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## **Skilful legal judgment and varieties of intuition**

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### **Abstract**

This article examines intuition as a skill. A skill which guides the focus of our work, with good intuition repeatedly guiding us to the correct path. Five varieties of intuition are distinguished. Differing views on intuition in judicial decision-making are comprehensively analysed, and the idea of a locator skill proposed. The oldest three of the five varieties originate from Aristotle; the remaining two discussed are Poincaré's phases of discovery — which anticipated the most classic example of judicial intuition — and, finally, intuition as familiarity. The article contends that intuition is best understood as a locator, indicating the area in which we must work. That simple idea is appropriate to difficult questions, unlike the influential view of intuition as quick recognition of familiarity. The article makes progress in understanding the history of ideas about intuition in jurisprudence, and the idea of good intuition — a locator skill, set apart from quick judgment.

### **Key words**

Intuition; judicial intuition; practical wisdom; *nous*; insight

### **Resumen**

Este artículo examina la intuición como una habilidad, que guía el enfoque de nuestro trabajo, con una buena intuición que nos guía repetidamente hacia el camino correcto. Se distinguen cinco variedades de intuición, se analizan de forma exhaustiva las diferentes opiniones sobre la intuición en la toma de decisiones judiciales y se propone la idea de una habilidad de localización. Las tres variedades más antiguas de las cinco tienen su origen en Aristóteles; las dos restantes que se analizan son las fases del descubrimiento de Poincaré —que anticiparon el ejemplo más clásico de intuición judicial—, y, por último, la intuición como familiaridad. El artículo sostiene que la

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intuición se entiende mejor como un localizador, que indica el área en la que debemos trabajar. Esa idea simple es adecuada para cuestiones difíciles, a diferencia de la influyente visión de la intuición como reconocimiento rápido de la familiaridad. El artículo avanza en la comprensión de la historia de las ideas sobre la intuición en la jurisprudencia y la idea de la buena intuición —una habilidad de localización, diferenciada del juicio rápido—.

### Palabras clave

Intuición; intuición judicial; sabiduría práctica; *nous*; perspicacia

## Table of contents

1. Introduction .....	4
2. A variety of reflections by judges .....	5
3. Ancient distinctions about experience and <i>nous</i> .....	9
4. Two varieties from the 1900s and 2000s.....	14
5. Good intuition is often wrong, but in the right place .....	19
6. Conclusion: A locator skill apart from quick judgment .....	22
References.....	23
Case law .....	25

## 1. Introduction

This article examines intuition as a skill, guiding us to where we should continue our work. Good intuition repeatedly guides us to the correct path. Five varieties of intuition are distinguished, three drawn from the time of Aristotle and two from the contemporary period. Views on intuition in judicial decision-making are comprehensively analysed, before the simple idea of intuition as a locator skill is proposed. Intuition is of wide and lasting interest, because of its association with intelligence and with consciousness; it is also a subject common to ethics, law, science, and art. I stress the commonalities pointed out by judges below.

Relatively recently, intuition has been reduced to fast thinking learned through stable and regular contexts, as made well known through works flying off airport bookstores' shelves (e.g., Kahneman 2011/2012). Simultaneously, the widespread low estimation of intuitions in matters like chance provoked the metaphor of a "war on intuition" in the social sciences (Gigerenzer 2023). I attempt to reconnect to earlier understandings of intuition, beginning with Aristotle, who is exemplary for our discussion in many respects. He lingers on the analysis of the relevant powers or processes of knowing, without hurrying to answer when we can trust intuition; he describes phenomena from numerous aspects; and he suggests intuition is part of rational thought. His distinctions around *nous* provide us with the earliest three varieties of intuition.

The first of these, the so-called theoretical *nous*, relates to science. This variety would be exemplified by the scientist's ability to discover fundamentals (e.g., Broadie 2002, 370). An example of the second variety, the so-called practical *nous*, comes from recent research on how a kind of wisdom — *phronēsis* — manifests in the daily practice of physicians. The researchers named one theme "embodied perceptions". Physicians themselves called them "sense", "gut feeling" or "intuition". Here is one example:

[He] met the criteria for major depressive episode [but] (...) ...it didn't fit my typical pattern... When I went through it in my mind... there was just something inside me that said...I call it intuition, I said deep down, there's something wrong with this story.  
(Boudreau *et al.* 2024, 173)

As we will see, discussions of judicial intuition also occasionally end up with *phronēsis* as the ultimate virtue. The gist of the third and last Aristotelian variety is quickness of intuition. An example of this is someone's immediate understanding, when seeing two people talking, of why the two are friends (Aristotle ca. 330 BCE/1960, *APo*, 89b14).

The fourth variety below, the mathematician Henri Poincaré's phases of discovery, anticipated the most classic example of judicial intuition. In difficult cases, as Judge Joseph C. Hutcheson Jr. wrote, after a "long travail and struggle of the mind", the solution sometimes comes to the judge in a flash of intuition. After that, the judge begins to create the opinion in the light of that flash (Hutcheson 1929, 287). The last variety we discuss is the one favoured by recent cognitive psychology. Following this versatile analysis and the accompanying remarks on intuition and legal judgment, this article returns to the account with which we began.

I contend that intuition should be thought of as a locator, indicating the area in which we must work. While I develop my account mainly on the strength of Aristotle's wisdom and Poincaré's sequential phases — supported by my own reflections on legal judgment

— the overall idea is not without precedent. Scholarship in medical ethics, for instance, instructs physicians to “take their gut feelings as suggestive rather than as confirmatory,” and to “use these clues to seek further evidence” (Halpern 2001, 47).

I will start with what judges have said about intuition. I then move on to what general notions lie behind these reflections. I submit there are no fewer than five varieties of intuition. The first three of them, from Aristotle, are discussed in Section 3. The other two, the post-1900 ones, are discussed in Section 4. Next, as reflected in an aphoristic formula about right and wrong, I suggest what good intuition would look like and what may result from its absence. Finally, I emphasize the historical and philosophical conclusions about judicial intuition and reiterate the main idea of intuition as a locator skill.

## 2. A variety of reflections by judges

Discussions of judicial intuition have a history dating back to at least the late 1920s. Influenced by Graham Wallas’ book *The Art of Thought* and its retelling of Poincaré’s phases of discovery, Justice Benjamin Cardozo likened the processes leading to illumination in science, law, and art in his *The Paradoxes of Legal Science* (Cardozo 1928/1947, 286). He went on to quote these examples from Wallas’ text:

When I once asked the best administrator whom I knew how he formed his decisions, he laughed, and, with the air of letting out for the first time a guilty secret, said: ‘Oh, I always decide by feeling. So and so always decides by calculation, and that is no good.’ When, again, I asked an American judge, who is widely admired both for his skill and for his impartiality, how he and his fellows formed their conclusions, he also laughed, and said that he should be stoned in the street if it were known that, after listening with full consciousness to all the evidence, and following as carefully as he could all the arguments, he waited until he ‘felt’ one way or the other. (Wallas 1926, 119–120)

Cardozo felt the phases of discovery were truncated in that judicial example:

He had elided the preparation and the brooding, or at least had come to think of them as processes of faint kinship with the state of mind that followed. (Cardozo 1928/1947, 287)

Judge Hutcheson, in his article *The Judgment Intuitive* in 1929, joined in the conversation and even requoted Wallas’ examples. The content of that article, as opposed to its style, remains fresh today. More recent allusions to intuition simply tend to take intuition in an altered sense.

