ARTICLE

THE ROLE OF INTUITION IN JUDICIAL DECISIONMAKING

*R. George Wright**

TABLE OF CONTENTS

I. INTRODUCTION 1382

II. WHAT DO THE CASE OPINIONS THEMSELVES SAY ABOUT INTUITION? 1385

III. DRAWING UPON WHAT THE PHILOSOPHERS HAVE SAID ABOUT INTUITIONS 1390
- *A. Some General Understandings* 1390
- *B. Some Philosophical Critiques of Various Sorts of Intuitionism* 1392

IV. INTUITION, BALANCING TESTS, AND ABSOLUTISM IN THE LAW 1398

V. SOME OTHER POSSIBLE FORMS OF JUDICIAL REASONING AND THEIR INESCAPABLE DEPENDENCE ON INTUITION 1406
- *A. Inferentialism* 1406
- *B. Reliabilism* 1409
- *C. Coherentism* 1412
- *D. Analogy* 1417

VI. CONCLUSION: JUDICIAL INTUITION, PRACTICAL WISDOM, AND ARTICULATED JUDICIAL REASONING 1420

* Michael D. McCormick Professor of Law, Indiana University School of Law—Indianapolis.

I. INTRODUCTION

The role of intuition in judicial decisionmaking is in various ways controversial. Consider the well-known invocation of judicial intuition by Justice Potter Stewart in the obscenity case of *Jacobellis v. Ohio*.[1] Justice Stewart's brief concurring opinion concluded:

> [C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.[2]

Many readers find this explicit and direct reliance on judicial intuition[3] to be startling, if not shocking.[4] Justice Stewart's opinion is said to imply that "some knowledge comes immediately from seeing, not from deliberating,"[5] and thus to emphasize "nonrational elements in judicial decisionmaking."[6]

The idea of intuition is also invoked literally in Justice Holmes's account of the common law. Holmes famously writes,

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, *intuitions* of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to

---

1. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. *Id.* (emphasis added) (footnote omitted). The current basic test for obscenity requires appeal to a prurient interest in sex and patent offensiveness according to contemporary community standards, a lack of serious value of any of several specified kinds, and a specific definition or illustration of proscribed conduct by state law. Miller v. California, 413 U.S. 15, 24 (1973); *see also* Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (clarifying the role of community standards in the test for obscenity).

3. Justice Stewart, of course, does not refer explicitly to "intuition" itself. We will see in Parts II and III that terms such as "intuition" and "intuitionism" can be used in various ways. While it is tempting to say that we know an intuition when we see it, we will make some choices among alternative understandings below, and Justice Stewart's famous use will fall within the bounds of judicial intuition so understood.

4. *See* Paul Gewirtz, *On "I Know It When I See It*,*"* 105 YALE L.J. 1023, 1024 (1996) (arguing that "[t]he shock derives totally from its location within a Supreme Court opinion, since both its rhetoric and its content are so unusual in that context").

5. *Id.* Professor Gewirtz elsewhere refers to the implied limits to articulability, and to the absence of any "conscious process of deduction." *Id.* at 1031.

6. *Id.* at 1023; *see also id.* at 1025–26. Of course, we should not simply assume that intuitions are "nonrational." The relation between intuition and rationality is an important open question.

> do than the syllogism in determining the rules by which men should be governed.[7]

We cannot be sure precisely how Holmes intends the term "intuitions."[8] In particular, we may wonder whether he means to suggest that judicial intuitions can be only of "public policy."[9] Can there be other kinds of judicial intuitions? Can the "felt necessities of the time"[10] be intuited necessities? Can shared "prejudices"[11] take the form of intuitions? If "prevalent moral and political theories"[12] are not themselves intuitions, can they nonetheless be based on intuitions? Must such theories be based on, or otherwise crucially depend on, intuition?

Some writers have urged that the role of intuition in moral decisionmaking in general,[13] or in judicial decisionmaking in particular,[14] is or should be limited. Whether that is desirable or even possible we cannot yet say. We must think carefully about intuition in moral and judicial thought.

First, we will consider how judicial opinions themselves commonly regard intuitions.[15] This brief sampling will establish the ambivalence with which judges view the role of intuition in the law. Second, we will seek to add further clarity and depth to the judicial perspective by drawing upon the work of some of the best technical philosophers to have discussed intuitions.[16] A central focus will be on the varied critiques and defenses of several forms of intuitionism as an approach to arriving at moral truth. The themes of the pervasiveness and indispensability of intuition, along with the possible dependence of intuition itself on other forms of moral decisionmaking, will be raised.

---

7. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publ'ns 1991) (1881) (emphasis added).

8. Some or all of the mental work in arriving at an intuition may be unconscious, but on some definitions, the intuition itself might have to be conscious.

9. HOLMES, *supra* note 7, at 1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *See, e.g.*, KURT BAIER, THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS 123 (abr. ed., Random House 1965) (1958) ("I will now take it for granted that there is no such thing as moral intuition or seeing by reason what is right and wrong."). Baier argues that "[i]t would . . . be better to say that reason is the power *to work out*, rather than the power to 'see,' the answers to certain questions." *Id.*

14. *See, e.g.*, Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 524 (1998) ("Courts *reason* about rather than grasp intuitively to which precedent cases the cases before them should be assimilated. Or at least they purport to reason about this, which is why they write opinions that purport to describe their reasoning.").

15. *See infra* Part II.

16. *See infra* Part III.

These themes are then developed by specifically addressing intuition and weighing and balancing in the law. We discuss what are thought of as nonbalancing or priority-based judicial decisionmaking tests.[17] We then consider decisionmaking theories that seek to emphasize either logical inference, coherence among one's beliefs, or the reliability of the method by which one's conclusions were arrived at, as well as theories that emphasize the use of analogy in judicial decisionmaking.[18] We conclude by linking judicial intuition to the practical decisionmaking virtues of sound judgment, practical wisdom, or what is known as the classic Greek idea of *phronesis*.[19]

As the discussion unfolds, we will emphasize the pervasive and inescapable role of intuition, and the inescapable and crucial dependence of each allegedly distinct alternative to intuition upon intuition itself. We will not neglect, however, the ways in which intuition in turn depends upon these same alternatives to intuition in moral and judicial decisionmaking.

In particular, we must remember that appellate opinion writers are typically not called upon simply to reach and boldly announce a good legal result, or even to then solemnly assure us they have done so. Courts often face the task of somehow publicly and articulately defending, validating, or legitimizing their judicial result.[20] This demand is commonly imposed for various reasons, including that of maintaining the stable authority of a presumably sound adjudicatory system. This justificatory process, too, will inevitably depend upon intuition, and the mere reporting by the court of judicial intuitions that are not articulately defensible cannot fulfill these public justificatory functions. The judicial focus must then shift toward methods that may reasonably persuade the reader, and even a disappointed litigant, of the judge's comprehensiveness and sensitivity of consideration and concern.[21]

In conclusion, intuition is invariably central—whether overtly so or not—to the process of arriving at a judicial outcome by any standard recognized means. But intuition is itself typically dependent upon nonintuitionistic or less-centrally intuitionistic techniques in arriving at, and publicly legitimizing, the judicial outcome.

---

17. *See infra* Part IV.
18. *See infra* Part V.
19. *See infra* Part VI.
20. *See infra* note 239 and accompanying text.
21. *See infra* note 240 and accompanying text.

To return to our starting point, Justice Stewart's concurring opinion in *Jacobellis*,[22] we can say that for Justice Stewart to emphasize intuition in reaching his judicial result is in a sense merely to recognize the inevitable. Intuition is inescapable. Other supposedly distinct methods of reaching a judicial result, beyond an unusually bare and direct appeal to intuition, will often be more articulately defensible. If he had been pressed, Justice Stewart could doubtlessly have identified and articulated some particular aspects of the work in question that somehow supported his legal conclusion. But it is important to appreciate that the major alternatives to intuition in deciding *Jacobellis* themselves inevitably depend crucially on some exercise of intuition.

What is understandably disturbing to many of his readers is not Justice Stewart's intuitionism itself, but intuitionism unsupplemented and unadorned. Justice Stewart's opinion by itself does not fulfill the judicial task of legitimizing his outcome because he does not demonstrate that he has carefully and sensitively considered the evidence and alternative case holdings.[23] In any event, we shall see that appreciating the proper role of intuition in judicial decisionmaking is central to understanding not only Justice Stewart's opinion, but any standard judicial opinion.

II. WHAT DO THE CASE OPINIONS THEMSELVES SAY ABOUT INTUITION?

In the course of their published opinions, judges commonly explicitly refer to intuition or to some related idea. There is, of course, no reason to believe that the judges are all using intuition to mean the same thing. Nor do all judges use the term "intuition" in rigorous, precisely defined senses. Many judges, though, find themselves at least occasionally required to rely on "instinct or experience," even in densely rule- and test-governed areas of the law.[24] Sometimes there is a sense that judicial "intuition" and "feeling" can provide a personal but not fully

---

22. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Of course, not all concurring or dissenting opinions are intended as independent, self-standing, sufficient public justifications of any judicial result. The very brevity of Justice Stewart's concurring opinion may suggest as much.

23. *See id.*

24. *See, e.g.*, Crawford v. Lungren, 96 F.3d 380, 389 (9th Cir. 1996) (Tashima, J., concurring) (arguing that judges must sometimes rely on instinct or experience when applying a strict scrutiny analysis in the context of the First Amendment and quoting *Geary v. Renne*, 911 F.2d 280, 305 (9th Cir. 1990) (en banc) (Rymer, J., dissenting)).

articulable sort of knowledge,[25] with some judicial intuitions described as "sound."[26]

Thus, some courts speak of intuition—the sound instances thereof—as valid, even if the intuition is itself the outcome of an unexplainable process, and the intuition does not justify itself in any publicly accessible fashion. Courts often vaguely link[27] or even identify[28] judicial intuition with the similarly humble idea of "common sense."[29]

A possible linkage between intuition and common sense is through the idea of obviousness. Some courts recognize certain ideas, and even some conclusions, as "intuitively obvious."[30] Of course, courts also recognize that not all truths will be intuitively obvious,[31] whatever the overall relationship between intuition

---

25. *See, e.g.*, Avery v. Sabbia, 704 N.E.2d 750, 755 (Ill. App. Ct. 1998) (approving use of intuition and feeling in deciding what justice requires during discovery); *see also* State v. King, 883 P.2d 1024, 1041 (Ariz. 1994) (en banc) ("The court intuitively recognizes the potential deterrent value . . . .").

26. *See, e.g.*, Hassoon v. Shamieh, 107 Cal. Rptr. 2d 658, 663 (Ct. App. 2001) (stating "[w]e believe the judicial intuition underlying the result . . . is sound"); People v. Calderon, 283 Cal. Rptr. 833, 836 (Ct. App. 1991) (explaining that "'[t]he transferred intent doctrine is born of the sound judicial intuition that such a defendant is no less culpable than a murderer whose aim is good'" (quoting People v. Birreuta, 208 Cal. Rptr. 635, 639 (Ct. App. 1984))).

27. *See, e.g.*, Worthy v. U.S. Steel Corp., 507 F. Supp. 25, 28 (E.D. Pa. 1980) (observing that the determination of intent often "requires inference based in large part on common sense and intuition").

28. *See, e.g.*, United States v. Reyes, 87 F.3d 676, 681 n.7 (5th Cir. 1996) (asserting that "our judicial intuition—or common sense—tells us that the result is foreordained"). The court immediately goes on to argue, interestingly, that "[o]ften in such situations it is preferable to simply announce the conclusion, rather than to attempt to explicate its doctrinal basis." *Id.* This raises the issue of the costs and benefits of reason-giving or explanation in the law, which in turn affects the proper scope of more or less unexplainable judicial intuition. *See id.* The court concludes, "Sometimes, however, the latter exercise serves as [a] useful check on potentially erroneous or simply reflexive intuition, particularly where some of the contextual principles appear to be in at least moderate flux." *Id.* The roles of intuition and explanation, along with other ways of indirectly legitimizing judicial decisions, are taken up and discussed further in Part IV.

29. *See* authorities cited and discussion *supra* notes 27–28.

30. *See, e.g.*, Horace Mann Ins. Co. v. D.A.C., 710 So. 2d 1274, 1275 (Ala. Civ. App. 1998) (using specific case law to amplify or bolster an "'intuitively obvious'" legal proposition (quoting Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947, 948–49 (M.D. Ala. 1992))).

31. *See, e.g.*, Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 705 (Tex. 2000) (Hecht, J., concurring) (stating that "it is not intuitively obvious" that a "'general rule' keeps down insurance costs").

and truth.[32] Sometimes judges see intuitions as forceful[33] or creative,[34] if not as somehow inspired.[35]

But to the extent that courts have linked intuition with what is commonsensical, obvious, truly "manifest,"[36] or even just "evident,"[37] little creativity or inspiration would seem required. Thinking of intuition as what is obviously or manifestly true helps us appreciate how a court might refer to a particular intuition as "virtually universal."[38]

Most interesting legal questions, however, do not have manifest or obvious solutions. What the courts believe about any relations among intuition, accumulated experience, and sound judgment is therefore of great importance. On this question, the courts recognize several possibilities. It has been said first that "'the intuitions of courts derived from experience are sometimes better than their reasoning.'"[39] Intuition has also been thought to contribute along with experience to judicial reasoning, rather than to contrast with judicial reasoning.[40] Intuition and experience are thus sometimes taken to be judicial allies.[41] The

---

32. *See infra* Part III.

