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# Reasonableness and Law

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As already explained, balancing, however, is intrinsically connected with the possibility of reasonable disagreement, and one of the main reasons for the introduction of law was the problem of reasonable disagreement. This problem now reappears at just that point where it was thought to have disappeared. But it reappears in another form. Due to its having been embedded in the authoritative and institutional context of law, its urgency diminishes and its prospects of being mastered are increased. It would not be reasonable to require either more or less. This means that the reasonableness of law requires that proper scope be given to reasonable disagreement.

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# A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review

**Giovanni Sartor**

## 1 Introduction

I shall argue for a sufficientist understanding of reasonableness in legal decision-making: cognitive or moral optimality are not required for reasonableness; what needed is just that a determination—be it epistemic or practical—is sufficiently good (acceptable, or at least not unacceptable). Correspondingly, judicial review on the ground of unreasonableness requires more than mere suboptimality: it requires failure to achieve the reasonableness threshold.

To develop this idea, I shall first analyse the notions of rationality and reasonableness, examining the role they play in cognition. I shall then consider rationality in legal (and in particular legislative) decision-making, focusing on teleological reasoning. I shall consequently develop an idea of sufficientist reasonableness, by combining the idea of bounded rationality with the idea of deference, as required by institutional coordination in the legal process. Finally, I shall consider when a legislative determination can be considered irrational or unreasonable, and how this is related to the violation of constitutional requirements.

## 2 Reasonableness and Rationality

The concept of reasonableness is often understood as having a larger content (intension) and thus a smaller extension than the concept of rationality understood as cognitive optimality: in order to be qualified as reasonable, a practical determination would need to be both rational and moral. This makes reasonable practical determinations a subset of rational determinations, those qualified by morality (the

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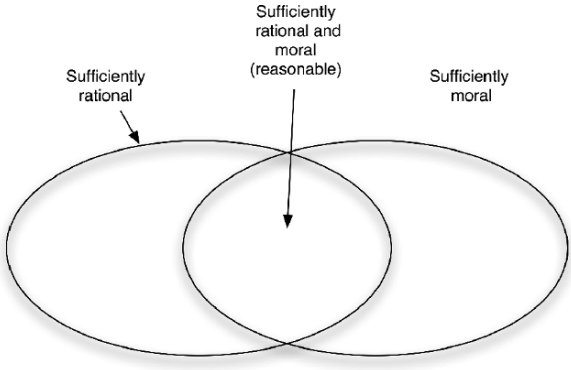


**Fig. 1** Sufficientist reasonableness

*differentia specifica* of reasonableness within the genus of rationality), and also a subset of moral determinations, those qualified by rationality (the *differentia specifica* of reasonableness within the genus of morality).

However, a different characterisation is possible, based on sufficiency rather than on optimality: reasonableness pertains to determinations that are good enough though not necessarily optimal; reasonable choices need to "satisfice"; they are not required to maximise (on the notion of *satisficing*, see Simon 1983). This sufficientist understanding of reasonableness, combined with the idea that practical reasonableness requires both morality and rationality, entails that reasonable practical determinations need to be both rational enough and moral enough, as shown in Fig. 1.

Figure 2 illustrates the connection among sufficientist practical reasonableness, rationality, and morality. The oval of the reasonable includes the practical optimum,