Hutcheson describes memorably the “hunch”, the feeling that a judge with his type of mind gets, after a period of brooding. That term, “hunch”, had acquired a new meaning in early twentieth-century America, as Agatha Christie put it in the mouth of a southern European doctor suspicious of Poirot in a 1930s novel: “‘You rely on the intuition — what the Americans call the hunch?’” (Christie 1934/2017, 152).

Yet Hutcheson describes much more than just the anticipation and arrival of the hunch. He details his decision-making, starting with reading and rereading and serious examination of all materials on both sides, and then understanding the passages in the law that are appealed to. Next, he distinguishes between matters that are “more plain, clear and liquid”, which he decides “more or less offhand and by rule of thumb”, and

difficult or involved ones (Hutcheson 1929, 278). In the second kind of cases, he gives his imagination room to play, meditates on the situation, and waits for the hunch to come.

[W]hen the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, 'when there are many bags on the one side and on the other' and Judge Bridlegoose would have used his 'little small dice,' I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way. (Hutcheson 1929, 278)

He separates that decision — perhaps unnecessarily strictly — from the “apologia” for it, which he also calls a logomachy, a contention with or about words, and clarifies that he is now speaking of “the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement” (Hutcheson 1929, 279). The faculty of the mind that can feel and follow a hunch is praised greatly by him, beyond legal dispute resolution, whether it is called intuition or imagination; Hutcheson refers to it as “this sensitiveness to new ideas” (Hutcheson 1929, 280). It makes the best gamblers, detectives, lawyers, judges, in the affairs “most chancey” and most human, and it guides the mathematicians and the scientists to their most difficult solutions (Hutcheson 1929, 279). At a later point, he compares the great patent judge’s “intuitive brilliance of the imagination” to that of the inventor (Hutcheson 1929, 284).

Aside from the distinctions about rationalization and difficult cases, we should not pass over two other contrasts. One of these is the contrast between the hunches of a judge and those of a lawyer. The judge is on the path to the just solution and will follow one’s hunch until “meet[ing] the right solution face to face”. Yet the lawyer regards only those hunches that keep them on the path to victory for their client (Hutcheson 1929, 278). The other contrast is his emphasis on differences between types of minds. The intuitive judge, or lawyer or administrator, differs from what appears to be another extreme, the logomachic lawyer, impatient of hunchers’ foolery, concentrating on the verbal argument, and satisfied with logomancy (Hutcheson 1929, 279–282). Apparently, the type of mind is either more in that direction or more his type.

Eventually, that portrayal of the judge who, after looking to all information, decides by rule of thumb the plainer cases and in complicated ones is prepared for the intuition that lights the way, remained the odd one out. One question, to which it will be illuminating to seek answers immediately, is why analyses such as Hutcheson’s did not blossom.

The first reason preventing that may well have been the dramatization of the hunch. Others’ associations with pure feeling or emotion led Justice Cardozo, who understood Hutcheson’s thesis well, to deny that the hunch is a “summary of the complete judicial process” (Cardozo 1932/1947, 28). One may wonder how it would even be necessary to defend such a clearly true but negative statement. The hunch idea had been so highly dramatized. The misunderstanding had come quickly, and it has not fully dissipated in the time since. Presumably, the one exploring intuition in decision-making risks being taken to endorse reflexive intuitive decision-making. When looking back on his article a third of a century later, Hutcheson mentioned its — to the uninitiated — misleading title. His point had merely been the judge’s right and duty to make use of all lawful

expedients supporting the judge in the result. His meaning was not at all to espouse a judge's right completely to disregard or reject all applicable precedents in favour of a solution only because the judge deemed that abstract justice supported the other result (Hutcheson 1961).

While the hunch is no summary of the judicial process, another stumbling block might well be the unsuitability of Hutcheson's text for a perfectly literal reading. As another of his sympathetic contemporaries stressed, we should not take him with "complete literalness". Legal rules, principles and the like are indeed not only window dressing, useful for rationalization. "It is necessary", Jerome Frank said, "— and this even Hutcheson would surely admit — to concede them more importance. *In part, they help the judge to check up on the propriety of the hunches. They also suggest hunches* [emphasis added]" (Frank 1930/2009, footnote 4, 113).

In addition to those obstacles existing from the beginning, a third and likely reason is the fact that intuitions, definitely as far as hunches are concerned, lacked philosophical respectability at some time in the late twentieth century. "The existence of hunches is uncontroversial", wrote Richard Rorty in *The Encyclopedia of Philosophy* in 1967, "and not of philosophical interest" (Rorty 1967, 204). It appears the times were not right for a continued exploration of this aspect of thought. Lastly, the distinction by Hans Reichenbach, between the contexts of justification and discovery, must have had an influence since the late 1930s. The contrast between justification and discovery highlighted the first objectivity-seeking context.

Hutcheson and Cardozo both focused on difficult cases. Their notion of intuition is reserved, so it is argued, for moments when prior common sense does not suffice (Crane 2011, 755). By contrast, a study of mostly late-twentieth-century American case opinions referring to intuition in some ways found that judicial intuition was at times paired with, or explained as, common sense (Wright 2006, 1386–1387, 1421). For instance, after re-examining facts concerning the demotion of an employee, one district judge remarked:

Intent is seldom capable of direct proof, and often a determination of the reasons underlying an action requires inference based in large part on common sense and intuition. (*Worthy v. U. S. Steel Corp.*, 1980)

In another case, an appellate court, after explaining that an alternative interpretation would lead to unequal consequences and, furthermore, lacked support from the framers' intent, ended their discussion in the following, unusual manner:

This is one of those instances where, despite the absence of a relatively recent 'spotted horse' case [i.e., controlling precedent], *our judicial intuition — or common sense — tells us that the result is foreordained* [emphasis added]. Often in such situations it is preferable to simply announce the conclusion, rather than to attempt to explicate its doctrinal basis. Sometimes, however, the latter exercise serves as *useful check on potentially erroneous or simply reflexive intuition* [emphasis added], particularly where some of the contextual principles appear to be in at least moderate flux. With these considerations in mind, we have written at some length on what others might consider to be a question with an obvious and simple answer. (*United States v. Reyes*, 1996)

Those distinctions between good, examined, and reflexive intuition echo the theme already mentioned: legal analysis empowers one to determine the correctness and appropriateness of intuition. Some opinions also associate intuition with experience. For

example, evaluations by a state supreme court rely partly on the “experienced judgment and intuition” of its members (cases cited in Wright 2006, footnote 41, 1387), and a trial judge’s intuition was redescribed in the appeals court as the “knowledge and experience” of the trial court (*Avery v. Sabbia*, 1998). Other opinions contrasted intuition with experience (an item of common knowledge in the medical community was based on “experience rather than intuition”) or linked, often disapprovingly, intuitiveness to subjectivity (cases cited in Wright 2006, 1388). The overarching view in the article reviewing the opinions was the Aristotelian one that not even a wise person’s judgment is fully articulable (Wright 2006, 1384, 1420–1424).

In a 2005 interview, U.S. Supreme Court Justice Anthony Kennedy dwelled on “quick judgments”, which resemble the object of contemporary psychological research. In the end, prudence is the outstanding commonality of law and everyday life.