33. *See, e.g.*, Mannesmann-Sumerbank Boru Endustrisi T.A.S. v. United States, 86 F. Supp. 2d 1266, 1274 (Ct. Int'l Trade 1999) (recognizing "the intuitive force of plaintiffs' arguments"). Recognizing the intuitive force of an argument, of course, hardly commits one to accepting that argument. An argument can clearly have intuitive force without being persuasive or convincing.

34. *See, e.g.*, N.Y. Bung & Bushing Co. v. Doelger, 23 F. 191, 193–94 (S.D.N.Y. 1885) (referring to "'that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision'" (quoting Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 72 (1885))).

35. *See id.*

36. *See, e.g.*, Bremner v. Marc Eidlitz & Son, Inc., 174 A. 172, 174 (Conn. 1934) ("[E]vident suggests something more of a mental process but no difficulty in seeing that the thing is true; manifest is a degree stronger than evident, the mind getting the truth as by an intuition."); Buckner v. Am. Nat'l Ins. Co., 161 S.E.2d 319, 320–21 (Ga. Ct. App. 1968) (defining evident and manifest).

37. *See supra* note 36.

38. *See, e.g.*, Abbott v. Burke, 710 A.2d 450, 514 (N.J. 1998) (relying on "virtually universal intuition").

39. Villanova Leasing Corp. v. L.M.J. Realty Corp., 226 N.Y.S.2d 763, 765 (Sup. Ct. 1962) (quoting Roscoe Pound, *Causation*, 67 YALE L.J. 1, 14 (1957)).

40. *See, e.g.*, State v. DiFrisco, 662 A.2d 442, 479 (N.J. 1995) (Handler, J., dissenting) ("[r]easoning from intuition and experience").

41. *See, e.g.*, State v. Keen, 31 S.W.3d 196, 220 (Tenn. 2000) ("'[W]e consider a multitude of variables . . . in light of the experienced judgment and intuition of the members of this Court.'" (quoting State v. Cribbs, 967 S.W.2d 773, 790 (Tenn. 1998))); State v. Henderson, 24 S.W.3d 307, 315 (Tenn. 2000) (same); State v. Smith, 993 S.W.2d 6, 17–21 (Tenn. 1999) (noting that the court "rel[ies] also upon the experienced judgment and intuition of [its] members" in a death penalty proportionality review).

courts, however, do not always take intuition and experience to be mutually supplementary in ordinary decisionmaking.[42]

In fact, more negatively, courts often link intuition to subjectivity,[43] where subjectivity is being contrasted unfavorably with objectivity in decisionmaking.[44] By itself, intuition in such contexts is thought to be an inadequate basis for the legal judgment in question.[45] What some judges think that intuition crucially lacks may vary. Beyond lack of objectivity,[46] reasoning itself in a broader sense may be thought to be missing or insufficient in cases of intuition.[47] Intuition by itself may be

---

42. *See, e.g.*, Evers v. Dollinger, 471 A.2d 405, 419 (N.J. 1984) (finding particular item of knowledge within the medical community as "based on experience rather than intuition").

43. *See, e.g.*, State v. Martini, 651 A.2d 949, 997–1000 (N.J. 1994) (Handler, J., dissenting) (linking, at several points, intuition to mere subjectivity in criticizing death penalty proportionality review and referring also to the judiciary's "unexplained intuitive moral response[s]" to particular crimes).

44. *See, e.g.*, Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 145–46 (4th Cir. 1992) (holding that "some stronger objective indicator . . . than simple judicial intuition is needed to warrant the drastic step of disqualification of counsel"); Squires v. Squires, 854 S.W.2d 765, 775 (Ky. 1993) (Leibson, J., dissenting) (arguing that "the Majority Opinion . . . is more intuitive than objective"). *But cf.* Pickens v. Children's Mercy Hosp., 124 F.R.D. 209, 211 (W.D. Mo. 1989) ("Subjective and nearly intuitive fact-finding is necessary in many cases, not least in reconstructing the 'truth' in discrimination cases, and a plaintiff is entitled to hope for the best without a substantial amount of objective proof of discrimination.").

45. *See, e.g.*, Lane v. Williams, 455 U.S. 624, 636–37 (1982) (Marshall, J., dissenting) ("This reasoning has no basis in Illinois law and appears to derive from nothing more than judicial intuition."); United States v. Johnson, 316 F.3d 818, 820 (8th Cir. 2003) (Riley, J., dissenting) ("Judicial intuition is helpful, but intuition alone is not enough to increase punishment. Proof is."); *see also* Rodriguez v. Colorado, 498 U.S. 1055, 1059 (1991) (Marshall, J., dissenting) (arguing that the Colorado Supreme Court's "intuitive judgment" did not save constitutionally defective jury instructions); EEOC v. S.S. Clerks Union, Local 1066, 48 F.3d 594, 604 (1st Cir. 1995) (acknowledging that "'an intuitive judicial judgment'" may not be adequate "as the sole basis for discerning a disparate impact" in employment decisions); Leverso v. S. Trust Bank, 18 F.3d 1527, 1534 (11th Cir. 1994) (rejecting the trial court's "intuitively equitable" rationale in favor of "unambiguous contractual rights").

46. *See supra* note 44 and accompanying text; *see also* United States v. Jimenez-Medina, 173 F.3d 752, 756 (9th Cir. 1999) ("Reasonable suspicion can not rest upon the hunch of an experienced officer, even if the hunch turns out right. The requirement of objective fact to support an inference of wrongdoing eliminates the need to deal with a police stop that rests on constitutional intuition.").

47. *See, e.g.*, Lake Gibson Land Co. v. Lester, 102 So. 2d 833, 835–36 (Fla. Dist. Ct. App. 1958) (explaining that the determination of the reasonableness of water use by riparian proprietors "'is not and should not be an unreasoned, intuitive conclusion on the part of the court or jury'" but requires a "'weighing'" of their conflicting interests (quoting Harris v. Brooks, 283 S.W.2d 129, 135 (Ark. 1955))); State v. Pillar, 820 A.2d 1, 19 (N.J. Super. Ct. App. Div. 2003) (seeking "'less an exercise in judicial intuition, or second guessing, and more of a reasoned application of a set of rules to a given fact pattern'" (quoting Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L. REV. 277, 282 (1995–1996))). It is not meant to suggest here that intuition can be disentangled from judicial reasoning, particularly in the forms of judicial

thought to be insufficiently analytic.[48] Or intuition may be thought by some judges to lack scientific support,[49] to be without sufficient empirical support,[50] or simply to be unscientific.[51]

Equally disturbing, and related to the above concerns, is the judicial sense that intuitions are themselves unexplained[52] and unarticulated.[53] Intuitions thus may not help the courts explain or articulate their reasoning process and the case outcome through a traditional written opinion. And even a written statement of an intuited outcome or principle may be thought to be unfortunately vague in its scope.[54]

When these apparent limitations of intuitionism in judicial decisionmaking loom large, a court's approach to intuition can as a result be dismissive. Intuition then becomes "naked intuition"[55]

---

weighing and balancing.

48. *See, e.g.*, Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 963 n.11 (D. Md. 1977) (conceding that the court's own belief was arrived at "[a]dmittedly more intuitively than analytically"); Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1128 (Wash. 1989) (en banc) (Utter, J., dissenting) (distinguishing "principled analysis" from a result appearing to "spring from . . . 'pure intuition'").

49. *See, e.g.*, Brown v. State, 736 P.2d 1110, 1121–22 (Wyo. 1987) (Urbigkit, J., dissenting) (characterizing a "'simple intuition of courts'" concerning sex offender behavior as having "'little scientific support'" (quoting James M.H. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 236 (1965))); *see also In re* William S., 333 N.Y.S.2d 466, 472 (Fam. Ct. 1972) (same).

50. *See, e.g.*, Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356, 1366 (Haw. 1975) (referring to an "intuitive finding" of specified judges "unaided by any empirical evidence" of the effect of defamation suits on the news media's freedom of expression and suggesting that the relevant empirical evidence would be better developed by legislatures than by courts).

51. *See, e.g.*, Tex. Steel Co. v. Recer, 508 S.W.2d 889, 899 (Tex. Civ. App.—Fort Worth 1974, writ ref'd n.r.e.) (characterizing an isolated, not broadly informed jury award as "intuitional and unscientific").

52. *See, e.g.*, Pub. Serv. Co. v. Burlington N. R.R., 53 F.3d 1090, 1096 (10th Cir. 1995) ("'Independent review . . . does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions.'" (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991))).

53. *See, e.g.*, *In re* Marriage of Haguewood, 638 P.2d 1135, 1138 (Or. 1981) (concluding that "as long as equitable principles remain intuitive instead of articulated, adjoining circuit courts may choose to apply different policies to similar cases"); State v. Oxborrow, 723 P.2d 1123, 1133 (Wash. 1986) (en banc) (stating that "[t]he length of an exceptional sentence thus should now be based on articulated factors instead of intuition").

54. E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 68 (2000) (Scalia, J., concurring) ("The problem with judicial intuition of a public policy that goes beyond the actual prohibitions of the law is that there is no way of knowing whether the apparent gaps in the law are intentional or inadvertent."); Lewis v. United States, 523 U.S. 155, 174 (1998) (Scalia, J., concurring) (contending that the "'precise acts' test . . . in practice is no test at all but an appeal to vague policy intuitions").

55. *See, e.g.*, Watson v. State, 900 S.W.2d 60, 63 (Tex. Crim. App. 1995) (en banc) (Clinton, J., concurring) (arguing that the plurality relied upon "nothing more than its

or "ipse dixit,"[56] in which a court "consult[s] its viscera."[57] "Mere"[58] intuition or "uninformed"[59] intuition is sometimes reduced to a more or less arbitrary "whim."[60] In such moments, and at least for some judges, the value of intuition in judicial decisionmaking may seem minimal or even negative.

The judges themselves thus range from seeing intuitions as valuable—if not essential—to a more neutral stance, to taking an extremely critical view of intuitions. Given this collective confusion, uncertainty, and disagreement, it may be helpful to draw upon the work of the philosophers who have thought most carefully, even if they in turn have in different ways disagreed, about the role of intuition in decisionmaking.

III. DRAWING UPON WHAT THE PHILOSOPHERS HAVE SAID ABOUT INTUITIONS

A. *Some General Understandings*

Judges, including the judges cited in Part II above, doubtless intend most often some ordinary, familiar, nontechnical, dictionary-guided meaning of the term "intuition." But our understanding of the role of intuition in judicial decisionmaking—both in actual judicial practice, and where judicial intuition might be best justified—might well be enhanced by drawing upon the work of those who have thought most carefully about intuitions.

A number of respected modern philosophers have thought carefully—both favorably and unfavorably—about intuitions, especially in connection with a variety of philosophical positions bound together by the name "intuitionism." Intuitionism covers too diverse a range of positions to repay an exhaustive inventory. But we may profit by drawing selectively from this more technical literature.

---

naked intuition").

56. *See id.* (describing the plurality's opinion as "ipse dixit").

57. *See id.* ("I suspect that the plurality has once again consulted its viscera . . . .").

58. *See, e.g.*, Gomes v. Fair, 738 F.2d 517, 525 (1st Cir. 1984) (supporting the trial court's observation that prison officials cannot take actions against an inmate based on "mere 'intuition'" but reversing the trial court's injunction because there was evidence to support the actions of the prison officials).

59. *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 679 n.4 (2002) (Scalia, J., dissenting) (referring to "the Court's uninformed intuition" about the degree of burden imposed on the states by the rule adopted by the Court).

60. *See, e.g.*, Ernst v. Roberts, 379 F.3d 373, 381 (6th Cir. 2004) ("The general question of how to characterize a non-federal public entity has not been left to federal courts' whim or intuition.").

One entry into the philosophical mainstream "is the view that one may legitimately appeal to one's moral intuitions in the course of moral reasoning, even though these moral intuitions are (by definition) not supported via inference from any other judgments."[61] The author of this formula goes on to specify that intuitionism on his understanding "is *not* the view that we are possessed of a mysterious sixth sense capable of detecting occult moral particles."[62]

On a similar view, "a moral intuition is a spontaneous judgment"[63] that "is not the result of conscious inferential reasoning."[64] Otherwise put,

> the allegiance the intuition commands is not based on an awareness of its relations to one's other beliefs. If one considers the act of torturing the cat, one judges immediately that, in the circumstances, this would be wrong. One does not need to consult one's other beliefs in order to arrive at this judgment.[65]

This author goes on to clarify that "spontaneity" in this sense "is entirely compatible with the possibility that a fair amount of cognitive processing may be occurring beneath the surface of consciousness."[66] As well, spontaneity of judgment does

---

61. Mark Nelson, *Morally Serious Critics of Moral Intuitions*, 12 RATIO 54, 54 (1999).

62. *Id.*; *see also* Mark Platts, *Moral Reality*, *in* ESSAYS ON MORAL REALISM 282, 285 (Geoffrey Sayre-McCord ed., 1988) ("[I]t is no part of this intuitionism to suggest that we detect the moral aspects of a situation by means of some *special faculty* of the mind, the intuition. We detect moral aspects of a situation in the same way we detect (nearly all) other aspects: by looking and seeing."). The latter claim is often found controversial, if not cryptic. For criticism, see, for example, J.L. MACKIE, ETHICS 41 (1977) ("It is not even sufficient to postulate a faculty which 'sees' the wrongness: something must be postulated which can see at once the natural features that constitute the cruelty, and the wrongness, and the mysterious consequential link between the two.").

