these inferences do not determine the meaning of that sentence.[11] The propositional content of a sentence is understood to be given by its truth-conditions, which are determined by the meaning of the sentence's components and their syntactical arrangement. Furthermore, contemporary philosophy of mind and cognitive sciences generally deny that propositional thinking and linguistic content are normative.[12] Why should they be? If a prosecutor asserts 'The defendant was in Rome on the 14th of April', there is nothing that she is actually obliged, prohibited or permitted to infer from it, nor is there any inherent obligation, prohibition or permission regarding what to infer from it. One may simply argue that speech acts are linguistic events having propositional content and a certain illocutionary force, yet they are not normatively and inferentially articulated. Finally, the idea that linguistic and mental content arises from the social interaction of rational creatures who attribute and acknowledge inferential responsibility and authority to one another, sounds counterintuitive and theoretically highly demanding. It seems plausible that linguistic expressions and thoughts can possess a content that expresses beliefs, desires, or other intentional attitudes, independent of the linguistic scorekeeping of the others.

It is important to emphasise, however, that Brandom does not seek to discard the standard explanation of propositional content, intentional attitudes and knowledge. Rather, inferentialism is better understood as a critical enquiry into the presuppositions underlying the standard view and the order of explanation adopted by it.[13] More precisely, inferentialism can be seen as a meta-sematic thesis, ie, a thesis about what it is by virtue of which linguistic expressions and thoughts have the content they have.[14] Starting from this, Brandom offers a novel account of the nature of intentionality, an account that carries significant consequences

[11] However, note that inferentialism is commonly accepted as the best explanation of the content of logical connectives. As Paul Boghossian has pointed out, 'It's hard to see what else could constitute meaning conjunction by "and" except being prepared to use it according to some rules and not others (most plausibly, the standard introduction and elimination rules for "and")': P Boghossian, 'Williamson on the A Priori and the Analytic' (2011) 82 *Philosophy and Phenomenological Research* 488, 493.

[12] *cf* K Glüer and Å Wikforss, 'Against Content Normativity' (2009) 118 *Mind* 31; H Ginsborg, 'Meaning, Understanding and Normativity' (2012) 86 *Proceedings of the Aristotelian Society* 127.

[13] RB Brandom, *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality* (Cambridge, MA, Harvard University Press, 2002) 90 ff.

[14] *cf* J Murzi and F Steinberger, 'Inferentialism' in B Hale, C Wright and A Miller (eds), *A Companion to the Philosophy of Language*, 2nd edn, vol 1 (Oxford, Wiley-Blackwell, 2017); L Incurvati and JJ Schlöder, *Reasoning with Attitude: Foundations and Applications of Inferential Expressivism* (Oxford, Oxford University Press, 2023) 35.

for a wide range of philosophical debates. In other words, inferentialism is not an alternative to standard semantics, traditional alethic logic, philosophy of mind and cognitive sciences. Rather, in line with contemporary pragmatism, inferentialism seeks to look at the problems traditionally addressed by these areas of philosophy from a different perspective, with the aim of stimulating novel research strategies. In the same spirit, I will consider in the following section Brandom's contribution to practical reasoning.

## III. Inferentialism and Practical Reasoning

Brandom's inferentialism has received significant attention in the field of theoretical reasoning, in particular with regard to the semantics of declarative sentences, the content of logical connectives, the concepts of justification and truth, and the nature of propositional attitudes.[15] As William White has put it, all this seems 'to come at the expense … of a careful treatment of areas concerning practical reasoning'.[16] Brandom, in fact, has paid limited attention to the classical questions characterising practical philosophy. In a seminal paper on the explanation of action, he just emphasised that practical reasoning has relevant similarities with theoretical reasoning, in much the same way that action is analogous to perception.[17] When we acquire information through observation, we react to our surroundings letting observational reports function as 'discursive entry transitions' thanks to our ability to discriminate between perceptive inputs.[18] By contrast, 'ought' sentences have motivational force: they function as 'discursive exit transitions' since they may transform reasons into actions. Although observational reports and ought-sentences serve different functions, both link reasoning with non-linguistic entities. In both cases, furthermore, this connection depends on the inferential responsibility and authority that speakers mutually attribute and recognise in the scorekeeping of reasons: 'Action (a discursive *exit* transition) depends on reliable dispositions to respond differentially to the acknowledging of certain sorts of commitments, the adoption of deontic attitudes and consequent change of score, by bringing about various kinds of states of affairs'.[19]