You know, all of us have an instinctive judgment that we make. You meet a person, you say, ‘I trust this person. I don’t trust this person. I find her interesting. I don’t find her interesting.’ Whatever. *You make these quick judgments. That’s the way you get through life. And, judges do the same thing. And, I suppose there’s nothing wrong with that if it’s just a beginning point* [emphasis added]. But, after you make a judgment, you then must formulate the reason for your judgment into a verbal phrase, into a verbal formula. And then, you have to see if that makes sense, if it’s logical, if it’s fair, if it accords with the law, if it accords with the Constitution, if it accords with your own sense of ethics and morality. And, if at any point along this process you think you’re wrong, you have to go back and do it all over again. And that’s, I think, not unique to the law, in that any prudent person behaves that way. (Academy of Achievement 2005)

After initial and quick judgment, we are to formulate our reason into a verbal phrase. We should check for aspects such as fairness, which appear to involve correcting the possibility of going to excess in a rational argument. If at any point along that process we think we are wrong, we must go back. If we do not start over, he says in essence, we are not judging well — for we see something is wrong and yet do not ask ourselves about it.

In the context of prudence (*phronēsis*), Swedish Supreme Court Justice Eric Runesson has expressed similar doubts as to whether the reasoning of a court, when examined as an explanation of a decision, would merely rationalize an outcome arising from other, non-verifiable impressions. According to him,

it may also be that the judge confronts his or her intuitive or prima facie opinion with a structured reasoning whereupon the first intuitive opinion is abandoned or adjusted. (Runesson 2015, footnote 19, 222)

That view, too, emphasizes the significant consequences of the deliberation that follows an initial, possibly quick, judgment. To give another example, decision researchers in Germany refer to judges’ reports of “legal intuition” — *Rechtsgefühl* (*Judiz*) — that the judges have after reading the information on a case. That intuition is then thoroughly checked: among other things, the deliberation compares alternative interpretations (Glöckner and Ebert 2011, 160–161).

In summary, judges — and, in a few examples, lawyers before becoming judges — have highlighted deliberation as the check on intuition. We also saw, during the late twentieth- and early twenty-first-century revival of intuition, a loss of prominence of the



earlier connection between intuition and difficult cases. The main variety of intuition seems to have shifted from a creative individual variety to a fast, effortless one. Overall, judges have pointed out resemblances between law, various arts and sciences, and everyday life when discussing intuition. With significance for the following section and argument, they and other legal authors appeal with some regularity to prudence or wisdom alongside intuition.

### 3. Ancient distinctions about experience and *nous*

Experience is often taken to underlie good intuition. For that reason, and because it is common to mention Aristotle already discussed our questions, I would now like to go back as far as ancient philosophy and to what he says about experience and *nous*. Among the intellectual virtues, *nous* is arguably closest to what we call intuition. After first briefly looking at what he tells about the experienced person, I then turn to Aristotle's mutually related types of *nous* and wisdom. We see where pure experience ranks in his view and how both scientific study and wisdom (*phronēsis*) connect to intuition as *nous*. Finally, I proceed to "quickness of *nous*" (*anchinoia*).

Aristotle's reflections on experience in the opening chapter of the *Metaphysics* throw light on the difference between a person with mere experience and another with experience and craft. While explaining that a craftsperson is wiser than an experienced person, he compares experience with craft as follows:

[T]o have a supposition [*hypolēpsis*] that *when Callias was sick with this disease this treatment benefited him* [emphasis added], and similarly with Socrates and many other particular cases, is a matter of experience. But to suppose that it benefited *everyone* of a certain sort, marked off by a single form, suffering from a certain disease (for example, phlegm-filled or bilious people when burning with a fever) is a matter of craft. (Aristotle ca. 330 BCE/2016, *Met.* 981a8–12)

The one with experience might know what to do, what to say and how to instruct colleagues after seeing precisely the same thing before. For instance, one knows how a particular individual is treated until further instruction. When many questions have been resolved in similar ways, the experienced person presumably has a collection of cases in their memory. What craft will bring is some distinct general supposition about similar things, knowledge that itself has come about through experience.<sup>1</sup>

Naturally, the degree of generality that mere experience has (e.g., Bolton 2021) is widely debated. Above, I leave room for different persons in the domain of experience, including people who need to encounter the same thing before. Even granted that experience allowed us to go beyond the known cases of Callias, Socrates and others towards solving any unknown case, the just quoted passage does not entail that activity. It is, though, open enough to permit such an interpretation too.

All the same, with only experience, a person lacks knowledge of the whys and wherefores (Aristotle, *Met.* 981a27–29). Also, that person is unable to teach (Aristotle, *Met.* 981b6–9). The ability to teach likely has an aspect of a test: does one truly know, as a person with craft does, or is one largely wasting others' time when superficially

<sup>1</sup> "Craft knowledge comes about when, from many intelligible objects belonging to experience, one universal supposition about similar things comes about" (Aristotle ca. 330 BCE/2016, *Met.* 981a5–7).

instructing them. As for effectiveness, that is another matter. The ancients saw that people with pure experience alone can achieve considerable success in action. Aristotle's following three-part ranking reflects that fact. Below people who have both general knowledge and experience, "we even see experienced people being more successful than those who have an account but are without experience. The cause of this is that experience is knowledge of particulars (...)" (Aristotle ca. 330 BCE/2016, *Met.* 981a14–16).<sup>2</sup>

In the common book of the *Eudemian* and the *Nicomachean Ethics* on the intellectual virtues, Aristotle at one point explains how wisdom (*phronēsis*) is practical and encompasses both knowledge of general — or universal — things and knowledge of particulars. Again, here he speaks of effectiveness in producing health in that same ranked manner. Someone who knows that light meats are digestible and healthy but is unaware of which kinds of meat are light will not produce health, while someone who knows meat from birds is healthy will produce health more. That illustration is meant to show that wisdom, in one sense, requires knowledge of particulars, which is what experienced people have (Aristotle, *EE/NE* 1141b14–21). Just as with craft, there is an ascending scale from general knowledge alone to experience alone and, finally, to general knowledge with experience. Success based on experience alone ranks second.

Many important aspects of intuition in our time are prefigured in this book on the intellectual virtues. The key term appears in last place among these states by which the soul has truth through affirmation and denial:

- *technē*: craft,
- *epistēmē*: scientific knowledge,
- *phronēsis*: wisdom, "practical wisdom",
- *sophia*: wisdom, "theoretical wisdom",
- *nous*: intelligence, insight, intuition.<sup>3</sup>

By contrast, two others can mislead us:

- *hypolēpsis*: supposition, judgment,
- *doxa*: opinion, belief. (Aristotle, *EE/NE* 1139b15–18)

(The suppositions in the narrative about craft and experience above were presumably true.) Further in the dialectic, *nous* turns out to be part of *sophia*, too, and later an element in *phronēsis*. Along the way, he distinguishes quick-mindedness, or quickness of *nous*, from good deliberation that relates to *phronēsis*.

The passages dealing with *nous*, which we are going to explore, do not of course conveniently foreshadow everything that has been asserted about intuition. It is debatable, for example, whether one can project later rational intuition onto the sections of the *Ethics* (Bolton 2014). Nevertheless, we see in this common book how *nous*

<sup>2</sup> Natali (1989/2001, 76), for instance, notes that in practical affairs there is this "ranking in terms of worth and efficacy".