63. Jeff McMahan, *Moral Intuition*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY 92, 94 (Hugh LaFollette ed., 2000).

64. *Id.* For some elaboration, see Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 65–66 (2001) (discussing the use of intuitive knowledge and its effect on judicial decisionmaking).

65. McMahan, *supra* note 63, at 94; *cf.* Walter Sinnott-Armstrong, *Moral Skepticism and Justification*, *in* MORAL KNOWLEDGE? 3, 25 (Walter Sinnott-Armstrong & Mark Timmons eds., 1996) ("Moral intuitionism is . . . the claim that some people are justified in believing some moral claims in some way that does not depend on the believer inferring or even being able to infer the claim from anything else that the person believes.").

66. McMahan, *supra* note 63, at 94. The possibility of unconscious cognitive processing as somehow contributing to the arrived-at intuition is sometimes thought to be fully compatible with the further belief that some intuitions are unprovable but self-evident. For discussion, see, for example, Brad Hooker, *Intuitions and Moral Theorizing*, *in* ETHICAL INTUITIONISM 161, 163 (Philip Stratton-Lake ed., 2002); Sinnott-Armstrong, *supra* note 65, at 25 (discussing the possibility of a belief being justified, but not justified by anything in particular); Mark Timmons, Book Review, NOTRE DAME PHIL. REVS., Oct.

not imply that the judgment is arrived at "instantaneously."[67] Instead, "moral reflection may take time even when it does not involve conscious inferential reasoning."[68]

The plausibility of these claims is certainly subject to contest. But some modern forms of intuitionism helpfully allow for the possibility of mistaken or untrue intuitive beliefs,[69] and for the possibility of meaningful challenge to,[70] revision of,[71] uncertainty of,[72] and improvement in[73] the outcomes of intuitive process.[74] Understood in this plausible way, it seems possible that intuition may play a significant and defensible role in judicial decisionmaking.

B. Some Philosophical Critiques of Various Sorts of Intuitionism

The above brief sampling of some understandings of intuitionism suggests that some forms of intuition can seem more defensible, and closer to some forms of judicial decisionmaking, than we might have imagined. But to assess the proper role, if any, of intuition in judicial decisionmaking, we should take some account of the philosophical critiques of intuition that seem most relevant to judicial intuition. Our purpose is not to defend or

---

7, 2003, http://ndpr.nd.edu/review.cfm?id=1317 (reviewing H.A. PRICHARD, MORAL WRITINGS (Jim MacAdam ed., 2002) and W.D. ROSS, THE RIGHT AND THE GOOD (Philip Stratton-Lake ed., 2002)).

67. McMahan, *supra* note 63, at 94.

68. *Id.*

69. Hooker, *supra* note 66, at 165. Self-evident beliefs may on some definitions actually be false, and some true self-evident beliefs may not be seen as true or as self-evident by some persons. *See* RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENCE 258 (2003). Some time ago, Aquinas recognized the latter possibility. *See* 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I, Q. 94, Art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (1652).

70. *See* Hooker, *supra* note 66, at 165.

71. *See id.*

72. *See* Platts, *supra* note 62, at 285.

73. *See id.*

74. Thus our brief examination of intuitionism will remain neutral on some other occasionally claimed elements of intuitionism, such as whether intuitionist ethical systems must have "a plurality of first principles," or whether there must then be "priority rules, or some decision procedure," for selecting among such a plurality of first principles in a given case. JOHN RAWLS, A THEORY OF JUSTICE 30 (rev. ed. 1999) (discussing intuition and the balancing of competing values); Christine Swanton, *The Rationality of Ethical Intuitionism*, 65 AUSTRALASIAN J. PHIL. 172, 172 (1987) (defining an intuitionistic system). Nor need we take sides in the historic Prichard and Ross debate over whether our most useful moral intuitions occur in particular contexts bearing upon particular concrete duties or instead as bearing upon more general principles of moral duty. For the former view, see H.A. PRICHARD, *What Is the Basis of Moral Obligation?*, *in* MORAL WRITINGS, *supra* note 66, at 1, 5. For the latter view, see ROSS, *supra* note 66, at 30. *See also* HENRY SIDGWICK, THE METHODS OF ETHICS 101 (7th ed., Hackett Pub. Co. 1981) (1907) (anticipating, without endorsing, elements of a more Rossian position).

explain intuition at every turn; some criticisms can be left for the specialists. Instead, our purpose is to allow some of the most relevant criticisms to affect our sense of the proper role, if any, of intuition in judicial decisionmaking.

We might consider first the extreme case of a strongly held intuition that seems, unlike Justice Stewart's judgment of nonobscenity,[75] to draw upon nothing relevant to the case beyond the intuition itself. Consider, for example, a bare intuition that despite all the available evidence indicating otherwise, one's distant child is safe from harm.[76] One critique of this bare and extreme form of intuition asks whether there is any difference between such an intuition that turns out, happily and for others unexpectedly, to be right, and an intuition under similar circumstances that turns out to be wrong. Are there any systematic differences in the subjective intuitive experience, or in any other detectable way, between such cases?

The intuitionist may respond that intuitions of the sort discussed by Justice Stewart in *Jacobellis* involve specific, substantive considerations. Justice Stewart presumably considered, for example, whether any persons depicted were wearing clothes, or were depicted engaged in particular activities of one sort or another. He might well have taken any number of considerations into account, consciously or unconsciously, in the process of arriving at his intuitive result. And his perceptions and judgment in any of these respects could well be supported or criticized by means of familiar sorts of argument.[77]

By contrast, in the case of an intuition apparently drawing upon nothing in particular, we can easily understand that "it is puzzling why an intuition—a normative conviction—should be supposed to be a test of anything."[78] That sort of bare intuition might well be thought to be "fundamentally non-explanatory."[79]

---

75. *See supra* notes 1–2 and accompanying text.

76. This scenario is suggested by W.D. HUDSON, MODERN MORAL PHILOSOPHY 101–04 (1970).

77. The philosopher G.E. Moore argued that reasons can be given for or against even immediate moral intuitions, but his argument seems to assume that our moral intuitions will be about how to maximize the good, about which reasons for choosing one course rather than another can be given. This assumption is itself subject to intuition—conflicting intuitions, in fact. It is unclear how to resolve such conflicting intuitions on Moore's theory. For Moore's specific discussion, see G.E. MOORE, PRINCIPIA ETHICA 198 (Thomas Baldwin ed., rev. ed. 1993).

78. RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 21 (1979).

79. David McNaughton, *Intuitionism*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY, *supra* note 63, at 268, 270. See also, for this and a series of other critiques of intuitionism, the work of the nonetheless intuitionist ROBERT AUDI, THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE (2004). For commentary on

Both its genesis, and its justification, may be mysteries. But whether or not these criticisms are valid of an intuition apparently drawing upon nothing in particular, there seems less reason to be sure that a Justice Stewart-type intuition must be defective on such a basis. Justice Stewart's intuition may, as depicted above, have somehow "tested" for something like the admittedly complex idea of obscenity. Justice Stewart could have "explained" his judicial result to at least some degree, without going much beyond a doubtless imperfect reconstruction of what his intuitive processes involved.[80] Again, Justice Stewart's intuition could have resulted from considering, say, clothing (if any) and visibility and particular activities depicted, along with any message and context, among other factors. Discussing these considerations could assist in unpacking his intuition and the legal result Justice Stewart reached in the case.

An intuition in this partially-articulable sense can offer some degree of explanatory power. But if we think of the intuition as just the conclusion to a preceding mysterious and impenetrable intuitive process, then the intuition itself will not explain very much. A useful explanation in the legal context will usually consist of the entire written legal opinion, including findings of fact deemed relevant. Some portion of the opinion may amount to an attempt to reconstruct, and to articulate or report, the intuitive process.

A further criticism of some forms of intuitionism builds on our assumption that intuitions, even if fervently experienced, may be mistaken.[81] What seems intuitively right or wrong to any of us seems to depend upon our culture and upbringing.[82] Unless we adopt an unambitious moral relativism,[83] intuitionism may leave society with an unsatisfactory stalemate in which one group's intuitions are unproductively matched against another group's partly conflicting intuitions. Each group may test its own intuitions by other of its own intuitions.[84] But ultimately, on a pure intuitionist theory, there may be no shared appeal beyond

---

intuitionist views of self-evidence and on the views of Robert Audi in particular, see MARK TIMMONS, MORALITY WITHOUT FOUNDATIONS: A DEFENSE OF ETHICAL CONTEXTUALISM 232–34 (1999).

80. Of course, to the degree that Justice Stewart's intuitive process operated subconsciously, the task of reconstructing and articulating that process becomes far more difficult.

81. *See supra* note 69 and accompanying text.

82. *See* BRANDT, *supra* note 78, at 21–22, 236.

83. For background, see, for example, RELATIVISM: INTERPRETATION AND CONFRONTATION (Michael Krausz ed., 1989).

84. *See* BRANDT, *supra* note 78, at 21–22. See also the extended footnote discussion in LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 72 n.108 (2002).

each group's own intuitions, including intuitions about intergroup conflict and tolerance.

If all we can draw upon is our own intuitions as revised in light of our other intuitions, then there does seem to be no neutral ground upon which to rationally choose between our own intuitions and those of another culture. But this problem, or some parallel problem, would also seem to confront those who would limit or eliminate intuition in broadly moral judgments as well.[85] We could check our intuitions by comparison with whatever else we also believe that is not an intuition. That process of evaluating our intuitions in light of our own nonintuitive beliefs might bring us into agreement with some other culture. But it is still difficult (if not impossible) to step outside all of our relevant beliefs, intuitive or not, to reach some neutral ground on which our beliefs can be rationally and fairly[86] compared with other systems of beliefs that we only partially share.

Whether we are intuitionists or not, we can still undertake the admittedly difficult task of sincerely critiquing and reassessing our culture's most cherished beliefs. And whether we are intuitionists or not, we obviously face great difficulties in gaining enough perspective to see how even our own posterity will judge us. It certainly seems "there are limits to what intuitionistic methods can show and to the kinds of disputes intuitions can resolve."[87]

Yet if intuitionism—along with other forms of decisionmaking—has its limits in reaching and accounting for its results, intuitionism is also sometimes thought to be, in its proper role, indispensable and inevitable. As one contemporary philosopher has observed, "It is hard to see how to justify any substantive moral view without appealing to some moral intuition at some point."[88] Even those who reject moral intuitions seem to unavoidably wind up criticizing one sort of theory or

---

85. *See* BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY 11–13 (2000) ("[W]e cannot evaluate our evaluative beliefs, or anything else, from a completely non-evaluative point of view. If we take up a point of view stripped of all evaluative conviction, we have no basis for evaluation." (emphasis omitted)).

86. Precisely what constitutes a "neutral" ground, or a broadly rational basis for preferring one system's belief over another system's conflicting belief, could also be subject to dispute between cultures.

87. Sanford S. Levy, *A Limit on Intuitionistic Methods of Moral Reasoning*, 37 J. VALUE INQUIRY 463, 463 (2003).

88. Walter Sinnott-Armstrong, *Moral Relativity and Intuitionism*, 12 PHIL. ISSUES 305, 306 (2002).

another "for implying counter-intuitive moral conclusions."[89] In a practical sense, intuitionism may thus be simply inescapable.

The well-known moral theory of John Rawls, for example, has been criticized by the philosopher Richard Hare for disclaiming, but then also utilizing, "appeals to intuition at all the crucial points in his arguments."[90] Rawls in fact forthrightly admits that "any ethical view is bound to rely on intuition to some degree at many points."[91] Rawls seeks, however, to reduce the need to appeal to intuition in moral argument.[92] At least in part, this desire reflects the fear that the crucial balancing in morals, and in so much of the law and adjudication, will be conducted differently by persons who rank or weigh principles or other considerations differently.[93] With the crucial balances being struck in different ways, we will inevitably differ on what justice, or a legally just judicial outcome, would require.[94]

Rawls seeks to reduce the need to appeal to balancing, or to intuition more broadly, most famously through what he calls lexical or strictly ranked principles of justice,[95] in which lower ordered principles are not accommodated at any cost in higher ordered principles until the requirements of the higher ordered

---

89. *Id.*; *see also* Nelson, *supra* note 61, at 59 (asserting, but not arguing, that "appeal to moral intuitions [is] unavoidable").

90. R.M. HARE, MORAL THINKING 75 (1981). Hare himself argues that because our intuitions, based on our peculiar upbringings, can conflict, we will need some distinctive, nonintuitive kind of moral thinking to resolve the conflict. *See id.* at 40. Actually, this does not follow, as we might have successively higher order intuitions as to how conflicts between lower order intuitions should be resolved. And no one's moral thinking, of whatever sort, can be further rationally justified beyond some point. In any event, Hare famously refers to the necessary nonintuitive thinking as "critical thinking." *Id.* Critical thinking adjudicates among intuitions by recourse to logic and nonmoral facts. *See id.*

It is, however, entirely unclear how we are to decide on the relevance, weight, and meaning of the nonmoral facts on any conflict between intuitions without some further appeal to moral intuition at just this point. For example, suppose we have conflicting intuitions about some level of unintended deaths of noncombatants. It is difficult to believe that the bare logic of morals, along with all the nonmoral facts available, will be able to tell us the acceptable number of civilian deaths without some further moral intuition as to how to best respond to and accommodate conflicting nonmoral facts. Moral intuition would be necessary to tell which nonmoral facts were relevant, and even to tell us that all the nonmoral facts pointed toward the same moral choice.