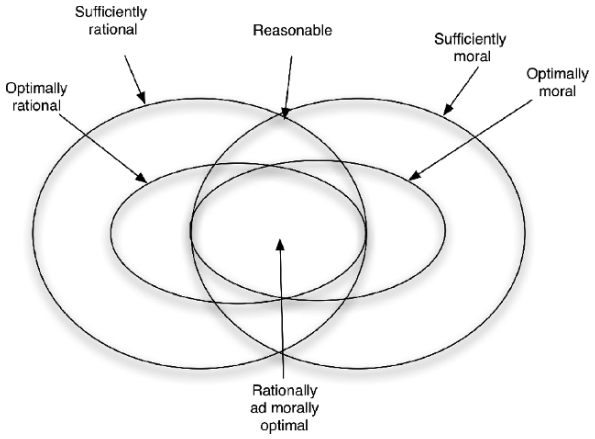


**Fig. 2** Optimality and sufficiency in rationality and in morality

namely, the set of determinations that are both optimally rational and optimally moral, but is not limited to such a set. It also includes determinations that, while failing to achieve optimal rationality or optimal morality (or both), still reach the sufficiency threshold in both respects. In this contribution, I shall not address moral reasonableness (which is discussed in other chapters of this book), but shall focus instead on cognitive reasonableness. With regard to moral reasonableness, I shall just specify that I view morality—understood, in a general sense, as taking fairly into account the interests of others within one's practical reasoning—as a separate aspect of reasonableness. It seems to me that, in legal decision-making, namely, the activity whereby coercible decisions are taken in the name of the collectivity, morality entails the general requirement that everybody (each member of the polity) be treated with equal consideration and respect (on equality, see Sadurski 2008). This is much a stronger requirement than the idea involved in reasonableness in private law, where the moral dimension of reasonableness requires taking into account other people's interests to some extent, but does not require equating them with one's own interests (for a discussion of reasonableness in private law, see Ripstein 2001). In particular, this means, with regard to rights, that the satisfaction of each right-holder's interest in exercising a right should equally be taken into account. However, even with regard to this moral dimension, no more than a sufficientist threshold needs to be respected, a threshold compatible with different understandings of the notion of equal concern and respect.

A third aspect (besides rationality and morality) is often included in the notion of practical reasonableness: in order for a determination to be reasonable with regard to a certain context (culture or form of life), it must also be *consonant* (or at least not completely dissonant) with the ideas prevailing in that context (for a development of this idea in the legal domain, see Aarnio 1987), and in particular, with the norms that are practiced in that context. This culturally dependent idea of reasonableness must be distinguished from the trivial assertion that the beliefs of a person about what is reasonable (sufficiently rational and moral) may be influenced by the surrounding culture. The requirement of consonance does not concern what is (possibly mistakenly) believed to be reasonable: it concerns what is reasonable in a certain context. Such a requirement is violated when between a legal determination and general opinion there is a distance that cannot be overcome with the cognitive resources available to people. Consonance with general opinion may entail a certain conservatism, but it corresponds to the idea that legal decisions should be taken in name of the people, namely, of the legal community: though a legal decision-maker may take his decision on the basis of views that are shared only by a part of his community, and may and should rationalise and revise such views when opportune (correcting biases and prejudices, taking into account relevant scientific knowledge, etc.), a certain proximity should be retained between the law and the opinions of the community it is supposed to govern. By adding this further component, the concept of reasonableness represented in Fig. 3 is obtained, which results from the intersection of three requirements, sufficient rationality, sufficient morality and sufficient consonance.

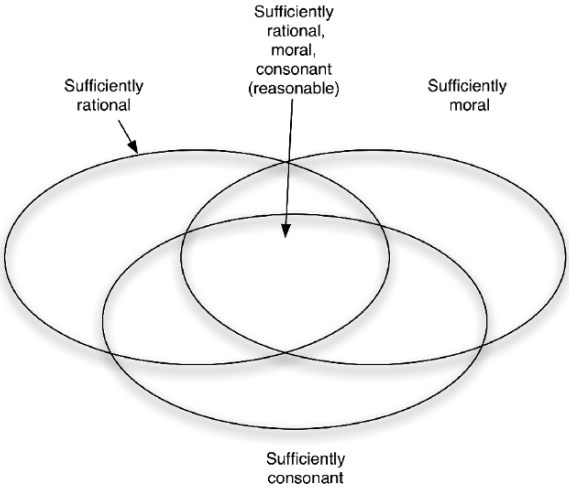


**Fig. 3** Reasonableness as sufficient rationality, morality and persuasiveness

## 3 The Process of Rational Problem-Solving in Individuals

Though reasonableness is to be distinguished from rationality, it needs to be characterised with reference to the latter. Thus, in the following I shall provide a summary analysis of rationality, based on the account in Pollock (1995), which expands the belief-desire-intention model often adopted in artificial intelligence (see Sartor 2005). This analysis refers to individual action, but its patterns, as I shall argue, also apply to rational decisions of collective bodies, and in particular to legislative decisions.