<sup>3</sup> The translations of *nous* in the right-hand column are found in the following translations of Aristotle's works: the *Nicomachean Ethics* by Rowe (Aristotle ca. 330 BCE/2002) (intelligence), the *Eudemian Ethics* by Inwood and Woolf (Aristotle ca. 330 BCE/2013) (insight), and the *Posterior Analytics* by Tredennick (Aristotle ca. 330 BCE/1960) (intuition).

bifurcates, how experience underlies a type of *nous*, how wisdom surfaces as the ultimate prevailing quality, and how quickness of *nous* merely amounts to a kind of skill in guessing.

*Nous* is, in the first place, about starting points in science (*epistēmē*) (chapter 6 of the book). Since that which is scientifically knowable is demonstrable, as Aristotle says, the starting point cannot be an object of scientific knowledge. Craft and *phronēsis* are excluded, because they deal with what admits of being otherwise, and *sophia*, because the *sophos*, the wise person, has demonstration about some things. The remaining alternative is for *nous* to be of the starting points (Aristotle, *EE/NE* 1140b31–1141a8). Next, *sophia*, the wisdom of people like Thales, is characterized as a combination of *nous* and scientific knowledge — scientific knowledge, “having a head as it were”, of the things that are most estimable (chapter 7) (Aristotle ca. 330 BCE/2021, *EE/NE* 1141a19–20). Aristotle does not mention experience behind *nous* in these contexts, although he has broad views on experience as a background to the intellectual virtues as a whole and the starting points. In an earlier book of the *Nicomachean Ethics*, he has, for instance, spoken, in the singular, of intellectual virtue in this subtle ambiguous manner:

the intellectual sort [of excellence] mostly both comes into existence and increases as a result of teaching (which is why it *requires experience and time*) [emphasis added]. (Aristotle ca. 330 BCE/2002, *NE* 1103a15–17)

When soon in the book on the intellectual virtues he compares different areas of knowledge, reflecting on why a young person can be a mathematician but not a *sophos* or a natural scientist, he wonders if that is because the starting points of the other subjects than mathematics come from experience (chapter 8) (Aristotle, *EE/NE* 1142a16–19). We hear about experience and *nous* explicitly, after the last-mentioned chapter, when he juxtaposes two types of *nous*.

That last chapter still describes *phronēsis* as “antithetical” to *nous*. The reason is that *phronēsis* has to do with what comes last. According to Aristotle, the perception of what comes last differs in kind from the perception of the objects of each sense (*EE/NE* 1142a25–30). Eventually, he calls that perception in relation to particulars *nous* (chapter 11). *Nous* in that sense, the second *nous* type in this book, is presented by name in a sentence evidently recalling the commonly used phrase “to have *nous*” (Aristotle, *EE/NE* 1143a25–28; Natali 1989/2001, 74).

The meanings of that phrase include “to have sense, be sensible” (Liddell *et al.* 1940, *νόος*). The analysis of this second *nous* type proceeds in a complex context. *Nous* has a particularly close relationship with another quality that the same people have, variously called sense or discernment or consideration (*gnōmē*). That relationship reveals itself in that the text twice pairs the ideas of “having *nous*” and “having *gnōmē*” (Aristotle, *EE/NE* 1143a27, 1143b9). *Nous* and this sense (*gnōmē*) form, with wisdom (*phronēsis*) and one more quality, comprehension (*synesis*), a quartet of converging abilities. All four get attributed to the same people, when it is said that those who are wise and able to comprehend have sense and *nous*. All four pertain to the last particular things (Aristotle, *EE/NE* 1143a25–29). The context implies further ramifications, as sense means people have a shared sense (*syngnōmē*) and sense correctly distinguishes what is reasonable (*epieikes*).

In the complex practical context, *nous* is like its theoretical namesake in a way. As Aristotle says at the beginning of his explanation below, *nous* is not reasoning (*logos*). Now *phronēsis* is not just antithetical to *nous*; *nous* is at work as an element in this sort of wisdom too.

[*Nous*] is concerned with things that come last in both directions; for concerning both the primary terms and the things that come last, there is [*nous*] but not reasoning (*logos*) — that is to say, on the one hand, in the case of demonstrations, [*nous*] is of the unchanging and primary terms; on the other hand, in the case of those [*premises*] that are practical [emphasis added], it is of the last thing and the one that admits of being otherwise and the other [i.e., minor] premise; for these are starting-points of the for-the-sake-of-which, as it is from particulars that universals come. So of these we must have perception, and this is [*nous*]. (Aristotle ca. 330 BCE/2021, *EE/NE* 1143a35–b5)

In short, *nous* is a specific kind of perception in relation to particulars in the light of an end. This specific kind had already been distinguished from sense perceptions under the heading of *phronēsis*. If the major premise is a supposed end, the minor one, which may take time for the deliberator to establish, is specific and concerns particulars governed by perception. The minor premise need not always be detailed, commentators say, just as no experienced maker must redeliberate at every step once the task is clear, but can instead begin to act swiftly (e.g., Natali 1989/2001, 94). As will be discussed in the next section, late-twentieth-century research into the decision-making of experienced persons — such as firefighters — identified intuition as this sort of accelerated recognition of familiar situations, a recognition that already includes priorities (Klein 1998).

Aristotle attributes the growth of this second type of *nous* fairly directly to experience and time. Shortly after his analysis above, he draws on the impression that people have *nous* and *gnōmē* as a result of age. We think that “this particular age has intelligence [*nous*] and sense”, he says, illustrating the appearance that people have them (and he includes *synesis*) by nature (Aristotle ca. 330 BCE/2002, *EE/NE* 1143b8–9). His eventual recommendation associates that pair of qualities (and apparently also *synesis* with them) with experience and the passage of time. He says,

So one should attend to the undemonstrated sayings and beliefs [*doxais*] of experienced and older people or practically-wise ones [*phronimoi*], no less than to the demonstrations; for because they have an eye formed from experience they see correctly. (Aristotle ca. 330 BCE/2021, *EE/NE* 1143b11–14)

The eye and *nous* of wise persons (*phronimoi*) will, accordingly, develop “naturally” in a similar way through long experience. Aristotle, in fact, speaks about the development of *nous* only in connection with the virtue of sense (and possibly that of comprehension). We do not hear about its development independent of other qualities. Earlier, we heard of people in whom wisdom, comprehension, sense, and *nous* converge. His recommendation, now, to pay attention to the undemonstrated sayings and opinions of the wise makes a lot of sense, although it may not always be as sensible to pay attention to those of the merely older and experienced, but that is his recommendation.

Aristotle’s handling of *nous* in the two senses shows, early on, a tendency to think ultimately about wisdom. *Nous* and scientific knowledge of the most estimable things is wisdom (*sophia*), he says. *Nous* figures in *phronēsis*. Having said that and having advised us to pay attention to the undemonstrated sayings and opinions rooted in experience, he

returns to the two sorts of wisdom only. He now has stated, in the book on the intellectual virtues, what *phronēsis* and *sophia* are and what each of them is concerned with (Aristotle, *EE/NE* 1143b15–17).