[15] *cf* B Prien and DP Schweikard (eds), *Robert Brandom: Analytic Pragmatism* (Heusenstamm, Ontos Verlag, 2007); B Weiss and J Wanderer (eds), *Reading Brandom: On Making It Explicit* (London, Routledge, 2010); G Bouché (ed), *Reading Brandom: On A Spirit of Trust* (London, Routledge, 2020); See also the collection of papers edited by Edwar Minar in *Philosophical Topics*, vol 36(2) Fall 2008.

[16] WH White, 'Inferentialism and Practical Reason' (PhD Dissertation, Washington DC, Georgetown University, 2002) 5.

[17] RB Brandom, 'Action, Norms, and Practical Reasoning' (1998) 12 *Philosophical Perspectives* 127, reprinted in Brandom, *Articulating Reasons* (n 1) 79–96.

[18] Brandom, *Articulating Reasons* (n 1) 79. Following Sellars, discursive entry transitions involve the occupation by a language user of a position in an exchange of reasons as a response to a state of affairs that is not itself a position in an exchange of reasons. W Sellars, 'Some Reflections on Language Games' (1954) 21 *Philosophy of Science* 204, reprinted in K Scharp and RB Brandom (eds), *In the Space of Reasons: Selected Essays of Wilfrid Sellars* (Cambridge, MA, Harvard University Press, 2007).

[19] Brandom, 'Action, Norms, and Practical Reasoning' (n 17) 83.

These considerations suggest that Brandom's lack of attention to practical philosophy is only superficial. The attitudes required for the exercise of practical reason are also those necessary to actualise the normative practices that make theoretical reasoning possible. One could argue, therefore, that theoretical reasoning is only a modality of practical reasoning, as the normative articulation of the game of giving and asking for reasons underpins any form of reasoning and content, both in the epistemic and practical domain. Consequently, Brandom's meta-semantics can be understood primarily as a contribution to the study of practical reasoning. But what exactly does this contribution consist of, and to what extent is it philosophically significant? Let us attempt to answer these questions.

It is commonly assumed in contemporary philosophical debates that only one sort of entities can serve as the source of reasons for action.[20] The debate between Internalism and Externalism is instructive in this respect.[21] According to Internalism, reasons for action are the expression of desires or other dispositional mental states. It is so because practical reasoning must be able to explain action, at least in suitable circumstances, and only dispositional states seem to be able to carry out this work. If someone is not motivated to do *A*, nor would she be motivated to do *A* under any particular set of circumstances, it is implausible to assert that she has a reason to do *A*. To contribute to the explanation of action, practical reasons need to be connected to some sort of internal fact or event having the capacity to motivate action. Absent this connection, the relevance of reasons in the explanation of human behaviour remains mysterious. According to Externalism, on the contrary, reasons for action are normative properties of facts or states of affairs which provide guidance to action independent of an agent's internal dispositions. This perspective does not exclude the possibility that practical reasons are associated with dispositional states of individuals. However, the connection between reasons and internal dispositions may be present in some agents and absent in others without affecting the capacity of reasons to guide action.

What matters here is that each side of the debate contends that only one sort of facts (internal or external) serve as the primary source of reasons for action, while the other sort is viewed as subsidiary or derivative. Consequently, both Internalism and Externalism posit that practical reasoning requires a foundation demarcated in some ontological fashion, and practical philosophy should only establish which ontological foundation should be preferred. This approach seeks to offer a unitary picture of practical reasoning: to borrow Dworkin's famous expression, a 'one-system view' of how to determine what we ought to do.[22]

[20] I will use the expression 'reasons for action' to refer to *normative* or *justificatory* reasons, ie, considerations that count in favour of or against doing something.