Whether all the intuitions brought to bear at the higher, critical level will by themselves be entirely adequate is another question. In any event, Professor Hare's hope to avoid any need for substantive moral intuition at the critical moral level seems unlikely to be satisfied.

91. RAWLS, *supra* note 74, at 35.

92. *See id.* at 36 ("[W]e should do what we can to reduce the direct appeal to our considered judgments.").

93. *Id.* at 36–37.

94. *Id.*

95. *Id.* at 37–38.

principles are fully met.[96] Higher ordered principles are thus given absolute priority in any conflict with lower ordered principles. No balancing, and no intuition, is in this sense required.

Of course, Rawls's theory is subject to almost endless elaboration, critique, and defense. But just as Professor Hare himself cannot avoid recourse to intuition by appealing to a "critical" level of morality,[97] so Rawls in turn cannot avoid a similar reliance on intuition by constructing a ranked or a lexically ordered set of principles of justice.

Suppose, to oversimplify, Rawls wants a liberty principle always to outrank a fair equality of opportunity principle, or vice versa for that matter. Whether we should accept this ordering, in all circumstances, or perhaps in some circumstances only, and more crucially how it should be interpreted and applied in practice, will inevitably require recourse to moral intuitions. Can we in some or all circumstances reasonably prefer fulfilling even the very last and least valuable increment of our higher ranked principle at the expense of whatever amount of fulfillment of the next highest principle we could otherwise have? Is that how we normally treat hierarchies of values in our own lives? If we rank education above entertainment, do we typically conclude that no degree of entertainment can be worth the smallest sacrifice of education? If not, where is the proper line to be drawn, and how, in the absence of any intuition, do we know?

Can we be sure that a significant increase in fair equality of opportunity is never worth any sacrifice of any basic liberty? Can we responsibly assume that such trade-offs do not arise in practice? Don't we want to consider making such an exchange, in intuitively appropriate cases, partly through intuitive value assessments? And doesn't intuition have a role in confirming or denying the possibility that increasing equality of opportunity could actually also increase basic liberty overall? Of course, more than one sense of the idea of basic liberty could come into play. But don't we then need intuition to help us choose which sense of liberty is most worth protecting?[98]

---

96. *Id.* at 38.

97. *See supra* note 90.

98. For helpful background on whether there is actually any genuine conflict between the most valuable forms of liberty and equality, see the conflicting views of Sir Isaiah Berlin and Professor Ronald Dworkin in, respectively, ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 12–13 (Henry Hardy ed., 1991) (arguing that liberty and equality inevitably conflict) and Ronald Dworkin, *Do Liberal Values Conflict?*, *in* THE LEGACY OF ISAIAH BERLIN 73 (Mark Lilla et al. eds., 2001) (responding to Berlin and arguing that liberty, in certain forms, and equality may not

Thus, just as Professor Hare cannot adjudicate among conflicting intuitions without some role for a further or higher ordered intuition, so also Professor Rawls cannot avoid balancing and intuition, even in the choice of interpretation and application of lexical principles intended to avoid balancing.[99] This is not to suggest that intuition will guide us to a unanimous choice, or that intuition is all that should be called upon in such cases. We will certainly also need the capacity to draw careful inferences, and we will need as much proper motivation and relevant knowledge of fact as we can get.[100] But intuition will also be indispensable.

IV. INTUITION, BALANCING TESTS, AND ABSOLUTISM IN THE LAW

By this point in the analysis, we may rightly begin to suspect that the actual and legitimate role of intuition in the law may be much greater than is often supposed. The discussion above suggests that intuition may play a surprisingly large and pervasive role not only in weighing and balancing, but in the design, interpretation, and operation of decisionmaking procedures that might claim to be independent of weighing and balancing as well. Eventually, we will more fully confirm that intuition plays a pervasive role in all standard forms of judicial reasoning. Again, this is not to suggest that intuition by itself suffices to link a collection of facts to a unique legal conclusion. The main point is instead to continue building our appreciation of the universal dependence of adjudication on intuition. This Part illustrates in particular the role of intuition in a variety of judicial balancing tests, and in the purportedly absolutist, nonbalancing free speech jurisprudence of Justice Hugo Black.

That intuition plays an important role in judicial balancing tests should hardly be a surprise. Justice Cardozo vaguely hints at this possibility in his classic text, *The Nature of the Judicial Process*.[101] Cardozo writes, "If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from

---

necessarily conflict).

99. As a final complication, unless Rawls merely assumes the possibility away, there may be cases in which sacrificing a small amount of the liberty principle would involve costs borne mainly by the very best off, or by the already freest, and with resulting gains in fair equality of opportunity. How could we fully reasonably decide for or against this course without the exercise of intuition?

100. *See* HARE, *supra* note 90, at 40 (relying on nonmoral facts as one of the two bases for critical thinking).

101. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (William S. Hein & Co. 1997) (1921).

experience and study and reflection; in brief, from life itself."[102] Cardozo's refusal at this point to even gesture in the direction of any recognizable method perhaps suggests the role of intuition in interest balancing. But the reference to "reflection" may suggest not only an intuitional process, but some more formal, structured, systematic thinking as well—which in turn may itself rely on intuition at crucial points.

There is a substantial amount of literature discussing various types of weighing and balancing in adjudication. Professor Alexander Aleinikoff, for example, distinguishes "definitional" balancing tests[103] that are not supposed to require further balancing in their application from "ad hoc" balancing tests[104] that plainly invite further explicit balancing in their application. Professor Aleinikoff then further distinguishes balancing in general from "conceptualism and formalism."[105] We should, however, be skeptical that any judicial balancing test or any test that strives for nonbalancing formalism can avoid relying on intuition in its very construction, interpretation, or concrete application.

Consider, for example, the definitional balancing or the nonbalancing formalism that seems to pervade the classic separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*.[106] The various opinions, including Justice Black's opinion for the Court denying to the President the power to seize the steel mills to prevent a threatened strike during the Korean War,[107] seek to apply separation of powers principles in a rigorous fashion.

---

102. *Id.* at 113; *see also* Ty, Inc. v. Jones Group, Inc., 237 F.3d 891, 895–96 (7th Cir. 2001) (stating that the sliding scale balancing test for the availability of a preliminary injunction is "'subjective and intuitive'" in character (quoting Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992))).

103. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948 (1987) (referring to "definitional" balancing as "balancing that establishes a substantive constitutional principle of general application").

104. *Id.* (explaining that "ad hoc" balancing is "balancing that itself is the constitutional principle" and is used in procedural due process cases). Aleinikoff cites *Matthews*, in which the Court determined how much process was due by weighing the various private and public interests at stake, along with any difference in error rates between offered and proposed procedures. Matthews v. Eldridge, 424 U.S. 319, 332–48 (1976). Of course, explicit balancing tests pervade civil and criminal law, constitutional and otherwise. To cite merely one distinctive example, consider Judge Learned Hand's classic negligence balancing formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), transplanted to free speech in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), and then to possible free press versus fair trial conflicts in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

105. Aleinikoff, *supra* note 103, at 949.

106. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

107. *See id.* at 585–89 (emphasizing that the Constitution grants Congress alone

This process reaches its height in Justice Jackson's concurring opinion.[108] The heart of Jackson's opinion is an almost algebraic account of three possible relationships between the exercise and withholding of congressional power and the scope of the various presidential powers.[109] The three possible general relationships, focusing on congressional support of, indifference toward, or hostility toward the particular presidential venture in question, form a three-part classificatory system.[110] The classificatory system is intended to provide some structuring perspective for the ultimate decision of the separation of powers case. But can we really crank the handle of Justice Jackson's classificatory mechanism in *Youngstown* and expect an answer with no additional balancing, let alone with no additional application of any sort of judicial intuition? This seems unlikely.

The Court in *Youngstown* held, in particular, and on the basis of numerous considerations, that the President could not under the circumstances seize and operate private steel mills pursuant to the President's powers and responsibilities as Commander in Chief.[111] Now, this was doubtless a sensible judicial conclusion. But the conclusion was arrived at not merely by applying algebraically or otherwise the logically relevant legal rules, but through the application of intuition as well. Presumably, a Commander in Chief could order the temporary civilian evacuation of the site of an imminent invasion. But intuition must be called into play to determine the scope of such a power. Could a Commander in Chief also order the digging of defensive trenches in private lawns? Could a Commander in Chief order all adults and school children to learn basic vocabulary of the invading force's language, the better to foil their plans? Could a Commander in Chief prohibit the public discussion of military ship sailing times or military train departure times and routes, quite aside from any free speech issues? All with no greater external legal authority than was available to President Truman in *Youngstown*?

Realistically, even if knowledgeable persons came to the same conclusions with regard to all these hypothetical cases, they would be doing so partly through the application of professionally trained intuition in a given legal context. Graphing the

---

lawmaking authority).

108. *See id.* at 635–37 (Jackson, J., concurring).

109. *Id.*

110. *Id.*

111. *See id.* at 587–89 (majority opinion) (holding the President lacked the authority to issue the seizure order).

boundaries among presidential, congressional, and state authority, or deploying the vague—and perhaps decreasingly meaningful—concept of the "theater of war" can carry us only so far. Even if balancing as narrowly defined is not involved in such determinations, some form of intuition clearly is.

More generally, we should not be surprised that apparent alternatives to balancing, such as recourse to "precedent, original intent of the framers, history, and constitutional purpose"[112] actually involve balancing in themselves or in their application,[113] or at least some crucial form of intuition. Ascertaining the intent, at whatever level of generality, of the constitutional framers, for example, must depend crucially upon our own intuition.[114] This does not mean that our use of logical inference is irrelevant or inessential in such cases. But logical inference and other nonintuitive operations must be supplemented by intuitive assessments of possible conflicting evidence or conflicting theories of intent. Even if all the relevant evidence of framer intent can be identified without recourse to intuition, and even if all the evidence is easily commensurable,[115] the weight to be assigned to each item of evidence of intent simply cannot be determined without intuitive judgment.[116]

---

112. Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135, 164–65 (1994).

113. *See id.* at 163–71 (asserting that the alternatives to balancing merely shift the balancing).

114. *See supra* text accompanying note 7.

115. For a discussion of commensurability, see Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 787 (1994) (stating that "[t]he argument for commensurability, if successful, thus concludes that all decisional options can, in theory, be reduced to a single value"). *See also* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 780–81 (1994) (arguing that while Plato and Bentham believe "human goods should be seen as commensurable," this kind of valuation, "designed to aid in human reasoning, actually make[s] such reasoning inferior to what it is when it is working well"); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1513–14 (1985) (discussing the problems courts have with "balancing interests that even if ultimately commensurable, are defined on different levels of generality"). *But cf.* Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287, 1289 (1998) ("[T]he existence of incommensurability is inconsistent with the claims of rational choice theory, and reflection on incommensurability reveals the serious limitations of rational choice theory as a perspective from which to frame public policy."). Commensurability for our purposes may be taken to mean comparability on some common scale or framework. We shall generously assume that if things like reasons, interests, or rights can be commensurated in adjudicative contexts, they may be commensurated on nonintuitional as well as at least partly intuitional grounds. For further complications, see Tushnet, *supra*, at 1512 ("We define the boundaries between balancing and side constraints by balancing on a higher level.").

116. *See* Tushnet, *supra* note 115, at 1514 (noting that proper balancing requires intuition because "the interest and facts balanced have to be described on the *same* level of generality, and on the *right* level of generality").

More complex models of balancing may require more inferences, and more nonintuitive reasoning, but also more intuition as well. Consider for example the "Madisonian" balancing described by Professor David Faigman.[117] Madisonian balancing focuses on particular transactions,[118] but seeks to avoid piecemeal analysis[119] by considering all the implicated constitutional-rights and government-interest claims in the adjudication.[120] This ambitious balancing "thus aggregates rights and then balances them against the government's interests, which have always been aggregated for balancing purposes."[121]

Now, we may not be surprised if a judge who admits to intuitionism cannot articulate his or her decisionmaking process in a given case.[122] But we should be surprised if a judge who claims not to have relied on intuition can be no more articulate in reconstructing a judicial determination.[123] A Madisonian-balancing judge might claim to merely be following logically mandated rules in reaching his or her decision.[124] In a simple case, intentional or explicit gender discrimination, for example, might evoke mid-level constitutional scrutiny, thus requiring an important government interest and a substantial relationship between the gender classification and the government interest.[125]

---

117. *See* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 643–44 (1994) (noting "Madisonian Balancing" assesses the constitutional costs of an action from a "Constitution-wide perspective, rather than from a right-specific or amendment-specific viewpoint").

118. *See id.* at 644 ("The balance is struck at a transactional level, by comparing the depth of the full constitutional infringement with the government's justification for its action.").

119. *See id.* at 643 (stating "constitutional injury caused by some government action cannot be described in a piecemeal fashion").