The book on the intellectual virtues alludes to a third intuitive skill, which is not associated with wisdom, in examining good deliberation (chapter 9). *Anchinoia* — quick-mindedness, “quickness of *nous*” or quickness of intuition<sup>4</sup> — is a kind of skill in guessing, Aristotle says. Skill in guessing (*eustochia*) involves no reasoning (*logos*) and operates quickly; those features create a contrast with good deliberation (Aristotle, *EE/NE* 1143b2–6). His *Analytics* throws more light on *anchinoia*: it is a kind of skill in guessing the middle term in a negligible time, he says in that context (Aristotle, *APo* 89b10). He follows that up with examples and an explanation.

A man sees that the moon always has its bright side facing the sun, and immediately realizes the reason: that it is because the moon derives its brightness from the sun; or he sees someone talking to a rich man, and decides that it is because he is trying to borrow money; or he understands why people are friends, because they have a common enemy. In all these cases, perception of the extreme terms enables him to recognize the cause or middle term. A stands for ‘bright side facing the sun,’ B for ‘deriving brightness from the sun,’ and C for ‘moon.’ Then B, ‘deriving brightness from the sun,’ applies to C, ‘moon,’ and A, ‘having its bright side facing the source of its brightness,’ applies to B. Thus A applies to C through B. (Aristotle ca. 330 BCE/1960, *APo* 89b11–20)

For instance, if we return to the master detective, Poirot hears that a deceased old woman’s personal assistants did not stay long. In a moment, he remarks: elderly ladies crave for novelty; they get, perhaps, to the end of a person (Christie 1937/2015, 76–77). Craving for novelty and getting to know all about someone (B) “belongs”, in Aristotle’s terminology, to the old woman (C), and her companions not staying long (A) belongs to craving for novelty, getting bored (B).

In that example, the change of assistants belongs to the deceased, as she was looking for novelty. Other examples of hitting on the explanation would include someone understanding, at first sight, from certain slight facial expressions the unpleasant character of a person from a culture close to their own. Or someone rapidly understands why a neutral crowd is booing a player: that player’s foul against their team went unpunished in a prior game. When examining cases like these, we may see afterwards that we had, say, two explanations in the first moments and we eliminated the earlier one of them after checking. Another angle, equally commonplace, is the probable background of experience.

Although the texts elucidating *anchinoia* do not mention this, it is hard not to think that the understanding of the explanation is somehow experience-based (for instance, Bolton 2014, 52, finds this “obvious”). We observe those things which are illuminated in the environment; our experience helps to understand reasons for a friendship that arouses curiosity; the detective understands a little, he says self-deprecatingly, the mentality of elderly ladies; and someone else who grew up in another culture would be slow to discover the unpleasantness of the person in the second example we gave.

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<sup>4</sup> The translations of *anchinoia* in the text are from the *Nicomachean Ethics* translated by Rowe (Aristotle ca. 330 BCE/2002) (quick-mindedness), Bolton (2014, 50) (“quickness of *nous*”), and the *Rhetoric* translated by Roberts (Aristotle ca. 330 BCE/1954, 1362b24) (quickness of intuition).

The term *anchinoia* (from the words *anchi* and *noos*) refers to *nous*. Yet the skill is here characterized as a particular kind of guesswork rather than a type of *nous*. Given the underlying reference, we might speak of quickness of *nous* and comparatively slower “primary” *nous*. In that fine context of *phronēsis*, *nous* deals specifically with questions people tend to deliberate for a long time (Aristotle, *EE/NE* 1143b3–5). While good deliberation is faster than weaker deliberation and arrives at its result with timely precision, it still requires more time than skill in guessing and its form, *anchinoia*. That is how the chapter on deliberation juxtaposes good and weaker deliberation and *anchinoia* in terms of elapsed time (Aristotle, *EE/NE* 1143b2–6, 1143b26–28).

We saw how experience-based success comes second after the intellectual virtues, such as wisdom and craft. We saw a consistent opposition between reasoning (*logos*) and *nous*, skill in guessing, and *anchinoia*, but no opposition between *nous* — its two types — and the rationality reflected in the intellectual virtues collectively. We have some idea about the relationships between the types of *nous* and the types of wisdom associated with the best theoretical and practical thought. Though practical *nous* seems clearly to develop through experience, it is important we recognize its development is not addressed in isolation here. Its development is only discussed together with sense and, by extension, shared sense. Lastly, *anchinoia* — the instant realization of an explanation — differs from wisdom, but in other respects the subject has ultimately been wisdom, like in the discussions of legal authors at the end of the previous section.

In those debates, the reference to the inarticulate side of wisdom acknowledges Aristotelian thought. In addition, the final quotations in that section effectively state that a judge who, at first, has an intuition must then deliberate. The current section has explored how wisdom and scientific study are related to intuition as *nous* and how *anchinoia*, quick-mindedness, is not related to wisdom. We now look at flashes of intuition within the process of discovery.

#### **4. Two varieties from the 1900s and 2000s**

The next variety to examine is the discovery process, masterfully described by the mathematician Henri Poincaré. We shall begin with the events from the late nineteenth century. In 1908, Poincaré is recalling his early discoveries. The phases leading to illumination were already discussed earlier, for example, by the physicist Hermann Helmholtz, to whom “happy ideas” came unexpectedly, without effort, after he had investigated the problem in all directions. “They came particularly readily during the slow ascent of wooded hills on a sunny day” (Rignano 1923 as cited in Wallas 1926, 80).

Poincaré’s analysis features a fourth phase after conscious work, unconscious work, and sudden illumination — subsequent conscious work — and that analysis has been widely cited across disciplines. Underlying Hutcheson’s article through the writings of Wallas and Cardozo, the sequential phases of discovery effectively provided jurisprudence with the paradigmatic application of intuition to judicial decision-making, which prevailed until the ideas of late twentieth- and early twenty-first-century psychology. This section will conclude by briefly turning to these notions — mainstream by the 2010s — according to which intuition essentially reduces to the rapid recognition of familiarity.

Poincaré’s (1908/2001, 389–391) account improves on what he says could be gathered by reading books by geometers. He mentions the intuition of some organized whole,

required for fruitful discoveries, and challenges the word “selection” as a description of discovery. That word suggests a “purchaser” who has been shown many samples, who then examines them one after the other — and that is not how discovery works. These things, he says, were already understood to occur:

Unfruitful combinations do not so much as present themselves to the mind of the discoverer. In the field of his consciousness there never appear any but really useful combinations, and some that he rejects, which, however, partake to some extent of the character of useful combinations. Everything happens as if the discoverer were a secondary examiner who had only to interrogate candidates declared eligible after passing a preliminary test. (Poincaré 1908/2001, 391)

Poincaré himself seeks to explore further what happens in the soul, which is why he turns to his experiences.

He generalizes the sequence of four phases from his experiences. At the beginning of his lecture, he has suggested that what is most essential in the human mind may be hidden in mathematical discovery (Poincaré 1908/2001, 387). Always, at first there is conscious work — one’s efforts, voluntary efforts, to address a difficulty. When those efforts fail to produce a good arrangement, one takes a rest, goes on a walk or a journey, engages in something different. After that period of apparently unconscious work, the decisive idea appears in various incidental conditions (for example, walking in nature, crossing the street, going back to one’s desk). The results of that illumination must be worked out and verified, which is the second period of conscious work (Poincaré 1908/2001, 391–399).