Rationality pertains to cognition, namely, to the activity through which we process information in order to come at reasoned determinations. These determinations can be epistemic, i.e., meant to identify the features of the world surrounding us, or practical, i.e., meant to establish the goals to be pursued, the plans of action to be implemented, or the norms to be endorsed. Epistemic cognition consists in the appropriate formation of epistemic states, namely, internal (mental) states meant to model features of the agent's environment. Two types of epistemic states can be distinguished, percepts and beliefs. *Percepts* come about by way of mechanisms of perception, which are activated when inputs are provided to the agent's sensors (on the distinct cognitive function of percepts and beliefs, see Pollock and Cruz 1999, 84ff.). A *belief* consists in the endorsement of a proposition: it consists in adopting a proposition as a premise in one's reasoning and action, as something one is ready to reason and act upon. An agent endowed with the faculty of epistemic cognition will process external inputs and obtain percepts. The agent will then reason, producing new beliefs on the basis of previously formed percepts and beliefs. Hence, epistemic reasoning is the process through with one builds new epistemic states proceeding from the epistemic states one already possesses.

Practical cognition also consists in forming appropriate cognitive states, but these are conative rather than epistemic. Conative states are not intended to represent one's environment: their function is rather that of guiding one's deliberative process, of playing a role in the process determining behaviour. Thus an agent endowed with the faculty of practical cognition possesses conative states, and has the ability to form new conative states on the basis of his current epistemic and conative states. Practical reasoning is thus the process through with one builds new conative states on the basis of the epistemic and conative states one possesses.

Typically, in epistemic cognition, perception leads to beliefs about the environment. Such beliefs—when combined with other beliefs the agent already possesses, and when they go into a logical process (such as deduction, induction, defeasible reasoning, and probability calculus)—lead to the formation of further beliefs. The set of beliefs one possesses, however, does not consist mostly or even mainly of beliefs one constructs, directly or indirectly, out of one's own perceptions, according to some pattern of logical reasoning. It also includes inputs provided by the built-in cognitive modules of which our mind consists, modules for language, for building three-dimensional representations out of perception, for recognising faces, for making analogies, for inventing hypotheses and theories, for detecting other people's attitudes and the rules they are following, etc. (for different views on the "modularity of mind," see Fodor 1983 and Pinker 1999). These modules do not proceed in a "ratiocinative" way: they do not follow reasoning patterns of which we are aware and which we can monitor and direct. However, they provide sufficiently reliable inputs, inputs our conscious reason needs to accept (or at least to take into serious consideration). Moreover, in a social context, our beliefs mostly include information obtained from others, and through various social processes of cognition (see Goldman 1999, 2006). The rationality of a person's determination to accept the outcomes of a social source is based on the evaluation of the reliability of such a source, an evaluation that should take into account the cognitive limitations of the evaluating person. So it would be irrational for a layperson to refuse to adhere to the outcome of the scientific community, given the impossibility of autonomously forming a judgement on a scientific matter, or given that this judgement would much more likely be wrong than the judgement of the scientific community (unless one has evidence that the formation of the judgement of the scientific community was altered by disturbing factors, such as commercial or political interests, biases, prejudice, etc.).

It is often assumed that in practical cognition, an agent's goals are directly connected with the performance of actions believed by the agent to be necessary in achieving the same goals, thus making it so that actions, rather than mental states, are the conclusions of practical reasoning, as Aristotle says with regard to a syllogism described in *De motu animalium* (Aristotle 1912, 7). This model, however, is not really adequate for a bounded reasoner, who cannot perform all reasoning at the time of acting, and needs to store the outcomes of his practical reasoning in appropriate ways. Thus, a more articulate view of bounded practical rationality is required, where a key role is played by intentions, which store practical determinations for the purpose of guiding future action. Here I shall adopt the model found in Pollock (1995), who distinguishes three basic conative states.

The first conative attitude consists in having *likings* or *preferences* (I use these expressions as synonymous). By a liking (or a disliking), I mean a generic *pro* (or *con*) attitude with regard to certain situations (present or future) or with regard to certain features of them (Pollock 1995, 12ff.). Consider, for instance, one's dissatisfaction with a job that does not satisfy one's tastes and ambitions, as compared to the (imagined) satisfaction in having a different job.

The second conative attitude consists in having *goals* (the state of having goal is usually called a *desire*).[1] A goal is more specific and focused than a liking. An agent's adoption of a goal has the function of prompting the agent to make plans to achieve that goal. Not every liking gives rise to a goal (for instance, my liking for the idea of being a football player or of winning a Nobel prize will not become my goal, since I know from the start that these outcomes I cannot achieve): only a liking for an objective one views as achievable can give rise to a goal. Consider, for instance, how a dissatisfied worker can adopt the goal of finding a new job.