120. *See id.* at 643–44 ("A court's evaluation of the constitutionality of a challenged government action must entail a full assessment of the constitutional costs of that action.").

121. *Id.* at 644.

122. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."); *see also supra* note 7 and accompanying text.

123. *See* Shaman, *supra* note 112, at 168 (arguing that the original intent approach as attempted by the Supreme Court has failed because "[w]hen judges claim or even believe that they are engaged in an objective, impersonal search for the framers' intent, what they really end up unearthing are their own values").

124. *See* Faigman, *supra* note 117, at 654 (describing scenarios where a Madisonian-balancing judge uncritically defers to the legislature's reasons for passing the law, "the balancing court merely peers over the shoulder of the balancing legislature to ensure that the scales are not defective").

125. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications based on gender must satisfy intermediate level scrutiny). Of course, "[t]he abstract concept of balancing . . . tells us nothing about which interests, rights, or principles get

But how is the Madisonian-balancing judge to determine, for example, that the several government interests cited in support of the classification, each promoted to one degree or another, either do or do not add up to one overall interest that can be ranked under the circumstances of the case as important?[126] Even judgments as to the degree that interests overlap may well require intuition. Reference to some particular prior case rather than another for guidance may itself require intuition.[127] And the relevant circumstances of the selected prior case, as well as the degree to which the same government interests were threatened or promoted, will be determined to be similar or differ at least partly by intuition.[128]

---

weighed or how weights are assigned." Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 (1987).

126. *See Craig*, 429 U.S. at 217, 220–21 (Rehnquist, J., dissenting). Whether the relationship between the classification and the various interests promoted to one degree or another counts as "substantial" will also require intuition at some point.

127. *See* Shaman, *supra* note 112, at 165 ("Following precedent is not an alternative to balancing, but rather merely shifts the occurrence of balancing to an earlier case."); *see also supra* text accompanying notes 112–13.

128. Professor Stephen Gottlieb very usefully points out that "rules are based on and incorporate intuitive judgments, often the very balancing they were meant to replace. Thus, both balancing and rules depend on intuitive judgments we do not know how to explain." Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 850 (1994) (footnotes omitted). Our focus, unlike Professor Gottlieb's, is on intuition rather than on balancing. This is for several reasons. First, academic lawyers are generally more familiar with the literature on the various forms of balancing than on the technical philosophical literature of intuitionism. And more importantly, many classic intuitive judgments do not seem to involve any conscious balancing of interests. *See supra* notes 1–3, 7, 24–29 and accompanying text. We may, for example, intuit that it would be wrong to try to placate a destructive mob by scapegoating and sacrificing an innocent party, even without doing, either consciously or unconsciously, the complex interest balancing process that might otherwise be involved. *See* Sunstein, *supra* note 115, at 799 (describing the complex balancing process when goods are incommensurable, such as a mother asked to hand one of her two children to a Nazi officer).

But this does not mean, especially for judicial opinion writers, that even such intuitions cannot in any meaningful sense be publicly explained, justified, and reasonably defended by the opinion-writing judge. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. . . . The constitutional safeguard [of First Amendment protection] . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))). A Justice Stewart-like intuition of obscenity or nonobscenity, see *supra* notes 2–3 and accompanying text, could in an important legitimizing sense be defended by passing in review some of the specific features of the material examined by Justice Stewart, perhaps with descriptive comparison with other material elsewhere found either obscene or not obscene under the proper legal standards. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen., 383 U.S. 413, 418 (1966) (articulating a three-element test for obscene material which involves comparing "contemporary community standards" and ascertaining whether the work is "utterly without redeeming social value"). The relevance

What, though, of claims that rely on a rule-based absolutism in law and legal opinion writing, exemplified perhaps most famously in Justice Hugo Black's free speech absolutism?[129] Justice Black did not deny that balancing was somehow involved in free speech law, but he generally believed that the balancing was properly confined to the historical stage of drafting and ratifying the Free Speech Clause itself.[130] Is this attempt to confine balancing, and intuition more generally, to such an early historical stage of the process, long before the case adjudication itself is undertaken, at all likely to succeed?

For several reasons, this seems doubtful in the extreme. Bypassing crucial reliance on intuition at the adjudicative stage of typical free speech cases is grossly unrealistic. To begin with, a court must occasionally—as in the case of the symbolic burning of an object,[131] the display of brief verbal messages on a jacket,[132] or commercial barroom nude dancing[133]—decide whether "speech" in the constitutional sense is present at all. We may make even these initial categorical determinations largely by reference to whatever we take to be the purposes of the Free Speech Clause.[134] But it is difficult to believe that judges in such cases can escape the need to apply intuition if they are given merely some list of aims sought through freedom of speech. Not all of the purposes of protecting speech need point to some single classification as

---

and persuasive power of any such written opinion could, in turn, be largely a matter of further intuition, nonintuitive reasoning and inference, or a combination of both. *See* Miller v. California, 413 U.S. 15, 23–25 (1973) (rejecting the *Memoirs* three-element test and delineating a new three-element test for obscene material).

129. *See, e.g.*, *N.Y. Times*, 376 U.S. at 293 (Black, J., concurring) ("Unlike the Court, . . . I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials.").

130. For general discussion, see Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 876–79 (1960). For commentary, see Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441 (1967) (discussing Justice Black's antipathy towards balancing First Amendment protections).

131. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

132. *See* Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) ("Cohen's absurd and immature antic, in my view, was mainly conduct and little speech.").

133. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (finding nude dancing in the commercial context as expressive conduct within the scope of constitutionally defined speech).

134. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 127–30 (1989) (delineating the consequentialist and nonconsequentialist justifications for free speech); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the "constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization'").

speech or as nonspeech.[135] The exercise of judicial intuition seems inescapable.

Or suppose it is asked whether an absolute right of free speech contains an implied exception for extreme emergency. It is sometimes colorfully said that the Constitution "is not a suicide pact."[136] Determining whether the Free Speech Clause should be read to contain an extreme emergency exception[137] may well require historical judgment and intuition. Determining whether any such exception should be thought of as itself emphasizing balancing may require further intuition. And determining finally whether the exception properly applies in a given case may, of course, also require intuition.

Of course, extreme cases are also likely to be rare. A more common circumstance in which even a presumed free speech absolutist must confront the need for adjudicative intuition involves the determination of whether some government action really rises to the level of a legally actionable restriction of someone's freedom of speech.[138] Much of what governments do, including tax collection, imposition of traffic rules, enforcement of property rights, and such, can sometimes be upheld not as a justified burdening of speech,[139] but as simply not sufficient, in

---

135. *See* Greenawalt, *supra* note 134, at 127 ("There is no single correct way of presenting the justifications that matter for a principle of freedom of speech. . . . [T]he reasons for free speech are based on complex and somewhat overlapping elements, no basic division or multiple categorization can be wholly satisfactory.").

136. Haig v. Agee, 453 U.S. 280, 309–10 (1981) (internal quotation marks omitted) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)).

137. *See, e.g.*, United States v. Progressive, Inc., 467 F. Supp. 990, 991 (W.D. Wis. 1979) (discussing an injunction against publishing details of hydrogen bomb construction, even in the context of a broader public policy discussion). For crucial discussion of the possibility of violating otherwise absolute rules in extreme emergency circumstances, see MICHAEL WALZER, JUST AND UNJUST WARS 259 (1977) (defining the Walzer dilemma: "should I wager this determinate crime (the killing of innocent people) against that immeasurable evil (a Nazi triumph)"); Michael Walzer, *World War II: Why Was This War Different?*, 1 PHIL. & PUB. AFF. 3, 19–21 (1971) (arguing that the deliberate killing of noncombatants may by justified in certain situations). For one response, see R. George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 WAKE FOREST L. REV. 129, 158–72 (2003) (contemplating a plethora of minor variations to the Walzer dilemma and discussing how to balance these conflicting moral dilemmas).

138. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62–63 (1976) (upholding a government zoning ordinance as not violating the First Amendment, even though it singled out theaters that exhibit sexually explicit adult movies).

139. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 79, 89 (1949) (upholding an ordinance prohibiting "loud and raucous" sound trucks on public streets). *Contra id.* at 102 (Black, J., dissenting) ("The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.").

magnitude or directness and intention, to count as a burden on speech in the first place.[140]

Even more disturbing for a free speech absolutist, though, would be the extremely common instances in which there are free speech values, if not explicit free speech claims, on both sides of the case to be adjudicated.[141] Free speech absolutism alone cannot resolve such cases. At a minimum, some complex set of priority rules will also be needed. And it seems inescapable that in deciding on such rules, their priorities, limits, and application must at various points depend upon judicial intuition.

There are also cases in which free speech rights come into inescapable conflict with other specific individual constitutional rights. In this respect, free speech or free press rights with various fair trial or due process rights, for example, may clash.[142] It is implausible to imagine that all such cases can be properly resolved without any substantial sacrifice of free speech values.[143] Nor is it plausible that any increase in the freedom of speech always trumps, without recourse to intuition, any sacrifice whatsoever of equal protection or any other individual constitutional rights.[144] In general, there is no plausible form of adjudicative absolutism that can consistently escape the need for intuitionism at some crucial point.

V. SOME OTHER POSSIBLE FORMS OF JUDICIAL REASONING AND THEIR INESCAPABLE DEPENDENCE ON INTUITION

A. *Inferentialism*

What realistic alternatives are there to judicial intuitionism? As we have seen in connection with both judicial[145] and more

140. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 53–55 (1986) (finding that a zoning statute was aimed at the secondary effects of adult theaters and permissibly restricted adult theaters to certain areas); *Young*, 427 U.S. at 71–73 (holding that the local government's interest in zoning did not violate the constitutional rights of adult theater owner).

141. *See* Burson v. Freeman, 504 U.S. 191, 198 (1992) (upholding "campaign-free zone" restrictions although it "presents . . . a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote").

142. *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 568–70 (1976) (discussing how an absolute right to speech would hinder the constitutional requirement of a fair trial).

143. *See id.* at 561 (discussing the history and dangers of suspending categorical guarantees).

144. *See Burson*, 504 U.S. at 206 (finding the right to vote without potential intimidation outweighed free speech protection).

145. *See supra* Part II.

technical philosophical[146] discussions, different approaches to intuitionism are certainly possible. For the sake of clarity, let us continue to think of an intuition as a judgment that does not directly[147] involve conscious[148] inferential reasoning from one's other beliefs.[149] If we think of judicial intuition in these terms, what can we say about judicial intuition and other possible forms of judicial reasoning?

Not all commonly recognized forms of judicial reasoning operate at the same level as judicial intuitionism or as a rival to judicial intuitionism.[150] But an alternative approach we may call "judicial inferentialism" might operate in some such fashion. A case for both moral and judicial inferentialism can be built from the fact of pervasive disagreements among both moral and judicial intuitionists themselves on important substantive principles.[151] One contemporary philosopher writes along these lines that

> [t]he range of disagreements among strongly-held non-inferable moral beliefs . . . shows that many moral believers are unreliable. It doesn't matter that we do not know how many are unreliable or whether any particular one is unreliable. The fact that moral disagreements are widespread still reveals enough unreliability to create a need for inferential justification of moral beliefs, contrary to moral intuitionism.[152]

Or, more concisely, "[t]he only way to check the accuracy of moral beliefs is by inference."[153]

On such an approach, moral and judicial outcomes should depend crucially on chains of rational inference of one sort or another. Some sort of "explicit method" of reaching results,

---

146. *See supra* Part III.

147. It seems possible that an intuitive judgment might not be directly dependent upon any conscious inferential reasoning, but somehow depend on inferential reasoning in some more indirect fashion.

148. While an intuition might not depend on conscious inferential reasoning, it might nonetheless depend, indirectly or otherwise, on an inferential reasoning process not reaching the level of conscious awareness.

149. *See supra* notes 61–65 and accompanying text, as well as Part III more broadly.

150. *See, e.g.*, James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1585–90 (1991) (explaining how judges consider fairness, efficiency, process, and policy when making their decisions).

151. *See* Sinnott-Armstrong, *supra* note 88, at 317–18 (explaining that irresolvable moral disagreements occur, that many moral beliefs are unreliable, and that there is a need for inferential justification of moral disagreements).

152. *Id.* at 318.

153. *Id.*

perhaps through "priority rules," may be utilized.[154] In some way, the moral or judicial outcome depends on inferring or being able to infer the outcome from one or more of the decisionmaker's other beliefs.[155]

Intuitionists, in contrast, can and do recognize some unavoidable if limited role in decisionmaking for inference and deduction.[156] But the intuitionist generally must claim something like the following:

> It is no less logically respectable to base a judgement that some deed of murder or mutilation is wrong on an immediate and compelling perception that this is so, than to approach the issue from a more complex ethical perspective in which the particular judgement has to be derived from a more general, or indeed universal, judgement.[157]

The most ambitious claims of both the intuitionist and the inferentialist, however, cannot be entirely sustained. One problem, for example, with trying to directly and immediately perceive that a murder, or murder in general, is wrong lies in the complexity of murder.[158] Perhaps some "mere" killings are conceptually simple enough in context to be nearly perceived as murder. Perhaps some nearly "perceived" murders are sufficiently self-contained to be nearly perceived as wrong. But murders cannot generally be perceived or perceived as wrong without the crucial support of a number of sustaining inferences and assumptions, because a murder is ordinarily a morally, legally, socially, and psychologically complex act.[159] Perhaps, by

---

154. *But see* J.O. Urmson, *A Defence of Intuitionism*, 75 PROC. ARISTOTELIAN SOC'Y 111, 111 (1975) (stating that one of the features of intuition theories is "'they include no explicit method, no priority rules, for weighing'" (quoting RAWLS, *supra* note 74, at 30)).