The initial conscious work is necessary despite apparent unfruitfulness. It liberates, he says, some elements in the mind that relate to our aim (Poincaré 1908/2001, 398). The disordered unconscious will not after that go through all possible arrangements, only those with an element connected with our expectations. (In the subliminal ego “there reigns,” he thinks, “what I would call liberty, if one could give this name to the mere absence of discipline and to disorder born of chance”; Poincaré 1908/2001, 399.) Next, he declines, indeed, to believe the unconscious can — by a delicate intuition — divine the potentially useful arrangements. He wants to keep to the idea that the unconscious is automatic. We see there, intuition contrasted with automaticity. He speaks, regarding phase two, of aesthetic sensibility as a sieve (Poincaré 1908/2001, 395–397; “aesthetic feeling”, 396).

Feelings seem to form an explicit part of this process, not only essentially in phase two (sensibility), but as an accompaniment in phase three. The fruits of the unconscious work, the illuminations, are accompanied by a feeling of certainty. The final conscious work is necessary out of caution, because the correct and the deceptive accompanying feelings are often not distinct from each other as feelings (Poincaré 1908/2001, 394–395). It is also necessary because unconscious work, he says, “never” supplies ready-made the result, but only points of departure (Poincaré 1908/2001, 399).

He rejects the idea of a fresh look following simply an interruption of conscious work. We experience an impasse, have more or less of a rest (which, in the spirit of his narrative, does not mean any substitute activity keeping our mind busy) and, when back to work, soon receive the decisive impression. Our genuine rest, he believes, is more

probably occupied with unconscious work than merely interrupting conscious work and restoring freshness to the mind (Poincaré 1908/2001, 394).

Briefly, the illuminations bring points of departure from the unconscious to consciousness. The points of departure do not appear out of thin air. Wallas (1926, 80) named the prior phases preparation and incubation. Poincaré believed evidence in a contemporary survey on mathematicians' habits of mind and methods confirmed his conclusions. But as we noted, he was looking towards what is essential in the human mind. A work like Wallas' *The Art of Thought* expanded the ideas more clearly to the stream of thinking in our lives. With its examples of poets, scientists, applied scientists, people reflecting on their attachment to their country, that work paved the way for further applications, such as the reflections of Hutcheson and Cardozo at different levels of courts. For Cardozo (1932/1947, 27–28), Hutcheson's doctrine was a "vivid and arresting description of one of the stages in the art of thought." The hunch would not appear in isolation, without the preceding phases.

In *Law and the Modern Mind*, Jerome Frank applied the four-phase sequence to judges who think reflectively and have creative skills. Judges like this are needed, he said, for it follows from the particularity of circumstances and novel aspects in new cases that rules are not always able to draw distinctions and everything is not corresponding with rules (Frank 1930/2009, 129, 149–150). He was quoting Aristotle's *Politics* (3.16) and *Ethics* (NE 5.10). According to Frank, judges who view rules and principles in a mature way treat them as signposts, guides in their application, and will not speak of them as finalities (Frank 1930/2009, 179–180). Against that background, ideals and what the law ought to be constitute no small part of the thinking of lawyers and judges, and when we seek to make such thinking more conscious, we encourage — not dispense with — imagination, intuition, insight (Frank 1930/2009, 180–181). After those steps, he holds up Poincaré's discovery process as an example of how the mind of a great mathematician operates productively (Frank 1930/2009, 180–182).

Yet there is a method underlying his mere quotation. He argues for the four phases against pure fantasy thinking. Unconscious work and illumination may seem like fantasy, but they are fantasies of an inventive kind that provides points of departure for conscious work. This work demands energy "capable of being devoted primarily to soluble adult problems" (his concluding words) rather than absorbed in musings about reaching an overly idealistic place (Frank 1930/2009, 182).

These ideas are not new; terminology such as incubation period, familiar applications, and ideas about feelings accompanying illuminations and the overlap of phases as we explore different questions (Wallas 1926, chapter 4) have been known for a century. The final point concerns time: these phases vary in duration. The mathematician sometimes spoke about a fortnight of unsuccessful effort, or about days or much longer periods when he thought of other things. Verification, for him, tended to be fast, a matter of hours or just one sitting. Others conceived of illuminations in broader terms, such as a phenomenon, rising and falling along the fringe of consciousness before the appearance of the new idea (Wallas 1926, 95–97). The initial conscious work may even span months, as with architect Jørn Utzon during the design of the Sydney Opera House, who found his solution to the roofs after some years. Reportedly, stacking roof elements of a model, he saw how similar the shapes were and how each could perhaps be derived from a



single form (e.g., Bentley 2001). He tested the idea, the idea was discussed, and drawings were made. Some five years later, the roof structure was completed.

We will explore the final variety of intuition, this one prevalent in the social sciences. The economist and psychologist Herbert A. Simon's work in the late twentieth century is key. He proposed the following reduction:

The situation has provided a cue; this cue has given the expert access to information stored in memory, and the information provides the answer. *Intuition is nothing more and nothing less than recognition* [emphasis added]. (Simon 1992, 155)

A chess master faces multiple players simultaneously; a gourmet cook must prepare a meal in a hurry. A particularly large part of their expertise in those circumstances lies in speedy recognition of what is familiar (Simon 1992, 155–156). The psychologist Gary Klein (1998, chapters 3 and 4) and his colleagues studied the decisions of experienced professionals like firefighters in non-routine real-life circumstances, and they found that people who are pressed for time rely on recognizing familiarity. When atypical events occur, people take a step back to diagnose the situation. Intuition means the recognition of familiar things based on experience, without knowing how it occurs. Again, their analysis differed from the mainstream decision theory of that period. Again, the person was not comparing alternatives. The decider was looking for the first workable recourse among courses of action generated one at a time.

In *The Intelligence of Intuition* (2023), the psychologist Gerd Gigerenzer defines intuition as follows:

An intuition is a feeling: 1. based on long experience, 2. that appears quickly in one's consciousness, and 3. whose underlying rationale is unconscious. (Gigerenzer 2023, 3)

We gather experience consciously or without being aware of the learning process. Then, behind the quick appearance of intuition resides an unconscious process. Gigerenzer's prior work defined a gut feeling or intuition as a judgment possessing the above-mentioned second and third qualities, plus being strong enough to act upon (Gigerenzer 2007, 16), but that last aspect has given way to the new number one. The definitions draw on the work of Simon (1992; Gigerenzer 2007, endnote 17, 235) and Klein (1998; Gigerenzer 2023, footnote 9, 3), among others.

*The Intelligence of Intuition* defends intuitive decisions amid a "war on intuition" in the social sciences. While the disrespect for intuition in psychology goes way back to the early-twentieth-century opposition between male reason and female intuition, it reappeared, starting in the 1970s, as the devaluing of everyone's intuitions in domains like chance (Gigerenzer 2023, 10–11). That raises the question of what changed in the 1970s and why.

According to Gigerenzer, researchers have tended to find biases, rather than intelligent intuitions in an uncertain world; a new type of experiment produces data quickly, but without allowing participants to learn from experience during the experiment, unlike pre-seventies experiments that allowed participants to learn; and studies reporting good intuitions are rarely cited (Gigerenzer 2023, 11–12, 63–64). The cause in the middle has been termed a paradigm shift in the study of statistical intuitions. Since the early 1970s, ongoing processes, correction in light of experience, and learning were disregarded because experiments packaged information into a discrete description and subsequently

asked participants to respond to one single question at a time (Lejarraga and Hertwig 2021).