The third conative attitude consists in having *intentions*. An intention is the state of mind of an agent who has determined that a certain action is to be performed, if need be under certain conditions.[2] When we have formed an intention to perform an action (or a combination of actions), we have made up our minds as to whether we will perform that action, under the appropriate conditions, and are ready to perform the action as soon as these conditions are satisfied. Adopting intentions is our way of storing the plans of action (combinations of instructions) we have adopted, and of staying ready to carry them out: instructions contained in chosen plans provide content to our intentions. Thus, an agent who has formed an intention is *committed* to implementing the corresponding instruction, since this is required by the way in which practical rationality works: we may rationally withdraw our intention, but it would be irrational for us not to implement our intention all the while having that intention. For example, if we have the goal of being hired for a new academic job, we may adopt the intention of applying for a position with certain universities. We may withdraw this intention (if, for instance, we are offered the job we desired, in which case we would interrupt our job search), but it would be irrational for us both to retain the intention and not implement it.[3]

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[1] A desire may be distinguished from the mere wishing, the latter being a positive attitude toward a state of affairs, regardless of the possibility of achieving it (see Aristotle 1924, III). A desire in the sense here indicated presupposes that the agent does not consider impossible the achievement of the object of desire.

[2] I use here the term *intention* in the usual, commonsense meaning (which corresponds to the way in which this term is used in artificial intelligence or practical philosophy: see Bratman 1987). I am not using it to express the "aboutness," or direction toward an object, of a mental state or content of consciousness, as it is sometimes used in the philosophy of mind (on the approach of Brentano 1973).

[3] According to Pollock (1995), there is a fourth conative attitude, which he calls a *want*. A want is an unconditioned impulse toward performing an action, an impulse one feels when one has the intention of performing a certain action given certain conditions (including a certain temporal and spatial framework) and given that one believes that the conditions for the immediate performance of the action obtain. For simplicity's sake, I shall not include the idea of a want in the present

The cognitive states just described are integrated into a reasoning process, which can be called *ratiocination*, where the adoption of certain cognitive states is the reason that leads to, and justifies, the adoption of further cognitive states. In epistemic reasoning:

- having a perception with content $P$ is a reason for believing $P$;
- having certain beliefs $P_1, \ldots P_n$ is a reason for believing a certain conclusion $P$ linked to the input beliefs according to the various patterns of correct epistemic reasoning (deductive inference, defeasible inference, probabilistic inference, induction, etc.).

In practical reasoning

- liking a state of affairs $P$, and believing that it can be achieved, is a reason for adopting the goal of achieving $P$;
- having goal $P$, and believing that a plan (action) $A$ is a teleologically appropriate way to achieve it, is a reason for intending to execute $A$.

By arranging these reasoning schemata into sequences, we obtain downward chains: in epistemic reasoning, from perception to beliefs, and from beliefs to further beliefs; in practical reasoning, from likings and beliefs to goals, and from goals and beliefs to intentions (leading to action). These chains may be extended with intermediate steps, where sequences in a chain are recursively activated: the intention to perform an abstract action (e.g., going to a conference) leads to the goal of performing that action (an instrumental goal), and this goal leads to the intention of executing a corresponding plan (registering for the conference, buying a ticket, etc.); the belief that the antecedent of a conditioned intention is satisfied leads to an unconditional intention, etc.

A chain of practical reasonings ends with the agent's intention to unconditionally execute a specific action. If all reasoning steps have functioned properly, we will act in such a way as to be successful, at least in most cases (failure is always possible, in a complex and unpredictable world, even when we have used our cognitive functions as well as we can): by implementing our intentions, we achieve our goals; by achieving our goals, we satisfy our desires; and by satisfying our desires, we adapt the world to our likings. Thus, practical ratiocination enables a reasoner to reach the target of higher-level conative states by achieving the target of lower-level conative states. The fact that a single reasoning step is correct does not mean that the whole sequence, including all previous steps, is correct: a mistake can have taken place above, so that rationally correct inferences can be included in chains of reasoning that, as a whole, are irrational.

It is important to stress that rational problem-solving requires a connection between epistemic and practical reasoning (see Fig. 4).