155. *Contra* Sinnott-Armstrong, *supra* note 65, at 25 (defining intuitionism in opposing terms). In a much more elaborately developed context, the philosopher Robert Brandom argues that "what distinguishes specifically *discursive* [or conceptual] practices from the doings of non-concept-using creatures is their *inferential* articulation. To talk about concepts is to talk about roles in reasoning." ROBERT B. BRANDOM, ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM 10–11 (2000); *see also id.* at 11 ("Saying or thinking *that* things are thus-and-so is undertaking a distinctive kind of *inferentially* articulated commitment . . . .").

156. *See, e.g.*, JONATHAN DANCY, MORAL REASONS 95 (1993) (discussing intuitionist W.D. Ross: "Ross goes on to admit that there are occasional exceptional circumstances where we do 'apprehend individual facts by deduction', both in ethics and elsewhere.").

157. BRENDA ALMOND, EXPLORING ETHICS 105 (1998).

158. *See* Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 NEB. L. REV. 757, 768–69 (2002) (explaining that judges and juries make decisions about the death penalty based on the presence of various aggravating and mitigating factors).

159. See, for example, the issues raised by Guyora Binder, *The Origins of American*

way of analogy, "rage" can be perceived, but even if so, "righteous indignation" plainly cannot.

When we pronounce an act, under complex circumstances, to be not only (an intentional) killing, but "murder," or "righteous indignation," however, we are on the other hand not merely logically deriving a particular judgment from a more general judgment.[160] At the very least, the general judgments on which we might rely are themselves inevitably built up of various unproven intuitions not reducible to a series of rigorous, connecting inferences.[161] In general, before we could conclude that killing under the circumstances is wrong, we would need to know much, both through unproven intuition and by inference, about pain and suffering, loss and intention, and motivation and excuse, among other matters.

B. Reliabilism

Sometimes, though, appeal is made against pure intuition not so much to inferentialism[162] as to the reliability of the process through which a moral or judicial judgment was arrived at. Hearing more than one side of an argument may contribute more to a reliable adjudicative process than would a purely ex parte adjudication.[163] By analogy, some methods of judging whether there will be an eclipse of the moon tonight may be more reliable than others. Consulting a group of university astronomers or a recognized almanac may be more reliable than merely tossing a

---

Felony Murder Rules, 57 STAN. L. REV. 59 (2004) (analyzing the sources and the evolution of American felony murder laws); Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 379–87 (1994) (examining the law of murder and its changes over the years); and Alan C. Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786 (1985) (discussing previous attempts to define unintended murder).

160. *See supra* note 159 and accompanying text.

161. *See, e.g.*, Givelber, *supra* note 159, at 378 (asserting that a degree of "arbitrariness" is used in capital punishment decisions).

162. *See* BRANDOM, *supra* note 155, at 38–39 (distinguishing inferentialist and reliabilist approaches to observation); SHAFER-LANDAU, *supra* note 69, at 273 ("The basic idea behind any form of reliabilism is that the epistemic status of a belief depends crucially on the way it came about."); Sinnott-Armstrong, *supra* note 65, at 3, 28 (discussing moral epistemology and reliabilism); *see also* SIDGWICK, *supra* note 74, at 213 ("It may . . . be possible to prove that some ethical beliefs have been caused in such a way as to make it probable that they are wholly or partially erroneous . . . ."). For a recent brief critique of moral reliabilism, see David Merli, Book Review, 113 MIND 778, 780 (2004) (reviewing SHAFER-LANDAU, *supra* note 69, and asserting that many apparently false, even abhorrent moral beliefs were formed carefully and are thus thought to be justified even though the belief-formation process may not count as reliable).

163. *See* John R. Allison, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1197–1200 (describing how ex parte communications can lead to biased or invalid decisions).

coin, even if both methods are imperfect. Perhaps, then, some methods of arriving at a resolution to moral questions, or to legal disputes, are more similarly reliable than others. Consulting only currently popular opinion,[164] or only one's own damaged belief-forming mechanisms,[165] can in this sense sacrifice reliability.

One of the best known defenses of a form of reliabilism in the judicial context is that of Chief Judge David Bazelon in *Ethyl Corp. v. EPA*.[166] *Ethyl Corp.* addressed the problem of responsible judicial review of an agency's complex, technical determination of the health risk posed by lead additives in gasoline. Judge Bazelon emphasized, at least in this context, rigorous judicial review of the agency's compliance with the mandated steps in the agency fact-finding and decisionmaking process.[167] By contrast, Judge Bazelon downplayed the likely net benefits of a court's attempts to evaluate on the merits the substance of the agency's complex, technical, scientifically informed judgments.[168]

Judge Bazelon thus argued that

> in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.[169]

More concisely, Judge Bazelon concluded that "[b]ecause substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures."[170]

Judges, of course, are not required to confine the logic of their approach to a case within some single carefully defined philosophical doctrine. Even if we say that a judge is adopting a form of reliabilism, not all forms of judicial reliabilism must

164. *See, e.g.*, SIDGWICK, *supra* note 74, at 211–12.

165. *See, e.g.*, SHAFER-LANDAU, *supra* note 69, at 262 (referring in particular to "gullibility, lack of experience, brainwashing, morally impoverished upbringings, facile thinking, etc.").

166. Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring).

167. *Id.* at 66–68.

168. *Id.* at 66–67.

169. *Id.* at 66 (quoting his own concurring opinion in *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring)).

170. *Id.* at 67.

conflict with judicial intuitionism. Perhaps reliabilism could, for example, be used merely to help judges select between conflicting intuitions. Reliabilism in such a case could look to the circumstances under which an intuition arose, and might help a judge to determine which intuition is more likely true.

On the other hand, a judge might seek to apply some reliabilist test to evidence, arguments, inferences, or chains of inferences, that are not mere intuitions. In a sense, that kind of judicial reliabilism would thus not be entirely in the service of judicial intuitionism. Perhaps some evidence obtained in particular ways, for example, might on some reliabilist theory be deemed more reliably arrived at and more likely true than evidence obtained in other ways.[171]

The problem, though, is that every form of judicial reliabilism must, at various crucial points, rely upon one or more intuitions of its own.[172] This is so even if we assume that the judicial reliabilism in question is being applied directly to nonintuitions.[173] Consider, for example, Judge Bazelon's judicial reliabilism discussed briefly above. We can say that Judge Bazelon's reliabilism prefers judicial review of agency compliance with procedural requirements over more direct judicial review of the substance of agency outcomes, logic, evidence, or policy.[174] It is inescapable that Judge Bazelon must somehow, at least implicitly, decide when this prioritizing of procedural-over-substantive review is and is not justified. And this inescapably requires intuitive judgment. How technically complex must a case be before this priority is invoked? What counts as technical complexity? Is the prioritizing of review of agency procedure over substance absolute? Why so? If not, how strong is the priority? Does the strength of the priority vary? If so, depending upon what?

---

171. It has been argued, for example, that "[a]s early as the eighteenth century English courts rejected confessions 'forced from the mind by the flattery of hope or by the torture of fear' as being inherently unreliable." Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243, 257 (2004) (quoting DAVID M. NISSAM ET AL., LAW OF CONFESSIONS 4 (1985)).

172. *See* Markus Lammenranta, *Reliabilism and Circularity*, 56 PHIL. & PHENOMENOLOGICAL RES. 111, 111–12 (1996) (asserting that reliabilism involves circular reasoning because "[t]o be able to justify the conclusion, we must be justified in believing the premises").

173. *See id.* (explaining how reliabilism employs circular reasoning); *see also* Sinnott-Armstrong, *supra* note 65, at 28–29 (explaining why "reliability is not sufficient by itself to make moral beliefs justified").

174. *See supra* text accompanying notes 166–70.

How is the reviewing court to determine the boundary even between procedural review and substantive review?[175] Are all forms of review of agency procedures of equal weight and value? Are all agency procedures themselves of equal value in contributing toward judicial confidence in the reasonableness of the agency's result? Can agency "overkill" in some procedural respects compensate for otherwise unduly casual procedures in other respects?[176] In all cases?

These are but a few of the questions that a reliabilist in the position of Judge Bazelon must logically address, even when not directly addressing intuitions.[177] And it is fair to say that at some point in the overall reliabilist decisional process—if not at every point—Judge Bazelon must, at least as a humanly limited judge,[178] rely on intuition.

C. Coherentism

Could a judge bypass any need to appeal to intuition by giving up the quest for any rock-bottom, foundational, hierarchically basic moral or legal truths bearing upon the case at hand? There would thus be no unshakable underlying truth, general or particular, from which other relevant truths might then be inferred.[179] Our confidence in any judicial result would

---

175. Depending upon one's interests and purposes, a reviewing court might find an unduly sketchy agency statement of the basis of a newly enacted rule to be objectionable either substantively or procedurally, perhaps under 5 U.S.C. § 553 (2000). *See, e.g.*, United States v. N.S. Food Prods. Corp., 568 F.2d 240, 251–53 (2d Cir. 1977) (holding that a regulation promulgated by the FDA was procedurally erroneous and substantively inadequate). See also the occasionally unclear boundary between substantive and procedural review in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97–98, 101–05, 108 (1983) (reversing the D.C. Circuit Court's finding of insufficient compliance with the National Environmental Policy Act by the Nuclear Regulatory Commission in a nuclear power plant licensing case).

176. For an example focused in this respect largely on "substance," see *Baltimore Gas*, 462 U.S. at 102–06 (overriding Judge Bazelon's logic, as applied, in this respect).

177. *See, e.g.*, Sinnott-Armstrong, *supra* note 65, at 28 (explaining that a reliabilist views beliefs as justified because they result from reliable processes).

178. The best known alternative to humanly limited judges is a judicial Hercules of superhuman abilities. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105–30 (1977) (offering an example of how a superhuman judge would approach difficult cases or questions of law). Whether a judge who was not merely superhuman, but ideal in all respects relevant to decisionmaking, would need recourse to judicial intuition quickly becomes a question of greater interest to students of philosophy than of jurisprudence. *See id*. (describing when an ideal judge would rely on factors such as policy or his own convictions and preferences).

179. *See* R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1, 10–11 (2002) (explaining that under the coherentist approach, "no single belief is thought to be indubitable or otherwise privileged" in the formation of knowledge but rather a compilation of beliefs and experiences can produce knowledge).

instead be a function of how well or poorly that result is enmeshed in a network of mutually supportive relevant claims.[180] No single claim would be taken as intuitively unshakable.[181]

On such an approach, no single judicial result need have been arrived at through an act of intuition. Yet we might have confidence in any single element of the network of beliefs because of its degree of "fit"—the density and variety of its relationships with its local and more distant fellow elements of a web of mutual, reciprocal support.[182]

On this "coherentist" approach, the focus is thus not on isolated individual beliefs. Instead, "whether a belief is justified depends on the other beliefs one holds," and those beliefs need not be more basic beliefs.[183] Coherentist methodologies are found in many philosophical[184] and legal[185] contexts. The influence of

---

180. *See id.* at 4–5 (arguing that a belief may be established by "the somehow combined force of a number of different items"); *see also* Laurence Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUD. 281, 289 (1976) (explaining that one criticism of the coherentist approach is that it leads to the notion that "beliefs are justified only in terms of relations to other beliefs and to the system of beliefs").

181. *See* Wright, *supra* note 179, at 11.

182. By loose analogy, we might have some justified confidence that a complex, highly interactive, low-black-square crossword puzzle grid was filled in correctly by recognizing that each of the entered words is supported by, and supports, a variety of other words, directly and more remotely, even if we do not see any of the crossword clues. SUSAN HAACK, EVIDENCE AND INQUIRY 82 (1995) ("How reasonable one's confidence is that a certain entry in a crossword puzzle is correct depends on . . . any intersecting entries that have already been filled in . . . ."). For development of a crossword puzzle analogy in the context of epistemology, see *id.* at 81–89; Nancey Murphy, *Truth, Relativism, and Crossword Puzzles*, 24 ZYGON 299, 303–06 (1989). The crossword puzzle analogy may help with the objection that another name for reciprocal support is mere vicious circularity of argument.

183. SHAFER-LANDAU, *supra* note 69, at 256.

184. *See* Wright, *supra* note 179, at 10–11 (observing that "[c]oherentist theories, as the term is used by philosophers, vary in their description"); *see also* Bonjour, *supra* note 180, at 281 (exploring a coherence theory "which avoids all versions of foundationism"); Michael R. DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96 MIND 463, 463 (1987) (noting that Rawls's method of reflective equilibrium "remains open to at least two distinct interpretations which differ with respect to the kinds of revision of pre-philosophical beliefs the method allows"); Michael Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243, 243 (1980) (analyzing whether "rejecting the foundational view of knowledge commits us to some form of coherence theory" and "whether rejecting all foundations is a step in the direction of idealism"); *cf.* AUDI, *supra* note 79, at 162 (noting the possible combination of "top-down" moral theorizing with specific case-based, more intuitivist "bottom-up" moral theorizing).

185. *See, e.g.*, ALAN H. GOLDMAN, MORAL KNOWLEDGE 188 (1988) (contending that "[l]egal arguments are purely coherentist, and the truth of statements such as '*x* is liable' lies in their coherence with other judgments of the same sort"); Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1375–76 (1999) (observing that "coherentist methods permeate modern theories of law" and citing in particular the legal coherentism of Ronald Dworkin); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513–14 (2004)

coherentism in theories of law and adjudication has of late been substantial.[186]

Courts sometimes deny that in deciding cases they work in both directions, from evidence to conclusions, and at the same time from (tentative) conclusions to (relevant) evidence and findings.[187] Interestingly, courts occasionally describe their reasoning not in formalist, facts-leading-to-conclusion terms, but in backward-working terms. One court, for example, has argued,

> Notwithstanding protestations on the part of countless thousands of appellate judges during the course of numerous centuries, legal reasoning in complex cases inevitably works backward from the result to the rule rather than from the rule to the result. For example, "substantial compliance," "intention of the drafters," "clear and unambiguous," "unconscionability," and "constructive fraud" are all legal phrases which can be used selectively to arrive at any given result which suits the fancy of the court.[188]

We should not casually assume that such an admission should be interpreted as denying any "forward," findings-to-conclusion movement in complex cases. Read strongly, the quoted language actually seems to suggest a noncoherentist, exclusively "backward" movement of judicial reasoning to rationalize a predetermined, perhaps intuited, judicial result. Perhaps judicial intuitionism is more useful—or more utterly indispensable—in complex cases.

On the other hand, any defense of judicial intuitionism on the merits would have to explain how judicial intuitions are supposed to operate, properly, in cases that are assumed to be quite complex.[189] For the sake of the argument, then, we can at least hold open the possibility of coherentist, multidirectional,

---

(discussing the coherentist model as both moving forward from premises or findings of fact to the legal conclusions and at the same time moving "backward" from (tentative) legal conclusions to adjust or establish the premises and findings, such that the movement in either direction affects the movement in the other direction). *But see* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 273 & n.3 (1992) (describing Dworkin as a coherentist in some senses, but not in others).

186. *See, e.g.*, Kress, *supra* note 185, at 1375 (noting that "coherence has been a pivotal . . . explanatory and justificatory concept in theories of law and adjudication").

187. *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 21 (1961) (positing that the view "that the judge usually begins with the conclusion that he deems proper and only later seeks to rationalize this result" is not unique).

188. Butcher v. Miller, 569 S.E.2d 89, 99 (W. Va. 2002) (Albright, J., concurring) (quoting Bd. of Church Extension v. Eads, 230 S.E.2d 911, 917 (W. Va. 1976)).

189. *See* WASSERSTROM, *supra* note 187, at 90–91, 95–96 (observing that the procedure for reaching decisions based on intuition is difficult to verify and has not been fully explained).

web-like judicial reasoning. What does not seem realistic, though, is judicial coherentism that avoids relying crucially on intuitionism, in itself and as applied in any given case.[190] It might be that intuitionism provides the best defense for choosing a coherentist method in the first place.[191] And there may well be some cases, simple or complex, in which the judge first intuits the right result, and only then applies coherentist methods to confirm, or rationalize, the result.[192] But we need not rely on either of these possibilities in showing the inescapability of intuitionism even for coherentist judges.

The most fundamental problem is that coherentism, along with the idea of coherence itself, is merely a vague and general idea, rather than a method of deciding cases, until it is clarified or fleshed out.[193] The process of clarification requires that a number of choices be made.[194] These choices obviously cannot follow from a fully specified coherentist theory; they must precede and contribute to such a theory.[195] Coherentism itself cannot tell us how to specify what should count as coherentism, or as the best form of coherentism.

A judge who wants to apply coherentism must somehow answer a number of crucial questions: Is there anything more to coherence than mere logical consistency?[196] Over how broad an area of the law should coherence be sought in any given case? Coherence with all of the law? Or more modestly, with only the apparently nearby, neighboring area of the laws? How should we decide what counts as a "neighboring" area of the law? Should a judge weigh into the ultimate decision an apparently substantial incoherence with a "remote" area of the law? Should the importance of the remote area of the law itself matter? Are individual judges' decisions on such matters likely to be reliable?

---

190. *See* McMahan, *supra* note 63, at 100–01 (noting that under coherentism, even though intuitions have no value standing alone, they may serve as the basis for what will later become a unified set of principles).

191. *See id.* (describing "reflective equilibrium" and explaining that one may "begin with a set of moral intuitions" and then gather principles that serve as justified moral beliefs).

192. *See Butcher*, 569 S.E.2d at 99 (Albright, J., concurring) (suggesting that there are legal phrases which are "designed to justify a desired result").

193. *See* Bonjour, *supra* note 180, at 288 (noting the "serious vagueness and unclarity of the central conception of coherence").

194. *See id.* ("It is clear that coherence depends on the various sorts of inferential, evidential, and explanatory relations which exist among the members of a set of propositions . . . .").

195. *See id.*

196. *See id.* (noting that one essential point of the concept of coherence is that "coherence is not to be equated with consistency").

Judges will notice that a decision can be incoherent either with some other specific legal judgment or with a more general legal rule.[197] How should a judge decide which kind of incoherence is more important, in general or in the given case? Could a judgment be somehow incoherent with, but without actually violating, a relevant statute or constitutional provision? Are there degrees of coherence,[198] but not of consistency?

Could conflicting judicial outcomes be equally coherent overall, but based on their different degrees of coherence with different parts of a body of case law? If so, how should decisional ties—or at least ties as far as human judges can tell—be broken? How should judges address the problem of a clear but noncrucial incoherence versus an unclear but somehow more crucial incoherence? Are a large number of instances of incoherence enough to outweigh one especially important incoherence? How is a judge to decide, especially absent a violation of a statute or constitutional provision, whether an incoherence is important or not? Must not judicial coherentism take a stand on, among other concerns, the seriousness of various statutory and constitutional violations?

These inescapable choices are not mere complications thrown at a well-articulated judicial coherentism, but are instead some of the choices that must be made in the course of arriving at a meaningful judicial coherentism in the first place. Can we possibly say that all of the above choices, along with others, are strictly logically inferable from basic principles, where neither those basic principles nor their interactive relationships is at all a matter of intuition? If we have no grounds for believing that articulating a judicial coherentism can be achieved merely through inference from principles not intuitively grasped, we should all admit the crucial role of intuition in developing and applying judicial coherentism.[199] Without recourse to intuition, we have no nonarbitrary sense of better and worse in answering any of the questions posed above.[200]

---

197. *See* WASSERSTROM, *supra* note 187, at 77–78 (stating that rules of law should not be blindly followed because of stare decisis but instead only become precedent after numerous judges have determined the correctness of the rule).

198. *See* Bonjour, *supra* note 180, at 288 (noting that "coherence will obviously be a matter of degree").

199. *See* McMahan, *supra* note 63, at 101 (observing that under coherentism, intuitions are "potential sources of moral knowledge").

200. *See id.* at 98 (recognizing that there may be "a certain skepticism about whether the norms and principles extracted from a moral theory with foundations wholly independent of our intuitions can claim to be constitutive of morality at all").

D. Analogy

Reasoning by analogy in the law is "exceedingly prominent," and perhaps "the most familiar form of legal reasoning."[201] Reasoning by analogy has even been linked closely to the idea of truth or falsity among legal propositions.[202] Thus one philosopher has maintained that "[t]he truth of a proposition of law consists in that proposition's being more analogous to those in the previously settled body of law than is its denial."[203]

Reasoning by analogy to reach judicial decisions may well offer a number of arguable advantages over alternative ways of proceeding.[204] But our concern is not with anything like the actual merits of judicial intuitionism or of any possible alternative. Intuitionism may, for all we need argue herein, be somehow fatally flawed. But if deciding cases by use of analogies itself inescapably involves recourse to judicial intuition, as do the several approaches referred to above in this Part,[205] those who see advantage in the use of analogies must confront an important problem. If the analogical approach seems preferable to intuitionism because, perhaps, intuitionism is said to be mysterious, arbitrary, or incoherent, then the inescapable dependence of the analogical method on intuitionism raises a red flag. The advocate of judicial decisionmaking by analogy must explain how, given the unavoidable dependency, the vices of intuitionism can be compensated for, or neutralized, in judicial decisionmaking by analogy.

The dependency of judicial decisionmaking by analogy on intuitionism seems clear enough. We again see this by an accumulation of unavoidable questions lacking plausible and compatible alternative solutions. Perhaps most pointedly, we must first ask any proponent of the analogical approach how we know whether one case is relevantly more analogous than some

---

201. Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741–42 (1993).

202. *See id.* at 742 (suggesting that analytical reasoning may provide insight into determining the correctness of legal claims).

203. GOLDMAN, *supra* note 185, at 188 ("Legal arguments . . . are distinguished . . . from purely moral arguments by the independent, institutionally established data base from which the relevant analogies and disanalogies must be derived.").

204. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949) ("The [law] forum protects the parties and the community by making sure that the competing analogies are before the court."); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1186 (1999) (arguing, among other claims, that "a diligent process of studying and comparing prior decisions produces a wealth of data for decisionmaking").

205. *See supra* Part V.A–C (discussing inferentialism, reliabilism, and coherentism).

other case to our own case.[206] How do we know a relevant similarity or dissimilarity when we see one? Some such similarities may be strictly inferable from others, but surely not many of the most interesting.

Whether driving sixty miles per hour in a medical emergency is more like driving sixty miles per hour from sheer exuberance than like driving at the thirty-five miles per hour posted speed limit is presumably a matter of judicial judgment based on values, statutory or common law purposes, societal or more narrowly public policies, or on someone's understanding of moral permission and requirement more broadly. But precisely which of these? And even if we were to concede that intuition plays no role in choosing among these possibilities, applying the chosen possibility in actual cases inevitably requires intuition. Values, purposes, policies, and moral decisionmaking in general will in practice present a number of problems of choice to the adjudicator. What if one case is more similar to ours with regard to some values, but another, conflicting case is more similar with regard to other values? We might say that one value strictly outranks another value.[207] But does a very limited promotion of the higher ranking value still outrank, or outweigh, a much more substantial promotion of the lower ranking value? Intuition again seems inescapable.

A judge might try to bypass what we could call inevitable "intuition creep" by looking only to purely utilitarian considerations in deciding all the questions prompted by the analogical method of adjudication.[208] But any attempt to combine analogy in adjudication with maximizing utility must itself rely on a number of moral intuitions.[209] Utilitarianism itself is properly recognized as little more than a name for a series of largely intuitive choices one must make on the way merely to specifying a reasonably clear and unambiguous utilitarian

---

206. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 83 (1985) (asserting that the issue in reasoning by analogy is to decide which "factual similarities or differences between two cases will or should matter"); Richard Warner, Note, *Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523, 1555 (1989) (critiquing LEVI, *supra* note 204, by asking, "when and how does a court have an adequate justification for thinking one case relevantly like another?" (emphasis omitted)).

207. *See supra* text accompanying notes 129–44.

208. Such a judge might be looking to utilitarianism to carry forward an underlying, nonutilitarian commitment to the importance of analogy, or might believe instead that carving out a role for analogical thinking in adjudication actually maximizes utility in practice.

209. *See* David Lyons, *The Moral Opacity of Utilitarianism*, *in* MORALITY, RULES, AND CONSEQUENCES 105, 105 (Brad Hooker et al. eds., 2000) (noting that there are various objections to the claim that utilitarians need not rely on moral intuitions).

theory.[210] The various choices one must make among competing forms of utilitarianism obviously cannot themselves be made on utilitarian grounds. Intuitions, largely of a moral sort, will be required at every point.

To briefly summarize this Part, then, we have argued for the practical inescapability of crucial reliance on intuition in case adjudication. There are certainly a variety of possible understandings as to how judges do in fact or ought to decide cases. For their prominence, we have focused on theories of adjudication that emphasize, respectively, the role of logical inference,[211] reliability of the decisionmaking process,[212] coherence of a judgment with other judgments or other legal and moral considerations,[213] and analogy or relevant similarity in deciding cases.[214] We have not suggested that intuitionism is actually better or worse than any of these alternative approaches to adjudication. Intuitionism, in general or as applied by judges, may be incoherent, arbitrary, or somehow disadvantageous.[215] But those who endorse any alternative theory must recognize their own theory's dependence upon intuitions, and must then somehow bypass or minimize the damage done to their own theory by any defects of intuitionism.

The degree of damage done to alternative theories by their inevitable incorporation of intuitionism may depend less on the nature of the alternative theory than on the nature of the assumed defects of intuitionism. If, for example, intuitionism is thought to be completely incoherent, the damage done to alternative theories that depend on intuitionism may be substantial. A theory may be as weak as its weakest, or its least coherent, element. But if intuitionism is instead thought merely to be especially liable to abuse in some way, the damage may be more fully avoidable. An alternative theory, for example, might require a judicial intuition that is arguably merely subjective[216] to

210. *See id.* (referring to a number of the choices that must be confronted in arriving at any reasonably well-specified utilitarian theory).

211. *See supra* Part V.A.

212. *See supra* Part V.B.

213. *See supra* Part V.C.

214. *See supra* Part V.D.

215. *See, e.g.*, Lane v. Williams, 455 U.S. 624, 636–37 (1982) (Marshall, J., dissenting) (decrying the majority opinion as based on only judicial intuition rather than Illinois law); Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 145–46 (4th Cir. 1992) (requiring stronger proof than mere judicial intuition to warrant disqualification of counsel); *see also supra* notes 43–60 and accompanying text.

216. *See, e.g.*, SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING 86 (1998) ("The intuitionism with which [G.E. Moore] ends up is a blank wall. This is because it goes with no epistemology (no way of distinguishing better or worse

be checked against other intuitions of other judges with different backgrounds. Or if intuitionism is thought to be biased in some way, it may be possible for the incorporating theory to somehow counteract or limit that bias.[217]

VI. CONCLUSION: JUDICIAL INTUITION, PRACTICAL WISDOM, AND ARTICULATED JUDICIAL REASONING

Deciding judicial cases inescapably requires the exercise of intuition. Judicial intuition cannot be reduced to an explicit formula, or to an articulable process of decisionmaking. There is, so to speak, more to the judicial decisionmaking process than judges can articulate.[218] Yet when courts decide controversial questions, we often expect positive value in the court's oral or written opinion accompanying its otherwise bare declaration of the outcome. What value can really inhere in an articulated judicial opinion, though, if the real decisionmaking process must be largely inarticulable and opaque even to the actual decisionmaker?

It is again not our claim that judicial intuitionism is superior to its rivals, or even provably coherent.[219] But we will argue in this concluding section that the inarticulability that we find in intuitionism is no more suspicious than the inarticulability we consider normal in good judgment or practical wisdom in general.[220] The inarticulability in judicial intuitionism, and in wise practical judgment generally, thus does not make judicial opinion writing a valueless sham.

Judicial opinions, after all, need not pretend to render transparent and explicit a decisionmaking process that is not fully grasped even by the judge. A written judicial opinion can still be authentic, meaningful, and valuable. Crucially, an opinion accompanying an intuitionist outcome can itself amount

---

intuitions).").

217. In a somewhat similar fashion, it is sometimes thought that an historical tendency toward racial legislation that is later recognized as unjust can be to some degree counteracted by applying the judicial test of strict scrutiny, which in other contexts might be an excessively rigid restriction on government policy. *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227–31 (1995).

218. *See, e.g.*, United States v. Reyes, 87 F.3d 676, 681 n.7 (5th Cir. 1996) (noting that when judicial intuition provides the answer, it is usually preferable to simply announce the conclusion, rather than "attempt to explicate its doctrinal basis").

219. *See supra* text accompanying notes 101–05.

220. *See, e.g.*, Anthony Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL'Y 203, 206–07 (1986) (discussing Aristotle's concept of practical wisdom and explaining that "[s]ome men . . . possess an understanding of particulars and others lack it").

to reasonable evidence that the judge has taken full, careful, empathetic, and detailed account of all of the main interests and concerns of the opposing and other affected parties. In this way, the opinion can properly add to (or inadvertently undermine) the persuasiveness and legitimacy of even an intuition-based outcome.

The exercise of sound judgment not reducible to rule is often called for in judicial decisionmaking.[221] There are many routine cases that do not call for a judge with a distinctive capacity for practical wisdom and sound judgment. This may be because the case is easily and uncontroversially decided, and easily placed within a standard structure of rules and precedents. But many fairly complex and potentially controversial cases, with interesting implications and consequences, call for judgment and practical wisdom.

A common scenario along such lines was articulated by the philosopher Bernard Williams:

> It may be obvious that in general one kind of consideration is more important than another . . . but it is a matter of judgement whether in a particular set of circumstances that priority is preserved: other factors alter the balance, or it may be a very weak example of the consideration that generally wins.[222]

Deciding judicial cases thus cannot always, if ever, be a mechanical or formulaic process. Sound practical judgment that is no more articulable than intuition, if such sound practical judgment even differs from intuition, will often be required.[223]

Sound practical judgment, as an aim, a skill, or as a character trait, is part of the common aspiration of almost all persons.[224] Much of both the value and the limitations of such judgment was explored

---

221. *See, e.g.*, Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 740 (2004) (referring to the Greek concept of *phronesis*, translated as practical wisdom). For more extended discussion of good judgment and practical wisdom in the legal profession see generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); Kronman, *supra* note 220; and R. George Wright, *Whose* Phronesis*? Which* Phronimoi*?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817 (1996).

222. BERNARD WILLIAMS, MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 190 (1995). Sensitivity to circumstances, and especially to the possibility that most morally relevant qualities might contribute positive moral value in some circumstances, but negative moral value in other circumstances or contexts, is emphasized by what is called 'moral particularism.' *See generally* MORAL PARTICULARISM (Brad Hooker & Margaret Olivia Little eds., 2000).

223. *See, e.g.*, Worthy v. U.S. Steel Corp., 507 F. Supp. 25, 28 (E.D. Penn. 1980) (finding that intent sometimes must be inferred using common sense and intuition).

224. Kronman, *supra* note 220, at 206–07 (noting that people turn to lawyers and judges for guidance in hopes of benefiting from their practical wisdom).

early on by Aristotle.[225] Aristotle thought of the person of practical wisdom, or the *phronimos*, as capable not only of abstract logic, but of applying accumulated experience and reflection while controlling for biasing factors.[226] The *phronimos* will not be able to uncontroversially demonstrate the correctness of a given practical judgment, so in this sense, some sort of public trust or confidence in the *phronimos* is required.[227] In the end, according to Aristotle, no rigorous method, formula, calculus, or science "can replace careful and sensitive judgement."[228] Thus even Aristotle himself does not claim to be able to rigorously explain how the *phronimos* arrives at sound, practical—including moral and legal—judgments.[229] The main positive assumption is instead that the community will be able to somehow recognize such a distinctive person.[230]

The basic Aristotelian framework was carried forward historically by Aquinas[231] and developed in some ways by Edmund Burke.[232] But at a general level, the idea of inarticulable, unexplainable, but sound practical judgment not constrained by rule is now common intellectual property,[233] and is reflected in

---

225. *Id.* at 206 (describing Aristotle's description of "*phronismos*" [sic] as a man whose understanding of particulars is developed to a high degree).

226. *See* NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE 3, 123 (1989).

227. *Id.* at 54.

228. *Id.* at 85–86.

229. *See* LINDA TRINKAUS ZAGZEBSKI, DIVINE MOTIVATION THEORY 44 (2004) (noting that Aristotle "clearly is not confident that he can give a full account of" the nature of *phronesis*).

230. *See id.*

231. *See* BERNARD LONERGAN, *Insight: A Study of Human Understanding*, *in* 3 COLLECTED WORKS OF BERNARD LONERGAN 432 (Frederick E. Crowe & Robert M. Doran eds., Univ. of Toronto Press 1992) (1957) (describing the approach of Aquinas as going further than that of Aristotle by requiring judgment or wisdom to confirm and apply even self-evident principles); *see also* 2 AQUINAS, *supra* note 69, Pt. II-II, Q. 47–60 (discussing prudence and justice generally).

232. *See, e.g.*, EDMUND BURKE, *Reflections on the Revolution in France*, *in* THE PORTABLE EDMUND BURKE 416, 451–52 (Isaac Kramnick ed., 1999) (reflecting Burke's distrust of abstract rationalizing in favor of accumulated, if partly inarticulable, embodied wisdom).

233. See, for example, the work on inarticulable, not fully understood judgment in action discussed under the rubric of "tacit knowledge" by MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (1958). Consider also the fascinating discussion and investigations presented in Hubert L. Dreyfus, *What Is Moral Maturity? A Phenomenological Account of the Development of Ethical Expertise*, http://ist-socrates.berkeley.edu/~hdreyfus/rtf/Moral_Maturity_8_90.rtf (last visited Jan. 12, 2006) (discussing the nonrationalizability of intuitive expert judgments in several contexts). Some of Dreyfus's themes are explored and developed in Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 517 (2002) (finding moral reasoning, as opposed to affect-laden intuitions, to matter most in contexts in which influencing others or reaching consensus with allies is a priority); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach*

common experience. And along with a sense of the mysteries, the indispensability, and the arguable reality of sound practical judgment, we have developed something of an understanding of the traits, conditions, circumstances, and habits that often tend to impair the exercise of sound practical judgment.

Sound judging is, for example, often thought to require what might be called mental maturity.[234] Our intuitions and judgments, judicial and otherwise, may as well be adversely affected by "our personal interests or habitual sympathies."[235] Judgments may be similarly adversely affected by hastiness or by a "lack of thoughtfulness."[236] Our cultural socialization process may, of course, skew as much as facilitate genuinely sound intuitive judgment. Consider in particular Professor Peter Singer's suggestion "that all the particular moral judgments we intuitively make are likely to derive from discarded religious systems, from warped views of sex and bodily functions, or from customs necessary for the survival of the group in social and economic circumstances that now lie in the distant past."[237] The sound judge, presumably, displays the required personal qualities, decides under appropriate conditions, and seeks to somehow minimize or transcend the various distortive influences on the exercise of genuinely sound intuitive judgment.

It would be tedious, if not impossible, for a judge to provide overwhelming evidence in a judicial opinion of having met all of the above positive and negative requirements, along with any other requirements of good judging.[238] Yet the popular belief persists, rightly, that key judicial decisions should be publicly justified, beyond a mere dressing up of the bare results of judicial intuition.[239]

---

to Moral Judgment, 108 PSYCH. REV. 814, 814–15 (2001) (endorsing a social intuitionist as opposed to a rationalist model of moral judgment in many, but not all, contexts).

234. *See* ROSS, *supra* note 66, at 12 (asserting that direct apprehension of self-evident prima facie rightness of some kinds of acts requires "a certain degree of maturity," including "the development that takes place from generation to generation" as well as "that which takes place from infancy to adult life"); *see also* Nelson, *supra* note 61, at 56–57 (discussing Ross).

235. SIDGWICK, *supra* note 74, at 214.

236. H.A. PRICHARD, *Does Moral Philosophy Rest on a Mistake?*, *in* MORAL WRITINGS, *supra* note 66, at 7, 14 n.7; *see also* ALMOND, *supra* note 157, at 101–02 (discussing Prichard on this point).

237. Peter Singer, *Sidgwick and Reflective Equilibrium*, 58 MONIST 490, 516 (1974); Nelson, *supra* note 61, at 70.

238. What we look for in good judging, and what we assume leads to bad judging, as discussed above, could be brought together in a reliabilist theory of good judging. *See supra* Part V.B. Unfortunately, what counts as promotive of good or bad judging—as in the area of emotion in general—may in some cases be controversial, and even when not controversial, clearly dependent upon intuitional choice for its adoption and application. *See* text accompanying notes 171–74.

239. *See, e.g.*, Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1397 (2000) (suggesting that "a failure to provide reasons for a decision might

Ideally, we would want an articulated account of why one legal result was judged better by comparison with one or more alternative legal results. But even if this is not fully realizable, we want a public justification for the largely intuitive judgment that reasonably persuades and does not merely rationalize or legitimize by merely rhetorical means.[240]

Doubtless it will be difficult to reconstruct and present to the public the authentic unbroken chain of reasoning, if any, associated with one's intuitions, or an ultimately convincing justification for one's judicial intuitions as one actually experienced them.[241] But the mystery of one's intuitive legal conclusion is one thing, and persuasively justifying that conclusion in at least a loose or broad sense is something different.[242] A reasonably perceptive and articulate intuitionist judge should be able to offer some sort of genuinely relevant defense of the judge's intuitions.

Even if a judge somehow merely intuits the wrongness of, say, inflicting pain on an animal merely for the tormentor's own casual amusement, the intuition presumably would not occur without the judge noticing or assuming what most of us would take to be morally or legally relevant facts and circumstances, including sensitivities, vulnerabilities, biological laws, motivations, effects on character, and so on. And in a similar way, Justice Stewart may have intuited the nonobscenity of the material in *Jacobellis*[243] on the basis of a wide range of relevant circumstances, perceptions, and experiences, as well as the nature and effects of the specific material at issue.[244] All of these considerations can be referred to in a written judicial opinion.

---

actually undermine the Court's ability to function effectively as a judicial institution").

240. *Cf. id.* at 1397 ("The opinions of the Supreme Court are at times said to confer legitimacy on the decisions to which the opinions appertain."). By contrast with our approach, Prichard's famous moral intuitionism, *see supra* note 236, argued that we should not attempt to add independent moral reasoning to our particular moral judgments, which are said by Prichard to rest instead on immediate intuitive apprehension. *See* Nelson, *supra* note 61, at 56.

241. *See* SHAFER-LANDAU, *supra* note 69, at 252.

242. *See, e.g.*, WASSERSTROM, *supra* note 187, at 27 (comparing the "process of discovery" and the "process of justification"); *see also* Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455, 1463 (1995) (discussing the role of a judicial opinion as teaching, explaining, or persuading the public). There is a narrow sense of the idea of explaining—in the sense roughly of putting an idea in simpler words—in which, admittedly, an intuited judicial outcome cannot, strictly, be explained. Nor, in a strict sense, can judges offer genuine reasons for an intuited judicial outcome, if we take giving reasons to always involve moving to a higher level of generality. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 638–39 (1995). But there is for our purposes no reason to confine the idea of judicially justifying an outcome so narrowly.

243. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

244. *See supra* text accompanying notes 1–6.