The defence, in these conditions, is anchored in specific domains: experienced chess players, footballers, and other professionals tend to have very good first hunches in their game. The solutions appear quickly in their consciousness because of their domain-specific experience (Gigerenzer 2023, 3–6). Some cases discussed in Gigerenzer’s book, though, require deliberation in our lives. For example, a patient is pondering whether to choose treatment when survival is also uncertain in that case. Instead of biases such as the framing effect, we hear about the intelligent listener’s intuitive understanding. The person can pay attention to how messengers frame messages beyond the verbatim statement. Like the patient’s decoding, the doctor’s ability to use a frame to communicate unspoken information is intuitive (Gigerenzer 2023, 44–49).

In that case, the dimension of intuition opens new meanings for us readers. The intuitive aspects of the patient’s decision recall Aristotelian intellectual skills such as comprehension (correctly discerning what another says), sense and shared sense (what is reasonable in relation to another), and certainly *nous* when thinking about what this means for quality of life. Intuitiveness might serve as a term that fits these qualities, familiar from Aristotle, in decisions that are neither made very quickly nor simply a matter of expertise.

In other cases, the studied intuitions seem specific to domains in which a person has years of experience, such as — most traditionally — chess intuition. We are left to wonder what may be common to all those who are truly good in their different fields. We might reflect on what kind of intuition would be important in many domains. The recent ideas of good intuition may well be too domain specific.

I wonder, too, whether too much stress is laid on seeing or even seeking the familiar in what is not previously familiar. Recognizing familiarity in new situations was prominent in at least Klein’s and Simon’s original texts. It is prominent in the discussions of intuition in Kahneman’s *Thinking, Fast and Slow* (2011/2012, 12, 234–244). The opposite of that tendency is to perceive the unfamiliar in things we think are familiar to us.

The beginnings of creative discovery more likely reflect this last way of seeing. The question of intuition early in the twentieth century — when artistry and comparison with art were central to the question — differs, accordingly, from the newer variety. If seeing what is familiar in the unfamiliar lies at the core of intuition, we have probably strayed far from creative discovery.

When looking back on his firefighter research, Klein made a distinction between insight and intuition. These seem, deceptively, to be our last two varieties of intuition. Only the quick, familiarity-based intuition is, he says, intuition. Insight is different from his point of view.

The work with firefighters might suggest that insights are the same as intuitions, but they’re actually very different. Firefighters build up patterns that they apply in making rapid decisions in emergencies. *Intuition* is the use of patterns they’ve already learned, whereas *insight* is the discovery of new patterns. (Klein 2014/2017, 27)

Previously, the firefighter study mentions that there may be aspects of intuition other than the speedy recognition of situations (Klein 1998, 33). Now, Klein’s restrictive

description makes him a dangerous ally. He creates an opposition between what others would see as aspects of intuition. At the same time, the sort of insight he distinguishes from intuition need not involve any specific preparation, or impasse or incubation (Klein 2014/2017, 20–22, 92–96). Sometimes, that insight looks like *anchinoia*. His primary example is a cop on patrol pointing out to his partner that the driver of the fancy car in front of them just dropped ash on the upholstery. That driver could not be the owner or a friend who borrowed the car. The driver was possibly a thief (Klein 2014/2017, 3–4). This insight, in terms familiar in antiquity, is quick-mindedness.

An article applying the late-twentieth-century ideas of Simon and Klein to U.S. Supreme Court decisions, *A Revised View of the Judicial Hunch*, emphasizes familiarity and suggestive intuitions. In contrast to a narrow majority opinion by Justice Antonin Scalia, intuition could, for example, bring to mind factual analogies to deal with the changing circumstances. In another case, facts which Justice Scalia called “extraordinary” reveal what was intuitively familiar to him. In one case, the majority opinion recognized as reasonable the way of looking at a provision that had been suggested in a brief, while for Justice Scalia that suggestion was unprecedented. One case turned on the justices’ different intuitive worldviews (such as the power of the national government to regulate immigration or “Union of sovereign States”), which briefs had likely been designed to prompt (Berger 2013, 2–3, 26–35).

To end this analysis of the five varieties of intuition on a terminological note: Many, if not most, of them may be called “insight”. Poincaré’s inquiry most definitely underpins work on insight. Scientific discoverers such as him or Archimedes are naturally thought about when examining forms of insight (e.g., Gruber 1995). At times, Aristotle’s *nous* (in its two varieties) is translated as “insight”, as already mentioned. As for the forementioned opposition between insight and intuition, it is the result of an unduly limited view of intuition. It is a very special way of seeing the terrain, polarizing things between intuition as familiarity and insight as discovery.

## 5. Good intuition is often wrong, but in the right place

The purpose now is to locate intuition in judging difficult questions. We lived through the time when comparisons to art vanished, without a trace, from the descriptions of intuition. One scholar suggests clarifying, in this intellectual climate, the nature and use of intuition indirectly by supplementing the poet’s account with the judge’s account. A view that moves back and forth among the juridical, ethical, and literary is needed (Crane 2011, 752). We would seek clarity on intuition and its use through art, ethics, and legal judgment. I attempt to address that need and that aim with legal judgment at the centre of reflection.

Intuition activates in matters of difficulty, though not exclusively. That is the context of the early twentieth-century examples and even *nous* above. Presumably, today we still speak of intuition in the primary sense when we are facing conundrums and have time for reflection. When thinking back to such times, many people would recognize the earlier sequence of phases, at least if the suddenness and certainty of illumination are not overstated. After considerable work, we check if an intuition comes. If it does, that phase is followed by work on the revealed point of departure (Poincaré 1908/2001).

Influenced by that analysis, its applications in law, and particularly Aristotle's analyses surrounding *phronēsis*, we set out to think about good intuition and its deficit. The next sentence, slightly exaggerated in its absoluteness, captures what I propose forms the foundation of good intuition. Good intuition is often wrong, but in the right place.

Let me explain these ideas. When you have intuition, in those cases we may speak of intuition in the primary sense, more work is required as you go forward. I am convinced by the mathematician's observation that unconscious work "never" supplies the product ready-made. The intuition could be like a sketch, I think, which may not even resemble the final thing, but gives you an idea of it and points the way for further conscious activity. Good intuition simply brings you to one of the correct areas in different instances, again and again. That makes it, first, part of a kind of thinking life in a continuous fashion. It relates not only to some single episode. Occasionally, scholars discussing creative insights have, quite naturally, taken a similar longer perspective on creative thinking (e.g., Wallas 1926, chapter 4; Gruber 1995, 399–400).

Good intuition is, by the same token, not enough, not in a practical sense. We must act on those intuitions. Since the intuitions are not ready-made solutions, their possessor is, for instance, like a designer making drawings: the work must be realizable in the end; it has to be good in reality; discussions take place. Similarly, the famous detective from fiction, though seemingly solving cases just by sitting back in a chair and thinking, actually follows clues, speaks to people, remains non-committal until he knows his interpretation is correct, and then acts. Another instance of this is in law in the conflict between the parties' opposing views. In the face of uncertainty, after conscious and unconscious work, intuitions go on being guides to exploring, testing, debating, learning in different ways.