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model, and shall limit myself to the idea of a unconditioned intention to perform a specific action, without considering the further process leading to action.

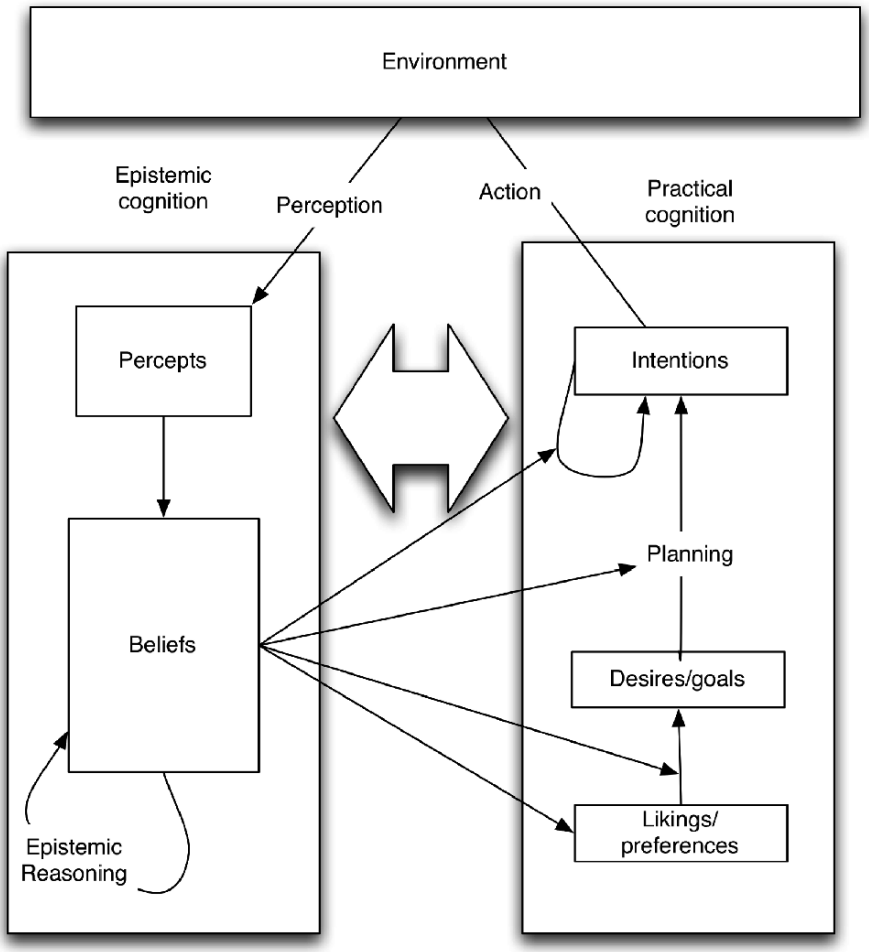


**Fig. 4** Rationality = Practical cognition + Epistemic cognition

Advances in practical reasoning are dependent upon the results provided by epistemic reasoning: we adopt a goal assuming that it is achievable and we adopt an intention to execute a plan on the basis of the belief that this that plan provides a teleologically appropriate way to achieve its goal (it would be irrational to have a goal to achieve something that we believe to be unachievable, or to have an intention to do something while believing that doing something else would be a better way to achieve our goals, consistently with our interests and constraints). Thus failures in practical rationality may depend (and do most often depend) on a failure in the epistemic processes providing inputs to practical reasoning. On the other hand, epistemic inquiries can be activated by practical reasoning (they depend

on the reasoner's practical interests): when we need new information in order to develop a plan of action (I have the goal of going to a conference, but I do not yet know what means of transportation are available), or in order to establish whether a precondition for an adopted intention holds (I do not know whether I am scheduled for a lecture today, but it is my intention to lecture if I am scheduled), we engage in epistemic-reasoning and auxiliary information-seeking actions aimed at coming to know what we need to know. This does not imply that all epistemic interests are only instrumental to specific "material" goals: humans have an inborn conative disposition for knowing (curiosity), regardless of further specific uses knowledge, and a corresponding liking for the discovery and possession of knowledge, a drive that supports scientific research as well as gossip. As Aristotle observed in *Metaphysics*, "all men by nature desire to know" (Aristotle 1921, 980a).