[21] For an overview of this debate, see S Finlay and M Schroeder, 'Reasons for Action: Internal vs External' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017), available at: plato.stanford.edu/archives/fall2017/entries/reasons-internal-external/.

[22] See R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 400–09.

This has further consequences for the study of practical reasoning. If only one sort of facts are at the foundation of practical reasons, and these are moral facts – in the sense that they make a difference with regard to what it is to be a good or bad, just and unjust action – then the 'moralisation' of practical philosophy becomes inevitable. The case of political philosophy and philosophy of law is emblematic in this respect. As Raymond Guess and Bernard Williams have observed, the slogan 'politics is applied ethics' has gained great popularity among political philosophers over the last 50 years.[23] Following the pathway traced by authors such as John Rawls, Ronald Dworkin and Wil Kymlicka, this slogan suggests that moral philosophy's role is 'to formulate principles, concepts, ideas, and values', while politics 'seeks to express these in political action', or that morality 'lays down moral conditions of coexistence under power, conditions in which power can be justly exercised'.[24] Similarly, in the field of legal philosophy, many scholars maintain that legal problems do not have autonomous characteristics: they are, after all, moral problems that need to be tackled through moral reasoning.[25] From an ontological point of view, these considerations are supported by the idea, defended among others by Mark Greenberg, that legal facts are grounded on moral facts. In other words, the fact that an action is legally required, permitted, or prohibited can be explained only in terms of the moral consequences that are generated by the law-making activity of legal institutions.[26] This implies that the normative dimension of legal reasoning is given by its moral profile, and that legal reasoning is actually a form of moral reasoning. A consequence of the 'moralisation' of practical philosophy is that it tends to blur the distinctive features of practical reasoning in areas such as political philosophy and philosophy of law, which are eventually conceived as suburbs of the citadel of morality.[27] Concepts such as *power*, *legitimacy*, *institution*, *legal validity*, among others, are considered derivative or peripheral to moral concepts such as *justice*, *integrity*, *respect* and *fairness* in the study of political and legal reality.

In contrast to this standpoint, inferentialism adopts an anti-foundationalist stance in the theory of practical reasoning. According to Brandom, any premise recognised as suitable in a practical argument can, in principle, serve as a stopping point in a quest for justifying an action. Whether a given practical premise needs further support depends on the context in which an exchange of reasons occurs,

[23] R Guess, *Philosophy and Real Politics* (Princeton, NJ, Princeton University Press, 2008) 1; B Williams, 'Realism and Moralism in Political Theory' in B Williams, *In The Beginning Was The Deed: Realism and Moralism in Political Argument* (Princeton, NJ, Princeton University Press, 2005). The idea that political reasons cannot be reduced to moral reasons have been also defended by C Larmore, 'What is Political Philosophy?' (2013) 10 *Journal of Moral Philosophy* 276, 280; E Rossi and M Sleat, 'Realism in Normative Political Theory' (2014) 9 *Philosophy Compass* 689, 690.

[24] Williams, *In the Beginning Was the Deed* (n 23) 1.

[25] S Hershowitz, *Law is a Moral Practice* (Cambridge, MA, Harvard University Press, 2023). See also J Finnis, 'What is the Philosophy of Law?' (2012) 1 *Rivista di Filosofia del Diritto* 67.

[26] M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288.

[27] *cf* W Kymlicka, *Contemporary Political Philosophy*, 2nd edn (Oxford, Oxford University Press, 2002) 5.

rather than on the ontological nature or source of the premise. Consequently, there are, in principle, as many kinds of *practical reasons* – considerations that may justify an action – as there are kinds of practical premises licensing practical conclusions. Furthermore, there are as many forms of *practical reasoning* as there are sets of inferential rules governing an exchange of reasons on what one ought to do.[28]

This is exemplified by the way in which Brandom analyses the content of normative sentences of the form 'One ought to do *A*'. Ought-sentences are not seen as the expression of desires nor as the description of the normative properties of facts. Rather, they are used 'to make explicit the endorsement of a pattern of material practical inferences',[29] ie, commitment-preserving relations, entitlement-preserving relations and incompatibility relations. For instance, recalling an example proposed by Brandom,[30] the normative sentence 'Bank employees are obliged to wear neckties' makes explicit the endorsement of a commitment-preserving relation from 'I'm a bank employee going to work' to 'I shall wear a necktie', which characterises the use of the expression 'bank employee' in that context. If an agent is considered to be committed to the former claim, then she is also committed to the latter. Similarly, 'Bank employee are obliged to wear neckties' makes explicit the endorsement of an entitlement-preserving relation from 'I'm a bank employee going to work' to, say, 'I shall comb my hair'. If the agent has been recognised as a bank employee, then, unless she specifies otherwise, she is prima facie also entitled to acknowledge her normative attitude to comb her hair, because social norms usually provide for this in that context. Finally, the normative sentence in question makes explicit an incompatibility relation from 'I'm a bank employee going to work' to 'I shall wear a clown costume'. If the speaker is considered to be committed to the former claim, she is not authorised to the second unless further considerations are added. In other words, ought-sentences do not express pro-attitudes, nor are they grounded in normative facts. They are rather used to make explicit patterns of reasoning: specifically, discursive exit-transitions from language to action that are typically employed to justify human behaviour. According to Brandom, therefore, the inferential authority of practical reason does not depend on its ontological status but rather on the social process that leads to the elaboration of reasons for action. From this perspective, the aim of a theory of practical reasoning is to make explicit, with regard to a linguistic practice, what is implicit in this practice: the hidden premises of practical inferences, and the rules governing an exchange of reasons regarding what one ought to do.

[28] An externalist about reasons typically maintains that 'at least some reasons for action are not connected to motivation in the way reasons internalism claims': Finlay and Schroeder (n 21) 4. Based on that, it could be argued that Brandom is an externalist in so far as he claims that reasons for action can be identified independent of the motivational set of agents. On Brandom's 'social externalism', which is not ontologically committed, see S Figueroa Rubio, 'Objetividad de los deberes y razones para la acción. Notas desde el externalismo' (2021) 44 *Doxa. Cuadernos de Filosofía del Derecho* 521.

[29] Brandom, *Making It Explicit* (n 1) 134.

[30] Brandom, 'Action, Norms, and Practical Reasoning' (n 17) 85.

It seems to me that the philosophical stance outlined above can be described as a form of *practical deflationism*. According to it, it is a mistake to assume that reasons for action possess a substantial nature that might be uncovered through sound philosophical enquiry. All that can be significantly said about them is exhausted by the role that reasons for action play in reasoning and thought: a role that is neither metaphysically substantive nor provides a genuine explanation of action.

## IV. The Common Law Model of Content Determination

The centrality of practical reason in Brandom's philosophical project is testified by a further consideration. One of the problems that besets inferentialism the most is the indeterminacy of content. According to Brandom, the inferential rules governing linguistic practice are at once *applied* and *instituted* by linguistic practitioners.[31] As a consequence, a move in a linguistic game – such as, for instance, a statement about the way things are – is correct only if it is *taken* to be so by the participants in the game. To recall the example proposed at the outset, according to an inferentialist account of content, the sentence 'The defendant was in Rome on the 14th of April' seems to be true simply if the prosecutor, who uttered it in the first place, is authorised to such a claim based on the linguistic behaviour of the other participants in the trial. But if the rules establishing semantic content are made by those who applied them, how can they be genuinely binding? A normative account of content requires at least two things: (1) that there is a difference between correct and incorrect applications of linguistic rules; and (2) that a move in a linguistic game can be a true or false statement about something independent of the game. These conditions, however, seem not to be met by inferentialism. Brandom actually contends that we should accept 'the permanent possibility of a distinction between how things are and how they are taken to be by some interlocutor [that] is built into the articulation of concepts'.[32] There are cases where this acceptance is hard to justify, however. An example is provided by concepts deprived of scientific justification. For instance, take the concept of *witch*. If the inference from W's possessing characteristics $P_1$, $P_2$, and $P_3$, to W's being a witch is taken as correct, are we to consider it as correct independent of any further consideration? This objection could be resisted from the point of view of Brandom's scorekeeping theory of content. There is no inferential content that *ought* to be taken as correct.

[31] RB Brandom, 'A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel' in G Hubbs and D Lind (eds), *Pragmatism, Law, and Language* (New York, Routledge, 2014) 23.

[32] Brandom, *Making It Explicit* (n 1) 597.

New scientific acquisitions are typically used in an exchange of reasons to modify the inferential articulation of our linguistic practices.[33] It is so because the normative character of the practice concerns the way in which doxastic and practical reasons are inferentially articulated rather than the propositional content of a sentence. Anyway, the framework just outlined fosters the idea that linguistic content is radically indetermined. There may be as many contents of a linguistic expression as situations in which the expression can be used, and non-linguistic reality seems constitutively unable to put objective constraints on content determination.

To address this issue, Brandom argues that legal reasoning, as it is practised in common law adjudication, provides a model for understanding how it is that linguistic content comes to be determined, and why the inferential rules governing content determination are binding.[34] In other words, judicial reasoning *qua* practical reasoning provides the basic structure for understanding content determination in general, and the role played by propositional attitudes also in theoretical reasoning. How can it be so?

In his eclectic reading of Hegel's *Phenomenology of Spirit*, Brandom argues that the content of linguistic practices and their inferential articulation have a *social* dimension, as explained by the scorekeeping model of content determination, as well as a *diachronic* dimension: these practices develop over time, 'both looking backward recollectively to their historical antecedents and looking forward to their future development'.[35] The diachronic dimension of content has been traditionally neglected by the philosophy of language and analytic philosophy in general, whereas it has been acknowledged in other areas of enquiry, such as the philosophy of law. Ronald Dworkin has given it theoretical significance through the metaphor of the 'chain novel', which illustrates how judicial decision-making is both backward looking and forward looking: judges consider the corpus of past decisions as both a guide and a constraint on their future decisions.[36] According to Brandom, however, Dworkin's metaphor 'sketches only the *form* of an account'.[37]

[33] 'Whenever an interpreter takes a community to be engaging in scorekeeping practices whose implicit properties confer one set of propositional contents on the deontic statuses they institute, there will always be alternatives, others sets of contents that could be taken to determine the pragmatic significances that scorekeepers ought to associate with discursive performances': ibid 638.

[34] Brandom presents the common law model of content determination as a critical response to the 'semantic skepticism about the determinateness of legal concepts' defended by American Legal Realism and, in particular, by Jerome Frank's 'digestive jurisprudence'. See: Brandom, 'A Hegelian Model of Legal Concept Determination' (n 31) 19; RB Brandom, *A Spirit of Trust: A Reading of Hegel's Phenomenology* (Cambridge, MA, Harvard University Press, 2019) 662.

[35] Brandom, *A Spirit of Trust* (n 34) 3.

[36] More recently Brandom has recognised that the 'recollective model' of judicial law-making can be extended to civil law frameworks: 'Even where legal norms are stated explicitly in the form of rules or principles (statutes), they must be interpreted in order to be applied to particular cases … Case law works like common law': Brandom, *A Spirit of Trust* (n 34) 661. For a discussion of this point, see S Arnold, 'The Chain Novel and its Normative Fine Structure in Civil Law and Common Law: Dworkin, Brandom, and Law's Normativity' in N Bersier, C Bezemek and F Schauer (eds), *Common Law – Civil Law: A Great Divide?* (Cham, Springer, 2022).

[37] Brandom, 'A Hegelian Model of Legal Concept Determination' (n 31) 31.

The role of precedent in judicial decision-making deserves further specification, as it exemplifies how linguistic contents are also determined over time in non-legal contexts:

> In selecting the prior cases [the judge] treats as precedential, and the features of the facts she takes as salient in making the decision and providing a rationale for it, the judge both further determines (in the sense of sharpening) the content of the legal concepts involved, and provides precedents and rationales to which future judges are at least potentially responsible. In this way the deciding judge exercises authority over both the content of the legal concepts being applied and, thereby, over the decisions of future judges.[38]

Looked at retrospectively, this process appears as a 'theoretical, epistemic task'.[39] Judges try to *find out* which norm covers the case under scrutiny and ought to be applied. This norm gradually emerges, step by step, from past decisions by looking at the reasons justifying them, ie, from the discursive commitments and entitlements that have been attributed and acknowledged, in past cases, to the participants in the judicial exchange of reasons. In so doing, the decision-making process is presented as 'the gradual emergence into explicitness of a norm that becomes visible as having been all along implicit in the deliberations of prior judges'.[40] Looked at prospectively, instead, the decision-making process appears as a 'constructive semantic task'.[41] By applying a legal norm to novel particulars, a judge is determining its content 'in the sense of *making it* the case that some applications are correct, by *taking it* to be the case that they are'. In other words, through the application process, the content of precedents or other authoritative legal texts is further specified, thereby establishing its new boundaries, ie, what falls within that content and what does not.

Now, the question arises: is this an accurate account of the use of precedent in judicial decision-making? Furthermore, does this account exemplify how linguistic content is actually established in both practical and theoretical reasoning? In this chapter it is not possible to provide an in-depth analysis of practical reasoning based on precedent. Instead, I will focus on some fundamental features of judicial reasoning that are common to both common law and civil law systems.

It is well known that legal reasoning is about the creation, interpretation, application and extinction of legal norms. Legislators and lawmakers argue about the creation and extinction of norms, while judges and other officials argue about the application of norms, based on evidence about the relevant facts and the interpretation of the precedents and other authoritative legal texts. In the courtroom, reasons are given and asked for by the parties involved in the litigation before a judge. The argumentative practice in judicial contexts includes evidentiary arguments that reconstruct the relevant facts of a case; interpretive arguments that

[38] ibid 32.
[39] ibid 36.
[40] Brandom, *A Spirit of Trust* (n 34) 737.
[41] Brandom, 'A Hegelian Model of Legal Concept Determination' (n 31) 36.

derive legal rules, standards or principles from authoritative texts and precedents; and integrative arguments that fill the gaps in the law. Once the arguments and counter-arguments are presented, it is the third party's task to adjudicate the dispute. The judicial decision-maker is expected to evaluate the arguments and counter-arguments presented and render a legal decision based on them.

Thanks to the inferentialist framework outlined above, these different patterns of legal reasoning can be analysed as an exchange of reasons through which inferential commitments and entitlements are attributed, undertaken and acknowledged by the participants in the practice. Furthermore, an analysis of this sort makes explicit the rules of inference internal to the practice, which govern the exchange of reasons and establish which legal outcome is legally justified on the basis of the 'scoreboard' of the practice.

However, one might wonder what characterises the game of giving and asking for reasons in a highly institutionalised context such as law. What are its distinguishing features? One preliminary answer can be found in David Lewis's picture of the scorekeeping in a linguistic game, which is at the basis of Brandom's social account of content. Lewis observes that the rules specifying the kinematics of the score can be regarded as 'empirical generalizations, subject to exceptions, about the way in which the players' behaviour tends to cause changes on the authoritative scoreboard'.[42] On the contrary, the rules governing legal reasoning in judicial decision-making are of a different sort: they have an *institutional* character. As Joseph Raz has pointed out, legal systems '[contain] both norms guiding behaviour and institutions for evaluating and judging behaviour'.[43] These institutions, such as courts and tribunals, are established by power-conferring norms that determine who is a public official, and qualify public officials' acts as the performance of a legal duty or the exercise of regulatory power. Legal systems also include procedural norms which regulate the performance of institutional acts: specifically, the conditions under which the public officials' behaviour produces a certain institutional outcome, such as a valid judicial decision, public order, declaration, or other authoritative determinations.

Recalling the inferentialist vocabulary, one could argue that the game of giving and asking for reasons that takes place in judicial proceedings is governed by three kinds of institutional norms:

a. *Discursive entry-norms*, which establish who is committed to provide *pro tanto* reasons in legal fact-finding and with regard to the legal qualification of facts.
b. *Discursive exit-norms*, which determine who is entitled to take a final decision with regard to the facts of a case and/or the legal norm regulating them.[44]

[42] Lewis (n 8) 344. Lewis notes that 'what [these rules] register depends on the history of the conversation in the way that score should according to the rules', ibid 346.

[43] J Raz, 'The Institutional Nature of Law' (1975) 38 *Modern Law Review* 489, 497.

[44] Discursive exit-norms in judicial decision-making typically include the *res judicata* doctrine and the principle *ne bis in idem* (double jeopardy).

c. *Discursive structural norms*, which define the general course of a judicial exchange of reasons, including how is it initiated, which kinds of reason are admitted, how the process is conducted and how it concludes.

Depending on the legal system, judicial reasoning is characterised by different sets of discursive entry-norms, exit-norms and structural norms, and the same holds, respectively, with regard to evidentiary reasoning, interpretive reasoning and integrative reasoning both in common law and civil law frameworks.

Now it is important to emphasise that the institutional dimension of legal reasoning differentiates the latter from other kinds of practical reasoning in at least two respects. First, the sets of institutional norms determining the kinematics of the 'scoreboard' are not usually established by those who apply them. In the common law model considered by Brandom, the powers, duties and prerogatives of judicial decision-makers, as well as the procedural norms they are supposed to follow, have been established in advance by other legal authorities. Another important characteristic of legal reasoning that sets it apart from other kinds of practical reasoning is that a judicial outcome, such as a decision of legal dispute, 'is binding even if it is mistaken'.[45] This means that a judicial decision may modify the legal situation of individuals – their rights, duties and prerogatives – even if it is not justified by the discursive scorekeeping of the relevant reasons, at least until the decision is quashed or revised by other judges. For instance, even if a court is not rationally entitled to declare, say, that the defendant is criminally liable based on the available evidence, the relevant legal norms and the reasoning presented during the trial, the judicial decision establishing the defendant's liability remains legally binding unless it is overturned by the decision of another authority following a new exchange of reasons.

These structural features of judicial reasoning prevent it from being understood as a general model for the determination of content. The capacity of judicial exchange of reasons to determine the content of the law in an individual case, both in common law and civil law frameworks, relies on the institutional norms that govern the discursive interaction between the parties, the jury, the judge and the other participants in the process. Outside an institutional framework of this sort, the problem of the indeterminacy of content remains an open question for Brandom's philosophical project.

## V. Conclusion

Inferentialism offers an original contribution to the study of practical reasoning, including legal reasoning. By considering the normative structure of linguistic interaction as fundamental to explaining intentional attitudes, linguistic content

[45] Raz, 'The Institutional Nature of Law' (n 43) 494.

and reasons for action, inferentialism promotes a deflationist and pluralist view of how humans determine what they ought to do. Normativity is not regarded as a substantive property of mental states, facts, events, or states of affairs; rather, it is seen as an aspect of how we talk and think about human action. Consequently, inferentialism does not focus on the metaphysical foundation of practical reasoning but on the ways it is performed to respond to individual needs and achieve social ends. The inferential features of practical reasoning highlight its pluralistic nature. According to inferentialism, there are as many kinds of practical reasons as there are sorts of considerations that warrant a practical conclusion in an exchange of reasons. Furthermore, there are as many forms of practical reasoning as there are sets of inferential rules that govern an exchange of reasons regarding what one ought to do.

A pluralistic approach of this kind may help to distinguish the various dimensions and occasions of practical reasoning, and the distinctive features of each. In other words, an inferentialist approach may illuminate the differences between the reasons for action characterising various practical contexts, rather than focusing on their commonalities. In particular, the scorekeeping framework proposed by Brandom allows for a fine-grained analysis of legal reasoning in judicial decision-making by examining the normative statuses of participants in an exchange of reasons, along with their discursive authority and responsibility.

Contrary to Brandom's view, however, the specificity of legal reasoning precludes it from being conceived as a general model for explaining how linguistic content acquires determinacy over time. The determinacy of legal content, especially in litigated cases, is made possible by the institutional features of judicial reasoning: namely, the discursive entry-norms, exit-norms and procedural norms that govern judicial exchanges of reasons in both common law and civil law systems. Focusing on the institutional dimension of legal reasoning is a precondition for understanding its functional features in societal life.