When our intuitions finally appear to have misguided us, we have occasion to think again. That is the course of action of a prudent person, as the Supreme Court justice says above (Section 2): "you have to go back and do it all over again." Over a long period, good intuition is not, even at its best, about knowing the right solutions supposedly at once and without much thought. It is, rather, founded on allowing free space for intuition, and while our intuition might be wrong, we rely on it as we work towards a good solution.

Good intuition, in this view, has a strong track record of locating areas where one should work more and gain more clarity. If we look at the inverse of the argument, in the absence of intuition, much work can be done in the wrong place. We would not find, repeatedly or regularly, the correct areas where to keep on working in difficult matters without good intuition.

We would, at least, not discover them so quickly, one might add, although putting the skill that way can be misleading. The good intuition we refer to neither hits the target at once nor rushes down a direct path (just as the vision of the one seeing best in the dark may not be the quickest to adapt to darkness). After all, intuition may, for instance, reveal in which respect we should hesitate. Such intuitions, too, make us refrain from concentrating on the wrong area.

Judge Hutcheson also observed this fact about his colleagues who decided difficult cases: some had good intuition but justified their decisions less well. He says,

All of us have known judges who can make the soundest judgments and write the dullest opinions on them; whose decisions were hardly ever affirmed for the reasons which they gave.

He uses an analogy to illustrate the perceived difficulty:

Their difficulty was that while they had the flash, the intuitive power of judgment, they *could not show it forth* [emphasis added]. While they could by an intuitive flash leap to a conclusion, just as an inventor can leap to his invention, just as often as an inventor cannot explain the result or fully understand it, so cannot and do not they. (Hutcheson 1929, 287)

Those colleagues had good intuition, constantly seeing the “right place”, if you will. They had the intuitive power of judgment but could not explain the outcomes of the cases correctly, or even fully understand them. Despite their recognizably good intuition, their reasoned judgments were wrong in those respects in which a court of higher instance gave other reasons.

More broadly speaking, some of us recognize good intuition behind the flawed musings of another speaker. Others are unimpressed with what has been done with it.

While intuition may, according to one description, be a kind of perception about things, the intellectual quality that ultimately prevails is wisdom, given Aristotelian impressions. We come, in our discussion of intuition, finally to wisdom, like discussions of intuition often do. At the end of Section 2, the views about deliberation following intuition referred to prudence; Aristotle was ultimately thinking about wisdom when he spoke of *nous* in the *Ethics*. One more example was the article reviewing the case opinions that commented on intuition: it ended up discussing a partial “inarticulability”, even characterizing the wise person’s (*phronimos*) conveyed judgment. Aristotelian scholarship (Wright 2006, 1422, cites Sherman 1989, 54, 85–86) underlay that characterization, as did the recommendation, quoted in Section 3, about the sayings and opinions of experienced and older people or wise ones (Sherman 1989, 54, alludes to Aristotle, *NE* 1143b11–14). According to the article, judges could refer to some genuinely relevant, not merely rhetorical, defences of intuitions, given the facts and circumstances they perceive or assume and their experience (Wright 2006, 1424).

In fact, good intuition resembles the two types of *nous* in many respects. We think of them all concerned with difficult matters, all of course having to do with knowing without reasoning why, and all taking second place to wisdom. As discussed, intuition comes into play primarily in difficult matters, guiding us to one of the correct areas, but not to a ready-made solution, when we have been puzzled by or struggled with a question. It belongs to the quiet voice, so to say, or to one’s heart, which one should listen to and then choose to act. That figurative listening is something deeply one’s own; and the thoughtful inquiry into those ideas or feelings and active listening in conversations about the matter are characteristic of the wise.

In that case, we also encounter and examine notions that add to our uncertainty — as several statements at the end of Section 2 effectively put it — before the results have their form. Certainly, all that testing, going back to the beginning, and learning, as our intuitions might be wrong, can be questioned by appealing to conditions in which people commonly do not act that way. Still, it cannot be said that people generally seek arguments only for their intuitions, to confirm them.

As a final point, let us briefly return to the question of why some people, over time, have good intuition about complicated problems. Besides the often-mentioned basis in experience (along with some explanation of why one person apparently learns more from experience than another), part of the picture is arguably the ability to distinguish intuition from desire. If we leave that difficulty aside now, another key lies in our account of intuition as a direction locator in the questions vexing us.

While good intuition might be wrong at first, it helps us keep working — amid hesitations — in one of the correct locations. We do not expect to find a ready-made solution, nor do we think about acting on an intuition unhesitatingly. Last but not least, other than this proposed account of intuition and difficulty distinguishing intuition from desire, we should not forget the fact that in ancient Greece, as we noted, the same people were said to have *nous*, sense, and, following that quality, shared sense. It is worth considering a possible connection between good intuition and a kind of shared sense with another. Yet the examination of these other aspects will have to be left for another time.

## **6. Conclusion: A locator skill apart from quick judgment**

We have made progress in understanding the history of ideas about intuition in jurisprudence and the idea of good intuition. Rather than still taking *The Judgment Intuitive* as a starting point, we have learned to elevate the discussion in *The Art of Thought* above that jurisprudential classic. The earlier, synthesizing discussion brought the ideas about phases of discovery over to the legal authors of the period. More precisely, that discussion forms a bridge bringing those ideas over to the legal authors of the period. The significance of that bridge — connecting Poincaré’s elaborate vision with legal applications — is that it binds such applications ever more clearly to common notions of an inventive person’s intuition or imagination.

By attending to the origin of those applied ideas in the sequence starting with a seemingly fruitless yet necessary problem-solving effort, we can give due credit to Hutcheson’s descriptions of the difficult preceding situation and long “struggle of the mind”. The impasse in the problem in hand suggests the judge does not, primordially, decide the matter simply according to the judge’s own tastes. That later conceived caricature does not match the first three phases in the art of thought. Behind Poincaré’s thinking we saw, too, that “selecting” the result from a range of options appeared to distort discovery even in that time. This is not new to the revival of intuitive decision-making nearly a century later. Attached to the effort to solve a problem, to impasse and discovery, a figure selecting a solution to their own taste would be an imaginary opponent.

My thesis on intuition — virtue — was advanced by the necessary sequential phases and the relationship between intuition and wisdom. It also resembles the view that gut feelings are suggestive, that they may help, for instance, the physician seek further evidence. In harmony with those influences I see intuition as a locator, indicating the area in which we must work.

The justice’s reflections on quick judgments go in the same general direction. When we contemplate the last phases of the longer process, intuitions are, indeed, a beginning point for articulating and examining reasons. Over time, good intuition would tend to

find the directions in which we keep working towards a good result. In the absence of intuitions, much work can be wasted.

That understanding of good intuition was developed to address those questions we spend considerable time pondering. The idea differs from, but does not disagree with, those of quick-mindedness, which is not related to wisdom except perhaps incidentally, and quick recognition of familiarity. If one detects two kinds of thinking among the varieties, the last-mentioned two varieties, *anchinoia* and familiarity, probably belong to one and the same group. Fast thinking defines much less my view or the three others: the scientific *nous*; the type of *nous* that is awareness or perception; and the phases of discovery from which the history of judicial intuition arose.

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