Rational thinking and decision-making under complex circumstances are both defeasible and argumentative. Rationality is defeasible in the sense that many of the inferences it validates consist in inferring conclusions on the basis of limited information, conclusions that may need to be revised when additional information is provided. For instance, the perceptual conclusion that an object is pink (having been perceived in this way) should be abandoned when we become aware that the object was viewed under a red light; the conclusion that Tweety is white, being a swan, should be withdrawn when we come to know that Tweety comes from Australia, where swans are black; an explanation of certain aspects of a phenomenon should be abandoned when a more comprehensive explanation is available; etc. Similarly, in the practical domain a goal should be abandoned when new evidence shows that it cannot be achieved; the intention to perform a specific action in keeping with a general intention (e.g., an intention to do exercise today as a consequence of an intention to do exercise every morning) should be abandoned when it conflicts with a prevailing intention (catching an airplane very early in the morning); the belief that a plan is the most appropriate way to achieve a goal should be abandoned when further evidence shows that a better option is available (there is a train that takes me to my destination more cheaply and comfortably than the airplane I had decided to take); etc.

The argumentative nature of rational thinking is related to its defeasibility. If epistemic and practical reasoning is defeasible, then justifying a conclusion will require more than considering the reasons supporting that conclusion: it is also necessary to consider the reasons against it. As Mill (1991, 41) puts it, in "any subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons," so that the use of *positive logic*, which relates a thesis to its supporting grounds, must be supplemented with critical discussion of the opinion to the contrary, that is, by that *negative logic* which "points out weaknesses in theory or errors in practice, without establishing positive truths" (ibid, 109). Recent research on defeasible reasoning has indeed identified for different patterns or schemes of defeasible argument the corresponding "critical questions," pointing to information that (if it were to be accepted) would defeat the argument in question (see, for all of this research, Walton et al. 2008).

## 4 Rationality and Practical Determinations

Epistemic reasoners do not restart from scratch whenever they need to understand or predict their environment: they approach new a situation by using previous epistemic determinations, stored as beliefs in their memory. Similarly, practical reasoners keep memory of their practical determinations to use them at a later time, rather than restarting their practical reasoning from scratch whenever a problem comes up. Once an agent has adopted certain practical determinations, rationality requires the agent to proceed on the basis of these determinations, giving them an appropriate weight in his or her reasoning process, until the agent abandons such determinations. For instance, it would be (procedurally) irrational for me to have an intention to make a €50 donation to charity $X$ and not do so (though it may not be irrational for me to withdraw such an intention in appropriate circumstances, for instance, upon discovering that $X$ is a fake charity, exclusively aimed at enriching its organisers).

Not deriving the practical conclusion supported by our conative states is as irrational as failing to derive the consequences of our beliefs. Failing to proceed in reasoning may be the right thing from the point of view of an external observer who knows that the belief or conative state providing the premise of the inference at issue is wrong (and reliance on it is likely to lead the reasoner to further false beliefs or inappropriate determinations), but it is irrational from the internal perspective of the reasoner, who has nothing else to go on. This does not mean that we should put an absolute trust on our cognitive states (I know that my determinations may be wrong, and my beliefs false, even when I sincerely believe that they are right and true), but the awareness of our fallibillity only justifies continuing the inquiry meant to question such determinations and beliefs (when we have no more-urgent things to do), it cannot justify epistemic and practical paralysis.

In the model of reasoning provided in Section 3, an important role in storing practical determinations is played by intentions: an intention stores the outcome of a teleological deliberation, and it prompts to action. An agent having an intention to do action $A$ under condition $B$ is ready to (unconditionally intends to) perform $A$ when $B$ is met and is committed to perform $A$, in the sense that it would be irrational for the agent not to perform $A$, as long as the agent continues to have that intention (and believes that $B$ obtains).

Intentions are not the only practical determinations we store and reuse: by retrieving from memory our preferences and goals, we input them into our present reasoning, and we are indeed justified in doing so, as long as we do not have prevailing reasons to the contrary. However, it seems to me that we often also choose our preferences and goals by making them conscious objects of intentions. This happens in particular when, having questioned a preference or a goal, we come to a determination to adopt it: then we form an intention to have that preference, or to pursue that goal. Subsequently, we retrieve this intention and implement it by adopting the preference or goal contained in the intention. Thus an intention can take different contents: