Essays

On "I Know It When I See It"

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My subject is one of the most famous phrases in the entire history of Supreme Court opinions: "I know it when I see it." The phrase appears in Justice Potter Stewart's concurring opinion in *Jacobellis v. Ohio*,[1] a pornography case decided by the Court in 1964. Although many people have appropriated the phrase—some approvingly, some not—no one has ever examined it in any way commensurate with its fame. But the phrase repays reflection. Aside from its provocative place in the history of pornography regulation, "I know it when I see it" invites us to reappraise the role of nonrational elements in judicial decisionmaking, which I think deserve both more attention and more acceptance than they typically enjoy. Such a reappraisal is my underlying purpose here.

Jacobellis v. Ohio involved a theater owner who had been convicted for showing *The Lovers*, an early film directed by the marvelous French filmmaker Louis Malle. The story in *The Lovers* concerns a woman in an unhappy marriage—the woman was played by the actress Jeanne Moreau—and the

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I note here only one particularly relevant matter. My connection to Justice Stewart did not begin with my appointment to the professorship bearing his name. I met him for the first time more than 20 years ago when I was a law clerk for Justice Thurgood Marshall. Justice Stewart's law clerks that year included two of my closest friends from Yale Law School, Ben Heineman and Bill Jeffress, and we were in each other's chambers all the time. My admiration and affection for Justice Stewart were immediate and great. After the Justice retired from the Court, and I had started teaching at Yale, I invited him to visit his old law school and teach a class in my course on "Antidiscrimination Law." He came and taught a controversial affirmative action case in which he had recently dissented, and was a great success. My admiration for Justice Stewart, and for his "common law" way of judging, have only deepened over the years. So, in assuming the Chair that bears his name, I know the specialness of the man the Chair honors, and I know firsthand why the many people who established the Chair wished to honor him.

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

claim that the film was obscene rested almost entirely upon a scene of lovemaking toward the end of the film. The leading First Amendment cases concerning pornography at the time were *Roth v. United States* and *Alberts v. California*,[2] decided shortly before Potter Stewart joined the Court. These cases offered a three-part characterization of suppressible pornography: It "appeal[s] to prurient interest," "goes substantially beyond customary limits of candor," and is "utterly without redeeming social importance."[3] But by 1964, when *Jacobellis* came to the Court, the Justices were sharply divided about what the earlier cases meant and how the Court should treat pornography.

By a 6–3 vote, the Supreme Court reversed the *Jacobellis* conviction. But the Court was utterly fragmented. There were seven separate opinions, and no majority opinion—indeed, not one of the seven opinions received more than two votes. In his famous, if brief, concurring opinion, Justice Stewart concluded that the film was protected by the First Amendment since it was not "hard-core pornography":

> It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California* in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal 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.[4]

There is not much about the phrase "I know it when I see it" that is startling in itself. If we heard it at a dinner party, few heads would turn. Indeed, there is something familiar about both its rhetoric and content, its symmetrical equation of seeing and knowing, and its insistence that some knowledge comes immediately from seeing, not from deliberating. The phrase has a vague resonance with other popular phrases having a similar rhetorical structure and content: "Seeing is believing." "Out of sight out of mind." "Takes one to know one." Yet it did startle, even shock, when it appeared, and it continues to do so today. The shock derives totally from its location within a Supreme Court opinion, since both its rhetoric and its content are so unusual in that context.

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2. 354 U.S. 476 (1957). The cases were decided jointly.
3. *Id.* at 484, 487 & n.20.
4. *Jacobellis*, 378 U.S. at 197 (citations omitted) (Stewart, J., concurring).

The reactions to "I know it when I see it" emerge against a backdrop of a set of traditional beliefs about the appropriate basis for judicial *decisions* and the appropriate content of judicial *opinions*. These beliefs arise from a wholly justified concern about the legitimacy of judicial power in a democracy, particularly in constitutional cases where unelected judges say "no" to the decisions of elected legislatures. Judicial power involves coercion over other people, and that coercion must be justified and have a legitimate basis. The central justification for that coercion is that it is compelled, or at least constrained, by preexisting legal texts and legal rules, and by legal reasoning set forth in a written opinion. From this perspective, the exercise of judicial power is not legitimate if it is based on a judge's personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection.

"I know it when I see it" has many fans in addition to the millions of people who have incorporated it into their daily speech.[5] It has been quoted in more than 150 federal court decisions,[6] and has been praised by Richard Posner for its "candor" and by Harry Kalven as "realistic and gallant."[7] But from the perspective of the traditional model of judging, "I know it when I see it" is disturbing. For one, it raises concerns about the basis for Stewart's decision. The decision seems to be based on a nonrational, intuitive gut reaction, instead of reasoned analysis; it seems to be utterly subjective and personal. In addition, regardless of how Stewart actually reached his decision in the case, his written opinion raises a further problem: Instead of explaining himself with reasons, he seems just to assert his conclusion with self-referential confidence.

My goal here is to suggest that such criticism is unfair. First, it wrongly characterizes what Stewart was doing in *Jacobellis*. Second, and more generally, such criticism mischaracterizes and understates the role that emotion and nonrational elements properly play in forming judicial judgments and in presenting those judgments in judicial opinions. In short, I want to identify and celebrate various ways in which nonrational as well as rational elements enter

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5. Not to mention popular songs—for example, Stephen Sondheim's song, *There Won't Be Trumpets*, as recorded by Dawn Upshaw on I WISH IT SO (Elektra Nonesuch 1994) ("Don't look for trumpets / Or whistles tooting / To guarantee him. / There won't be trumpets, / But sure as shooting, / You'll know him when you see him.").

6. Search of WESTLAW, Allfeds database (Nov. 1, 1995) (search: "know it when" /s "see it").

7. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 40 (1988); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 308 (1988). Justice Stewart himself came to regret writing the phrase, or at least to regret that it became his most famous utterance. *See A Retirement Press Conference*, 55 TENN. L. REV. 21, 25 (1987) [hereinafter *Stewart Retirement Press Conference*]. In giving renewed attention to the *Jacobellis* phrase, even in the face of its author's regret, I am nevertheless convinced that we enlarge Justice Stewart's legacy.

judicial decisions. And in doing so, I hope to add more scenic texture to the map of our legal life than we in the academic world usually acknowledge.

I

First, let us examine the *Jacobellis* concurrence as a whole. I see evidence of reasoning everywhere. Justice Stewart begins by saying he has assessed the precedents and thinks that they can be read in various ways, immediately establishing that there is no clearly settled law that decides this case. Next, he graciously adds that he is not criticizing the Court for those unclarities, since they reflect not so much a fault of craft as perhaps a fault of mission. The task in those cases, he says, was "trying to define what may be indefinable."[8] Note the tentativeness of these words, and their suggestion that the Court is involved in an ongoing project that will have to play out over time, and that may end in failure.

In the next sentence of his opinion, Justice Stewart announces where his own efforts to draw the line between protected and unprotected sexual expression have taken him. "I have reached the conclusion," he says—suggesting that a path of reflection preceded his conclusion—that criminal prohibition must be limited to "hard-core pornography." He then adds: "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."[9] Justice Stewart's conclusion that the category of unprotected sexual expression is restricted to "hard-core pornography" is a very significant limiting description of what is unprotected. It is not the utter absence of description as some critics of the phrase "I know it when I see it" suggest, but a significantly smaller category of punishable expression than most other members of the Court (and even the Attorney General) wanted. And once again Stewart underscores the evolutionary nature of the project; the phrase "hard-core pornography" is not the last word on the subject, but just an interim word, with the effort to give "further" definition deferred, not disregarded. He concludes with the famous sentence, short-circuiting further definition in this case: "But I know it when I see it, and the motion picture involved in this case is not that."

Thus, one way of reading Stewart's *Jacobellis* opinion is as a snapshot of reflection in midflight. We are so accustomed to the tone of authoritative perfectionism as the judicial voice that Stewart's reflective tentativeness is startling, even today. And yet resolving cases with some uncertainty surely is

8. The entire *Jacobellis* concurrence appears at 378 U.S. 184, 197 (1964).
9. *Id.* (emphasis added).

a common reality. A judge has an obligation to decide many cases, and to decide them relatively quickly. Indefinitely delaying a judicial decision is more at odds with a judge's role than deciding with some tentativeness, figuring out the gist of one's position and delaying to another day the working out of all of the details.

This is particularly true in cases that are *easy* on their facts—as I believe Justice Stewart thought *Jacobellis* was—since developing a refined definition of what would be *un*protected speech is not necessary when the film in question is so clearly outside that category. The burden of justification, moreover, is plausibly less in a case where the judgment is *not* to punish than in a case imposing punishment. Indeed, for a judge who is strongly speech-protective, as Stewart was, prematurely trying to define an entire category of unprotected speech creates a particular risk: It might unleash excessive censorship. Caution is well advised. Put more generally, there are good reasons to accept the imperfect in a judge. We should encourage judges to believe and say: This is the best I can do now; it doesn't solve all the problems, but it's a start, and I'll keep thinking. Believing and saying that is not at odds with the spirit of reason, but rather is its exemplification.

Justice Stewart did not go beyond "I know it when I see it" in *Jacobellis* itself. But he stayed true to the aspiration he spoke of at the outset of the opinion and continued "trying to define what may be indefinable." In a notorious case two years after *Jacobellis*, Stewart dissented from a quite shocking majority opinion by Justice Brennan upholding the conviction of Ralph Ginzburg for sending his magazine *Eros* through the mails.[10] In his dissent, Stewart noted that he had not described "hard-core pornography" in *Jacobellis*, but was now prepared to go further, and he set out a description from the Solicitor General's brief "of the kind of thing" he meant.[11]

And Justice Stewart continued to wrestle with the issue, with major consequences. In 1973, he concluded that the Court was "trying to define what was [indeed] indefinable," and he abandoned the project. He joined his old adversary on pornography issues, Justice Brennan, in a dissenting opinion admitting that "[a]lthough we have assumed that obscenity does exist and that we 'know it when [we] see it,' we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech," and thus risk suppressing protected speech.[12] This reasoning led Justice Stewart to abandon the effort to define a category of completely suppressible pornography, and to argue for

10. *See* Ginzburg v. United States, 383 U.S. 463, 497 (1966) (Stewart, J., dissenting).

11. *Id.* at 499 & n.3 (Stewart, J., dissenting).

12. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., joined by Stewart & Marshall, JJ., dissenting) (citation omitted).

permitting the state to regulate only distribution to children and to unconsenting adults. In short, the broader context of "I know it when I see it" makes clear that Justice Stewart hardly abandoned reflection and reasoned analysis.[13]

II

All right, all right, you might say, I grant that Justice Stewart's overall consideration of issues of pornography was guided by a basic spirit of reason. But doesn't "I know it when I see it" indicate the unacceptable abandonment of rational process at a critical point in Stewart's reflection—in fact, at the decision point about the film in question?

I resist this criticism for two reasons. First, the line between what is rational and nonrational, in this context at least, is simply impossible to sustain. To say "I know it when I see it" does not disconnect what is known from rationality and reason. Second, to the extent that a line between the rational and nonrational is sustainable, certain nonrational elements have an appropriate place in judicial decisionmaking.

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13. Although academic writing is not invariably the model of reasoned analysis, it is also worth noting that Justice Stewart's *Jacobellis* concurrence seems to have been influenced by a highly regarded scholarly article, a 1960 piece by the great Harry Kalven of the University of Chicago Law School. The article, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, was surely known to Stewart. Almost immediately upon publication it became well known, and was cited and quoted in several briefs before the Court. Beyond that, it singled out the newly appointed Justice Stewart for distinctly flattering praise (which we may assume made its way to the novice Justice's attention), saying that Stewart's opinion in Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959), "rank[ed] as one of the Court's clearest and most impressive utterances about free speech in general" and was "notably courageous." Kalven, *supra*, at 30.

Kalven's article was more analytic than it was prescriptive, but did seem to advocate two things: first, that "hard-core pornography" should be the Court's standard, and second, that the Court should not say much in its obscenity opinions—the very two things that Stewart did in his *Jacobellis* concurrence. And at the end of his article, Kalven discussed and quoted at length from a brief that Thurman Arnold (former Yale Law School professor, New Deal activist, and U.S. Court of Appeals judge) had written in an obscenity case before the Vermont Supreme Court, calling it the "appropriate last word" for his own article. This is how Kalven summarized Arnold's brief:

> [T]he court should hold the items before it not obscene unless they amount to hard-core pornography, and should, after rendering a decision, shut up. In Mr. Arnold's view, any fool can quickly recognize hard-core pornography, but it is a fatal trap for judicial decorum and judicial sanity to attempt thereafter to write an opinion explaining why.

Id. at 43. In Arnold's own words, as quoted by Kalven:

> No one can reason why anything is or is not obscene. . . . [T]he Supreme Court has adopted "hard-core" pornography as a Constitutional test . . . [but has] neatly avoided the trap of defining what 'hard core' pornography is. Such an attempt would . . . start[] the futile and desperate game of definition all over again. . . . [A]ctions must speak for themselves in this field. This may be an unconventional way of making law, but in the field of pornography it is certainly sound judicial common sense.

Id. at 44. It is thus plausible that in *Jacobellis* Stewart believed he was following the course urged by two of the most brilliant legal minds of his time.

All too often judges and scholars who write about law assert an inappropriately sharp distinction between the rational and the nonrational, especially between reason and emotion—invoking an overly narrow concept of reason and contrasting reason and emotion in an overly simplified manner. These discussions usually arise in the context of a traditional normative argument that judging is a realm of reason, not emotion.[14] Thus, to characterize some judicial or jury behavior as not "reason" but "emotion" is to say it is illegitimate. The Supreme Court, for example, has often said that the decision whether to impose the death penalty must turn on a "reasoned moral response . . . and not an emotional response."[15] This has led the Court to conclude that feelings of "sympathy" have no place in the decision whether or not to impose the death penalty.[16] Until recently, it led the Court to hold victim-impact evidence inadmissible at capital sentencing because of its tendency to produce an emotional, rather than reasoned, response.[17] In each case, I think, the Supreme Court has been led astray by not recognizing the relevance of what it calls an "emotional response," largely because it does not

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14. The following are just a few well-known epigrammatic examples from the Western tradition, as compiled in THE QUOTABLE LAWYER 268–69 (David S. Shrager & Elizabeth Frost eds., 1986): "The law is reason free from passion." (Aristotle's *Politics*); "Law is a regulation in accord with reason." (Aquinas's *Summa Theologica*); "Reason is the life of the law; nay, the common law itself is nothing else but reason." (Coke, *The Institutes of the Laws of England*); "Law governs man, reason the law." (Proverb).

15. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also* Booth v. Maryland, 482 U.S. 496, 508 (1987) ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'" (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977))); Saffle v. Parks, 494 U.S. 484, 493, 495 (1990) ("Capital sentencing must be reliable, accurate, and nonarbitrary" and not turn on "jurors' emotional sensitivities" or "whether the defendant can strike an emotional chord in a juror."); Payne v. Tennessee, 501 U.S. 808, 856 (1991) (Stevens, J., dissenting) (objecting to victim-impact evidence because it "encourage[s] jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason").

16. *See Saffle*, 494 U.S. at 485 (refusing to strike down instruction to jury to "avoid any influence of sympathy" during penalty phase of capital trial); *Brown*, 479 U.S. at 539 (upholding judge's instruction to capital-sentencing jury that it should not be swayed by "mere . . . sympathy").

17. *See Booth*, 482 U.S. at 496; South Carolina v. Gathers, 490 U.S. 805 (1989). These decisions were overruled by Payne v. Tennessee, 501 U.S. 808 (1991).

Significantly, both conservative and liberal members of the Supreme Court affirm that law is "reason not emotion" only when it is convenient for them to do so. Justice Sandra Day O'Connor, for example, has insisted that death penalty sentencing must be a "reasoned moral response" not an "emotional response" as the basis for rejecting defendants' objections to jury instructions directing jurors not to be influenced by sympathy. *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). But in *Payne v. Tennessee*, where prosecutors had introduced victim-impact evidence that she conceded had "moved" the jurors, Justice O'Connor concluded that their emotional reactions were acceptable since the impact evidence "did not inflame their passions more than did the facts of the crime." 501 U.S. at 831. Liberals are inconsistent in the opposite way. For example, Justice William Brennan joined the majority in *Booth v. Maryland*, where the Court barred victim-impact evidence from capital sentencing on the ground that such evidence was "emotionally charged" and that the death penalty decision had to be "'based on reason rather than caprice or emotion.'" 482 U.S. at 508 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)). But Brennan saw a place for emotion when, in his dissent in *Saffle v. Parks*, he argued that it was constitutional error for capital-sentencing juries to be instructed not to be influenced by sympathy—even though Brennan seemed to acknowledge that sympathy is an "emotion" and is "fairly regarded as a synonym for 'compassion.'" 494 U.S. at 514 (Brennan, J., dissenting).

appreciate how compassion, mercy, and sympathy for both defendants and victims can be elements of a rational punishment decision.[18]

The glib distinction between "reasoned" and "emotional" responses is far too simplistic. At least since Plato, philosophers have recognized that emotions come in many varieties: Some are like physical drives, such as hunger, and others are closely related to what we usually call rationality. More recently, a chorus of scholars from fields as diverse as philosophy, psychology, and neurobiology has demonstrated that emotions have a cognitive dimension, are connected to beliefs, and can promote, illuminate, and convey understanding in many ways.[19] In contrast to anti-Enlightenment critiques from Nietzsche onward which have insisted that behind the face of reason there is only raw power, these recent post-Enlightenment critiques have insisted that behind the face of reason—indeed, constitutive of reason itself—may be some familiar emotions.

What we typically call reason and emotion are interrelated in a variety of complex ways. For example, emotions can open up ways of knowing and seeing, and thereby contribute to reasoning. Fear and caring, to illustrate, can make us more attentive to facts; sympathy may be part of properly assessing mitigating evidence in capital sentencing. Indeed, rational beliefs themselves both shape, and are modifiable by, emotion. For example, fear can be reduced by changing our beliefs; our general views about gay people can be changed by empathy we come to feel toward a gay relative. Moreover, emotions—grief, for example—can reveal beliefs that conscious thought conceals. And emotions are often essential to the completion of a rational response. (Consider Michael Dukakis's answer, during a presidential campaign debate, to a question about what he would think if his wife were raped and murdered. His answer was so abstract and unfeeling that it suggested a not fully rational reaction.[20]) Alas, these ideas have barely made any inroads into the world of law, which, for the most part, has remained comfortable with the easy dichotomy of reason and emotion.

Just as reason is often inseparable from emotion, judgments should not be deemed outside of reason and rationality just because they are automatic or hard to explain. Many important and unimportant things in life we know without ongoing reflection, and without necessarily being able to explain why

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18. *See* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, *in* LAW'S STORIES (Peter Brooks & Paul Gewirtz eds., forthcoming 1996); *see also* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

19. *See, e.g.*, EXPLAINING EMOTIONS (Amelie O. Rorty ed., 1980); RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990); ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT (1990).

20. *Bush and Dukakis: Few Sparks in Final Clash*, 1988 CONG. Q. 3005, 3005 (transcript of debate).

we believe them. Interesting recent research on identification and recognition illustrates this point. Studies show that eyewitness identifications in law enforcement tend to be more accurate when they are instantaneous rather than the product of a deliberative process of elimination and comparison of faces. Recognition is an automatic process. Studies have also shown that "[p]eople who make instant and accurate identifications are using a nonverbal process, so they are often unable to say exactly what it is that made them choose. Faces are stored in memory in a visual pattern, not in words."[21]

I am not suggesting that the process of identifying "hard-core pornography" is a process of recognizing an image *from memory*[22] the way identifying a person is, nor am I equating judicial decisionmaking with mug-shot recognitions. But simply because Justice Stewart could automatically identify what for him was hard-core pornography and could not precisely define it in words does not imply a deficient or less accurate cognitive process. "Seeing" may become "knowing" instantaneously—with no conscious process of deduction, and with no after-the-fact attempt to give reasons—but it still may rest on reasons and beliefs. A conclusion that is simply an instantaneous response to an image is not necessarily less sound than one produced by sustained analysis.

A few years after *Jacobellis*, Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit sought to bring what he thought was more rationality to the pornography review process by categorizing all of the Supreme Court's pornography decisions, distinguishing cases based on body parts shown, arousal, numbers of people, positions of bodies, and so forth.[23] I cannot rehearse here all the familiar pitfalls and advantages of case-by-case decisionmaking as opposed to rule-based decisionmaking,[24] but I ask:

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21. Daniel Goleman, *Studies Point to Flaws in Lineups of Suspects*, N.Y. TIMES, Jan. 17, 1995, at C1, C7 (quoting interview with Cornell University psychologist David Dunning); *see* David Dunning & Lisa B. Stern, *Distinguishing Accurate from Inaccurate Eyewitness Identifications via Inquiries About Decision Processes*, 67 J. PERSONALITY & SOC. PSYCHOL. 818 (1994) (reporting on research). Dunning and Stern suggest two main reasons why it is so frequently the case that "[w]hen people accurately recognize a face . . . they will be unable to articulate or verbalize what it is about the face or their memory that led them to their reaction"—"[f]irst, people are experts at facial recognition," and second, representations of faces are stored in human memory differently from thoughts about the face, which makes articulation about the former more difficult than about the latter. *Id.* at 819.

22. In their description of the Justices' individual approaches to pornography cases, however, Bob Woodward and Scott Armstrong suggest that memory may have played a part in Justice Stewart's deliberation. According to them, Stewart called "I know it when I see it" the "Casablanca Test," because when he was a naval officer during World War II in Casablanca he had seen some of the local pornography his men brought back to the ship, and that was definitely "it." *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 194 (1979).

23. *See* Huffman v. United States, 470 F.2d 386, 396–402 (D.C. Cir. 1972).

24. The main arguments are summarized in Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) and Charles Fried, *Two Concepts of Interest: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 763–64, 773–76 (1963). For a recent endorsement of one form of case-by-case decisionmaking, the "analogical," see Cass R. Sunstein,

Would judges really do better at making judgments about pornography if they did it Judge Leventhal's way rather than by an automatic, case-by-case response?

As a related example, consider a famous phrase used by Justice Felix Frankfurter in an opinion concluding that the police violated the Due Process Clause of the Fourteenth Amendment when they forcibly pumped out the contents of a suspect's stomach. "This is conduct," Frankfurter said, that "shocks the conscience."[25] That phrase—"shocks the conscience"—was then and is still criticized as a constitutional judgment improperly predicated on the emotional reaction of "shock." But I think that criticism is wrong.

In deciding the case, Frankfurter was not some man on the street being asked what he felt about stomach pumping, and responding "pretty shocking." His "shock" was that of a judge with vast professional experience—a judge who had observed police conduct in many cases, who had reflected at length about the constitutional balance between liberty and order in law enforcement, and who had written many judicial decisions in cases involving these issues. His beliefs and reasons, I think, had been sufficiently internalized that his immediate reactions reflected patterned thought. To borrow a phrase, his experience of thought enabled him to "think feelingly."[26] An emotion, in short, was properly relevant in assessing fundamental standards of decency and fairness under the Due Process Clause. More broadly, "shock" was an aspect of rationality, an emotion that revealed reasons; a bright-line distinction between emotion and rationality would be unsound.

But I have a broader point. Even when the rational and the nonrational can be distinguished, nonrational activities of mind and spirit can play an important role in judging and lawyering.[27] This idea, significantly, is the basic theme

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On Analogical Reasoning, 106 HARV. L. REV. 741 (1993). For an endorsement of rule-based over case-by-case methods of adjudication, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

25. Rochin v. California, 342 U.S. 165, 172 (1952).

26. I have been unable to locate the source of this phrase, which has stayed with me since my undergraduate years and which I believe is probably from Henry James. Something very like the phrase appears prominently in T.S. Eliot's essay *The Metaphysical Poets*, *in* SELECTED PROSE OF T.S. ELIOT 63–64 (Frank Kermode ed., 1975):

> [Johnson and Chapman] were notably erudite, and were notably men who incorporated their erudition into their sensibility: their mode of feeling was directly and freshly altered by their reading and thought. In Chapman especially there is a direct sensuous apprehension of thought, or a recreation of thought into feeling, which is exactly what we find in Donne . . . . Tennyson and Browning are poets, and they think; but they do not feel their thought as immediately as the odour of a rose.

27. Others have begun to make the general argument that nonrational elements—or at least emotion—have a legitimate (not simply inescapable) place in law. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); William J. Brennan, Jr., *Reason, Passion & "The Progress of the Law,"* 10 CARDOZO L. REV. 3 (1988); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Mari J.

of the great myth about the birth of law in the Western tradition, Aeschylus' *Oresteia*. In the *Oresteia*, an indispensable event for the establishment of stable law is that the Furies—those forces of fearful passion—*must* be included in the legal order that Athena establishes at the play's end.[28]

Myth aside, nonrational elements are central in law today.[29] Consider just a few nonrational aspects of the self that are defining qualities of excellence in a judge: imagination; judgment; courage; compassion; good sense; energy; calmness; open-mindedness; the capacity to listen; eloquence. The American Bar Association, in rating potential judges, calls many of these qualities aspects of "temperament";[30] Anthony Kronman would probably call them aspects of "character."[31] My point here is that they are not usually seen as aspects of rationality, even though most of them are aspects of mind, and that these nonrational aspects of mind have long been seen as vital to the activity of judging.

Consider imagination. The imaginative capacity to stand in someone else's shoes and see events through someone else's eyes is a critical attribute of the best judges. A good example is the story of Solomon,[32] perhaps our culture's central myth about judicial wisdom. You know the story. Two women come to Solomon, each claiming to be the mother of a baby. Solomon determines who is the true mother by threatening to cut the baby in two, for the false mother agrees to the procedure while the real mother tries to stop it by saying that it is better to give the other woman the child than to destroy it. Martha Minow has written brilliantly of the Solomon story[33] but in the end does not quite capture what I think is the central aspect of Solomon's wisdom: his ability to imagine in advance how a real mother and a false mother would act,

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Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); Robin West, *Economic Man and Literary Woman*, 39 MERCER L. REV. 867 (1988).

28. *See* Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1046–50 (1988).

29. I discuss here only the role that nonrational elements play in the activity of judging. But as Aeschylus was perhaps suggesting (and as we know today), an important part of what judges hope *to produce in their audience* is nonrational. Most obviously, the basic deterrent function of criminal law rests upon an emotion: fear. Indeed, a failure to appreciate the emotional effects of law on its audience may blind judges to the unintended consequences of what they do. For example, I believe legal regulators have not adequately appreciated that attempting to suppress pornography may enhance its *allure*, since pornography's appeal probably rests in part on its being treated as taboo. For some ways that nonrational elements may affect the way judicial opinions are experienced by their audience, see *infra* Part III.

30. AMERICAN BAR ASS'N, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4, 7 (1988).

31. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 14–17 & *passim* (1993) (discussing centrality of "character" in legal life).

32. 1 *Kings* 3.

33. *See* Martha L. Minow, *The Judgment of Solomon and the Experience of Justice*, *in* THE STRUCTURE OF PROCEDURE 447 (Robert M. Cover & Owen M. Fiss eds., 1979).

for only with that imaginative capacity could he create the solution that reveals the true mother.

Another valuable role of nonrational elements is that they can *constrain* judges. We tend to think of the nonrational as what breaks through the restraints of judicial role, but the nonrational can itself constrain. The central insight here belongs to the greatest of the legal realists, Karl Llewellyn. The traditional account of judging sees constraint (and, therefore, judicial authority) as coming from preexisting legal rules and the disciplining force of reason. The legal realists and their heirs did much to undermine this conventional account of constraint, demonstrating the many indeterminacies of legal rules, precedent, and conventional modes of judicial argument. Llewellyn himself did much to identify these judicial leeways. But the main point of much of his work—ranging from his early lost jewel, *The Case Law System in America*,[34] which I edited for publication a few years ago, to his late masterwork, The *Common Law Tradition*[35]—was to emphasize the ways in which an adequate measure of constraint and predictability is achieved nevertheless. For Llewellyn, the most important constraint was not conventional legal reasoning at all, but rather what he called the "operating technique" of judges—a judge's feel, his habits, "the trained, tradition-determined manner of handling [legal] material," "practice, not norm; way of acting, not verbal formula."[36] Judicial "intuition," Llewellyn said, allows judges to reach generally correct results, "even when their ability to fashion legal grounds for their decisions has lagged behind."[37] These constraining factors, Llewellyn said, may operate "unconsciously."[38]

In the field of constitutional law, which Llewellyn rarely wrote about, one nonrational constraint on judges is quite different. We constitutional law professors spend much time trying to defend judicial review against the charge that it is undemocratic and that the broadly worded provisions of the Constitution do not adequately constrain the judges who interpret them. Our arguments almost invariably address quite abstract matters of political theory or the interpretation of historical texts or the constraining effects of evolving legal precedents—constraints of reason and deliberation. But one element that helps to accommodate judicial review and democratic values is a feeling and attitude—a judge's feeling of *humility*, an internalized sense that he is not the sole repository of constitutional truth, an attitude of restraint that is an aspect

34. KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 76–81 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989).

35. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

36. LLEWELLYN, *supra* note 34, at 10, 76, 77.

37. *Id.* at 78–79.

38. *Id.* at 79.

of temperament. For me, Justice John Marshall Harlan was right when he said that "[n]o formula could serve as a substitute, in this area, for judgment and restraint."[39]

In affirming that emotion has both an inescapable and an appropriate place in judging, I neither oppose rationality nor deny that emotion can present problems. Reason should obviously have a central place in legal thought. Thus, I disagree with the recent rousing paean to reason in legal life by my colleague Owen Fiss[40] not because of its basic defense of reason, but because of its extremism in doing so. He insists that the judicial method should be "*entirely* rationalistic,"[41] and his conception of rationality does not embrace even the cognitive contributions of emotion that I have considered above.[42] This extremism has a strong pedigree in traditional conceptions of the legal ideal.

I acknowledge a fear that relaxing an insistence on "reason" in the public sphere will empower the barbarians. We may give comfort to all the forces in the contemporary world that are at odds with civilized living: prejudice, violent anger, knownothingism, and so forth. The fear is that we will accelerate what I call the "Oprahfication" of American life. On the Oprah Winfrey show, everyone's opinion counts simply because one feels—regardless of what one knows, regardless of deliberation. The credo is "I feel, therefore I may judge," and that is wrong. But the answer cannot be to deem the nonrational illegitimate in the public sphere. The answer is to insist upon the dialectic of emotion and reason, feeling and deliberation, story and theory, rhetoric and argument.

Moreover, in affirming a place for emotion, I readily acknowledge that certain emotions must be excluded altogether.[43] Prejudice, for example, totally

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39. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

40. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990).

41. *Id.* at 789 (emphasis added); *see also id.* at 795, 797, 803–04. Fiss sees no place for nonrational elements in the legal process, except to the extent that they "inevitably creep" in because "[j]udges are people." *Id.* at 797.

42. A few pages from the end of his essay, Fiss does acknowledge a concern that judicial decisions should be a "full and true appreciation of social reality." *Id.* at 802. But instead of recognizing that nonrational elements may contribute to this cognitive understanding of reality, Fiss treats this concern as a conventional worry about judges being "removed from experience." Emotion, he says, "is not experience, nor a privileged means of gaining access to experience." *Id.*

In general, Fiss characterizes the idea of including emotion in judging as a "temptation." *Id.* at 797. As such, Fiss sees any turn to emotion as an abandonment of the "enormous amount of mental and physical effort" entailed in "rational deliberation," an avoidance of the "agony of decision." *Id.* This is very hard to see. Sympathy and emotional openness, if anything, augment the "agony of decision," for they introduce additional relevant variables and complicate the assessment of those variables. Indeed, rationality (including bureaucratic rationality), not its opposite, has typically been characterized as leading to simplification and aloofness, creating decisionmaking stripped of a full understanding of its implications. *See, e.g.*, LIONEL TRILLING, THE LIBERAL IMAGINATION at xii–xiii (1950).

43. Professor Fiss claims that this differentiation can be made only by "rational elaboration," thus "rescu[ing emotion] only by reference to" reason, "render[ing] the entire turn to passion redundant." Fiss, *supra* note 40, at 800–01. But this is hardly the case. Fiss seems to confuse points in time: To first use

undercuts the ideal of impartiality that is a necessary predicate for the legitimate exercise of judicial power. But other emotions—sympathy or courage, for example—can *promote* impartiality. (Indeed, the sympathetic capacity to see and feel a situation from many sides in a legal dispute comes close to *defining* the capacity to be impartial.) Put more generally, although some nonrational elements may be inconsistent with legal ideals, others—emotions and intuitions of certain types, imagination, judgment, rhetorical persuasiveness (considered below)—are fully consistent with those ideals.[44] Some emotions can be unreliable, just as reasons can be. Emotions can pull judges toward a greater preoccupation with particular individuals and their individual stories—particulars that may not be typical and that may therefore distort understanding—just as reasons can pull understanding toward generalities that may conceal particularity and diversity. Emotions, like reasons, can lead in multiple directions and create problems of indeterminacy. Emotions may open the way to understanding only partially and may need the competing insights and discipline of rational reflection—but likewise, reason may be incomplete without emotion. All of this means that emotional responses must be openly tested by deliberation and reasoned examination, and vice versa.[45] The courthouse setting facilitates the testing, however, for courtroom procedures establish an enormous range of opportunities for reasoned exchange among lawyers, judges, and juries.

Introducing nonrational elements also raises the important but not unrelated problem of individual subjectivity. This is certainly a fair issue raised by "I know it when I see it." Justice Stewart's repetition of the word "I" underscores the individual person doing the seeing, and the apparently personal, subjective basis of what he comes to know. Basing judicial judgments on mere subjective preferences is inconsistent with what is supposed to give judges their authority, and inconsistent with what Justice Stewart himself said many times about judging.[46]

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reason to conclude that some emotions are "bad" hardly precludes a subsequent role for the emotions that are judged "good."

44. Significantly, Professor Fiss concedes that reason can sometimes operate destructively. *See id.* at 792–93, 802 (critiquing uses of rationality in law and economics and noting danger of abstraction). But he immediately adds that "it need not." *Id.* at 802. Likewise, although emotions and nonrational elements in the law may sometimes lead to problems, they "need not." It is no more valid to move from a critique of particular manifestations of emotion to a general critique of emotion than it is to move from a critique of particular forms of rationality to a general critique of rationality.

45. A similar general perspective is reflected in Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994); Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Martha Minow, *Stories in Law*, *in* LAW'S STORIES, *supra* note 18.

46. *See Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States: Hearing Held Before the Committee on the Judiciary*, *in* THE SUPREME COURT OF THE UNITED

It seems quite clear to me that Justice Stewart did not think he was applying a personal, idiosyncratic notion of "hard-core pornography." Indeed, he thought just the opposite—that "hard-core pornography" was a category of pornography that virtually *all* people would view as beyond the pale, that virtually all would think suppressible.[47] This means that no sex-related speech could be suppressed outside of the very rare case in which virtually everyone *shares* a view about the material, the very opposite of a test that privileges idiosyncratic views or that enshrines the tastes of one sector or class of society. This requirement of near consensus was self-consciously a speech-protective standard of wide tolerance allowing only the most minimal censorship, and it actually gives more guidance than the vague, multifactor test that the Court's majority has used. Thus, those today who want more regulation of pornography can criticize Justice Stewart on the ground that his legal standard requires too broad a consensus before allowing censorship but not, I think, on the ground that his measure of "hard-core pornography" is too personal to him.

But the insistent "I" of "I know it when I see it" does remind us that at least Stewart's legal standard is his alone, and that perhaps explains why the phrase sometimes comes up in current feminist debates about pornography. Some feminists criticize our current, rather permissive, law of pornography on the ground that it was made largely by men and has neglected the perspective of women, particularly the way that pornography distinctively harms women. Given this, the phrase "I know it when I see it" invites, even if it does not justify, an obvious criticism from some feminists: What you see is not what I see. What you judge acceptable is not what I judge acceptable. What you claim is reality is not what I claim is reality. And most sharply of all, what

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STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1975, at 142 (Roy Mersky & J. Myron Jacobstein eds., Supp. 1977) ("[F]or me there is only one possible way to judge cases, and that is to judge each case on its own facts of record, under the law and the United States Constitution, conscientiously, independently, and with complete personal detachment."); Helaine M. Barnett et al., *A Lawyer's Lawyer, A Judge's Judge: Justice Potter Stewart and the Fourth Amendment*, 51 U. CIN. L. REV. 509, 513 (1982) (quoting speech in which Stewart argued that judges "are not free to decide cases according to 'personal predilections'"); *Stewart Retirement Press Conference*, *supra* note 7, at 36 ("[I]t is the first duty of a Justice to remove from his judicial work his own moral, or philosophical, or political, or religious beliefs . . . ."); *cf.* Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) ("I think this is an uncommonly silly law. . . . But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.").

47. The only case that Stewart cites in *Jacobellis* when he invokes the "hard-core pornography" standard, People v. Richmond County News, Inc., 175 N.E.2d 681, 682 (N.Y. 1961), explicitly insisted that its narrow standard allowed "only those prohibitions which find the widest acceptance, and which reflect *the most universal* moral sensibilities." *Id.* (emphasis added). Although this understanding of his standard was admittedly indirect in *Jacobellis* itself, when Justice Stewart explicitly developed what he meant by "hard-core pornography" two years later in his dissent in Ginzburg v. United States, 383 U.S. 463, 499 & n.3 (1966) (Stewart, J., dissenting), he underscored that his standard permitted suppression of only what "the *almost universal* judgment of our society" "has long" deemed suppressible. *Id.* at 499 (emphasis added).

you claim is reality you have too long had the power to declare *is* reality—for your power gives you the capacity to define what you know as "the truth," to make your partial vision a claim of near-universal truth, to make what seems sensible from your situated vantage point the law of the land.[48]

I do not disagree with the concerns about subjectivity, or with concerns that laws and social practices that claim to serve us all may really reflect the interests and perspectives of men. The fashionable phrase in academic circles these days is that reality, including law, is "socially constructed." There is much truth to that. On the other hand, to say that reality or law is "socially constructed" hardly means that what has been socially constructed is bad, or that it was constructed in order to promote narrow interests.

To the extent that "social construction" and "subjectivity" are problems, the answers, if there are any, lie with more open processes and personal self-awareness. We need structures of procedure by which alternative perspectives can be heard, and we need more diverse lawmakers. But once again, individual temperaments matter along with institutional structures—they are both part of what Stuart Hampshire has called the "civility" of process, a civility that assures that all sides have equal access and are heard.[49] Only judges who have a temperament of open-mindedness, who are aware of their own subjectivity and its potential pitfalls, will be able to hear what those given a podium actually say. If Justice Stewart's phrase "I know it when I see it" is read as an acknowledgement of the subjectivity that exists in judging, we should see this acknowledgement as a step that stimulates responses and even challenges—although I think the results Stewart reached in this area are pretty much the right ones.

III

I have thus far discussed how judges decide cases, but I want to turn now to how they present their decisions to the public through judicial opinions. One concern raised by Justice Stewart's *Jacobellis* opinion is that it seems to contain so little justification for its conclusion. This concern may be a bit exaggerated for what is after all only a concurring opinion. But I do want to

48. *See, e.g.*, Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 325 (1984); *see also* Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990) (discussing contextualized judgment in normative decisionmaking); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880–85 (1990) (discussing "positional" truth as situated and partial); *cf.* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (criticizing some feminists for themselves discounting women's situated experiential insights, including women's descriptions of pleasure).

49. Stuart Hampshire, *Liberalism: The New Twist*, N.Y. REV. BOOKS, Aug. 12, 1993, at 43, 47.

defend the opinion, and to do so I must say more about judicial opinions generally, particularly about their persuasiveness and candor.

There are three main functions that a judicial opinion serves: first, to give guidance to other judges, lawyers, and the general public about what the law is; second, to discipline the judge's deliberative process with a public account of the decision, thus deterring error and corruption; and, third, to persuade the court's audiences that the court did the right thing.

In the traditional account, giving reasons is the primary way that the three main functions of the opinion are fulfilled. From that perspective, all three functions of opinion-writing might seem poorly served by the brief and conclusory nature of Stewart's *Jacobellis* opinion. First, the opinion might be faulted for failing to provide sufficient guidance to others—although, as I have argued above, the "hard-core pornography" standard voiced in Stewart's opinion provides more guidance than the plurality's vague, multifactor test. Certainly it provided more guidance about Stewart's own views than if he had followed the quite common judicial practice of joining a majority opinion in spite of reservations about some of its reasoning, only to make differences explicit when deciding later cases.[50] Second, the conclusory terms of the opinion probably limited its self-disciplining effect somewhat—although, as argued above, there is more rational argument and pressure of thought in the opinion than critics usually acknowledge, and probably more of a self-disciplining effect in articulating those arguments than in silently joining someone else's opinion. Lastly, the limited amount of reasoned argument in this brief concurrence arguably restricts the persuasiveness of Stewart's opinion.

But it should come as no surprise that, even though I do not discount the central importance of reasoning in judicial opinions, I do not believe that rational argument is the only important aspect of an opinion. The reason is largely connected to the third function of an opinion—persuading its audience that the judge has done the right thing—since persuasion does not come from rational argument alone.

The persuasiveness of an opinion includes reasoning, of course—indeed, broader kinds of reasons than the traditional account usually accepts. In the traditional account, what counts are only reasons of *pedigree*, a judge's argument that he is following preexisting law. But, in fact, a judge also often gives reasons based on *policy and social consequences*. These arguments

50. *See* Antonin Scalia, *The Dissenting Opinion*, *in* JOURNAL OF SUPREME COURT HISTORY: 1994 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 33, 42 (1994) (noting that writing separate opinions avoids having judges' legal views submerged within an artificially unanimous opinion); *see also* Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990).

suggest that courts themselves think that the legitimacy and authority of their judgments depend not only on a decision's pedigree, but also on the court's broader ability to generate *prospective agreement* that it is doing the right thing. Courts achieve this by being as broadly persuasive as possible.

But the methods of persuasion include strategies other than giving reasons. Such methods of persuasion were until recently the self-conscious subject matter of training in "rhetoric," once the core of legal training. Judges use some of these methods self-consciously, such as shaping the facts so that the equities seem to favor the winning party. Others they use unselfconsciously. All have an effect on an opinion's persuasiveness and how audiences receive it. All involve persuasion without reasoning.

For example, one way judicial opinions persuade is by presenting the author as someone with an admirable character. In some cases, the judge has a preexisting public identity that makes him or her distinctively persuasive as the opinion-writer. An example of this is Justice John Marshall Harlan's opinion for the Court in *Cohen v. California*,[51] reversing on First Amendment grounds a man's conviction for wearing a jacket inscribed with a vulgar anti-Vietnam War slogan. Harlan's identity as a principled conservative and cultivated patrician gave his constitutional defense of Cohen's vulgarity added credibility. But in many cases, the judge etches a self-characterization in the text of the opinion itself by establishing a voice or by introducing a word or detail that gains the reader's trust.[52]

More obviously, courts use rhetoric in the narrower sense of particular language or turns of phrase that are designed to persuade. Judge Pierre Leval, one of the very finest judges sitting today, has recently criticized such rhetoric in judicial opinions as distracting both judges and their readers from careful legal reasoning.[53] But once one appreciates the broad persuasive function of judicial opinions, the place of such rhetorical means (in moderation) seems undeniable, and probably inescapable. They can be rhetorical measures with

51. 403 U.S. 15 (1971).

52. Justice Harlan's opinion in *Cohen* contains examples of this as well. Consider simply Justice Harlan's first sentence: "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance." *Id.* at 15. The sentence immediately suggests a reflective judge whose ongoing deliberation about the case has apparently led him to revise his own first impressions; who, in rather scholarly fashion, is concerned more about the case's broader constitutional significance than the defendant's particular deeds; and whose locution—"first blush," "our books," "no small significance"—is suggestive of a rather old-style and modest manner. Thus, before we are told anything at all about the case, we are quietly introduced to the character of the judge deciding it—a character so temperamentally different from what we soon learn about the defendant that we are encouraged to conclude that the ruling in the defendant's favor must truly rest upon principled constitutional grounds.

53. Pierre N. Leval, *Judicial Opinions as Literature*, *in* LAW'S STORIES, *supra* note 18.

a long line that sweeps through an opinion like a personality—for example, the opinion of Justices O'Connor, Kennedy, and Souter in the *Casey* abortion case, which had a grandeur and an intense but fine-tuned eloquence that suited the purpose of bolstering the Court's legitimacy and the aspirational quality of our Constitution.[54] Chief Justice Earl Warren's opinion for the Court in *Brown v. Board of Education* is another example.[55] *Brown* is often described as an opinion *without* rhetoric, but nothing could be further from the truth. In contrast to *Casey*, *Brown*'s rhetoric was designedly plain and understated, and it was designedly nonaccusatory. But that was the point, for that was the rhetoric that suited Earl Warren's persuasive purposes in this instance. His main audience was the white South, which he did not wish to inflame further with fevered language and a tone of blame.

Potter Stewart was a master of rhetoric in this highest sense. His character, preexisting all his opinions but also revealed in them, was the highly intelligent, open-minded lawyer-judge with great good sense. He knew the tang of a well-chosen fact and deployed it with telling effect in his opinions. But most obviously of all, he created enduring sentences that distilled the essence of a case with great persuasiveness: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[56] Warrantless electronic surveillance of a public phone booth was an unlawful search, said Stewart, because "the Fourth Amendment protects people, not places."[57] A quick, nighttime trial was unacceptable because "swift justice demands more than just swiftness."[58] "Property does not have rights. People have rights."[59] "[T]he Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep."[60]

"I know it when I see it" is a turn of phrase of this sort, and, like any turn of phrase, it gains its persuasiveness from a distinctive fusion of rhetoric and sense. The phrase seems suitably connected to the essence of what pornography is: something that produces a certain direct and immediate effect in its audience. There is a common-sense aptness and appeal in a phrase claiming that what is pornographic is knowable through an automatic process,

54. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
55. 347 U.S. 483 (1954).
56. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).
57. Katz v. United States, 389 U.S. 347, 351 (1967).
58. Henderson v. Bannan, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting) (opinion written prior to his appointment to Supreme Court).
59. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).
60. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

that equates sight and knowledge here, and that expresses this thought with simple, monosyllabic directness.

But a more generally important dynamic of persuasiveness is at work in Stewart's opinion: Here, as in many other contexts, persuasiveness is affected by candor. To a remarkable degree, Justice Stewart's opinion is about the problems he faced in resolving this case. Like Judge Posner,[61] I would praise the *Jacobellis* opinion for its candor in openly acknowledging the limits of legal reasoning—here, the difficulty of drawing lines in the pornography area, the difficulty of capturing a complex reality in rules and definitions, and even the inescapable subjectivity of certain legal judgments. It is this rhetoric of candor that gives Justice Stewart's opinion its distinctive effectiveness.

Candor is hardly the dominant rhetorical style of judicial opinions. The typical judicial opinion is marked by a rhetoric of certainty, inevitability, and claimed objectivity, a rhetoric that denies the complexity of the problem and drives to its conclusion with a tone of self-assurance. We all recognize that legal doctrine evolves over time, and even that individual judges' views may evolve over time. But at any given moment in time, judges typically employ the language of certainty. A court may confess yesterday's error, so long as it does so with self-assurance today; indeed, it is the present self-assurance that redeems the prior error. This rhetoric of certainty seems connected to judges' perceived need to preserve the institutional authority of the court. Acknowledging complexity, ambivalence, and subjectivity, on this account, threatens the legitimacy of a decision backed by state power.

But if one accepts that there are limits to legal reasoning, then a judge's candor about these limits may contribute to an opinion's persuasiveness. This is especially true given that on today's Supreme Court the decision of a case often brings not simply one opinion but multiple opinions, a series of concurrences and dissents. The rhetoric of certainty and noncomplexity usually remains the dominant rhetoric in each of the multiple opinions, but the very multiplicity defeats the ability of any single opinion, however forcefully expressed, to enshrine any particular version of reality as the certain, simple, objective truth. Given this, the candid expressions of difficulty, uncertainty, and even subjectivity in Stewart's *Jacobellis* concurrence state no more than what is obvious to a reader confronted by a profusion of seven separate opinions in the case.

There are many examples of judicial opinions that, I think, gain in persuasiveness from self-criticism, or from an admission of uncertainty, or even from an acknowledgment of limited authority. Consider, for example,

61. *See supra* note 7 and accompanying text.

Justice Harlan's opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[62] where he admits that he initially thought the case should be decided the other way. Or consider Justice Jackson's acknowledgment in *Youngstown Sheet & Tube Co. v. Sawyer*[63] (the *Steel Seizure Case*) that he had taken a different position on the legal issue when he was Attorney General. Or consider Justice Stevens's admission in *Craig v. Boren*[64] that he was still feeling his way in developing a single standard to use in equal protection cases and was not there yet. Or consider Justice Stewart's disarming concession in *Coolidge v. New Hampshire* that when "a [legal] line is drawn there is often not a great deal of difference between the situations closest to it on either side."[65] Or, lastly, consider the rather frequent situation of the judge who admits that he dislikes the law he is voting to uphold, and would have voted differently as a legislator. That very admission of limitation and even weakness—as a judge I cannot do what I personally wish I could do—adds to the judge's persuasiveness.

I do not believe that candor is an absolute good. For example, there may have been good reasons for the Supreme Court in *Brown v. Board of Education* (*Brown II*) *not* to admit candidly the real reason that it was allowing school boards to implement desegregation "with all deliberate speed"[66] rather than immediately. That real reason, we now know from Court records, was to take account of white resistance.[67] Even assuming that the Court was correct in believing that some gradualism was necessary to avoid further inflaming Southern whites and thereby defeating desegregation altogether, candor about its reasons would have waved in front of resisters an incentive to escalate their resistance.[68] To give another example, it may be unseemly if a judge describes too candidly the details of a pornographic film at issue. (Justice Tom Clark wrote such a vividly accurate description of the book *Fanny Hill* in his opinion in *Memoirs v. Massachusetts*[69] that newspapers printed the description and public interest in the book increased.[70]) But there should be a strong presumption for candor. And when we see it we should praise it.

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62. 403 U.S. 388, 398 (1971) (Harlan, J., concurring).
63. 343 U.S. 579, 647 (1952) (Jackson, J., concurring).
64. 429 U.S. 190, 212 (1976) (Stevens, J., concurring).
65. 403 U.S. 443, 474 (1971).
66. 349 U.S. 294, 301 (1955).
67. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 587, 611–12 (1983).
68. *Id.* at 665–74.
69. 383 U.S. 413, 445–46 (1966) (Clark, J., dissenting).
70. *See* Charles Poore, *Books of the Times*, N.Y. TIMES, Apr. 28, 1966, at 41, *cited in* C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 41 n.167. This episode may be related to a characteristic but striking dynamic of pornography, where the very effort to suppress it enhances its allure. *See supra* note 29.

IV

It is clear, I hope, what my main point is: Law is not all reasoning and analysis—it is also emotion and judgment and intuition and rhetoric. It includes knowledge that cannot always be explained, but that is no less valid for that.

But the stakes for me are larger. They also include matters about legal scholarship and law teaching, and their relation to the world of judging. This Essay, I confess, is in part a reaction to my uneasiness about certain trends I see in the legal academy nowadays—what I see as excessive rationalism in some legal scholarship, and an excessive abstraction from real law made in real institutions.

Consider, for example, the field of law and economics, arguably the most important and valuable scholarly movement of the last twenty years. All too often (not always, of course) scholars in this field assume much too much rationality in human affairs. They make extravagantly unreal assumptions about the degree to which individual human action is based upon rational calculation; build abstract rational models that leave out muddy but utterly real-world variables; view costs and benefits in quantitative rather than qualitative terms; and focus on instrumental rationality rather than on murkier questions of goals.[71]

Although very different in orientation, many critical legal studies scholars and interdisciplinary scholars tend toward their own sort of rationalist abstraction. To be sure, critical legal studies scholars have emphasized the indeterminacies of traditional legal reasoning and often been quite dismissive of claims on its behalf (more so than I would be); and at times they have praised the virtues of a nonrationalist intuition.[72] Yet its practitioners often pursue highly rationalistic projects of their own. They often use an abstract, philosophical vocabulary; rarely address issues of immediate social relevance, in spite of insistently "political" claims; and generally believe in and search for underlying structural principles of legal thought. Perhaps the two best-known critical legal studies scholars have, respectively, tried to "reduc[e] every human conflict to a single elementary contradiction" or have revealed "a devotion to

71. I acknowledge that many law-and-economics scholars also display a significant distrust of reason in certain respects. For example, although these scholars often assume that individuals are rational wealth maximizers in making their decisions in the marketplace, they often distrust the capacity of the government to devise adequately rational regulation to displace the market (even if there are acknowledged market imperfections). In addition, although law-and-economics scholars often tend to embrace rationality to devise appropriate means to achieve certain ends, they are usually very dubious about the ability of reason to help make choices among the ends themselves.

72. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1775–78 (1976).

the philosophical rationalization of all legal norms within a comprehensive scheme of values based upon nonlegal principles of a highly abstract sort."[73]

At the other extreme, though, I am often unsatisfied by the work of the so-called "storytelling movement" among legal scholars, which I think frequently moves too far in the other direction. Particularly popular among certain critical race scholars and feminist scholars, this work largely consists of stories of oppression or mistreatment (or defenses of such storytelling as a type of legal scholarship). Much of this work, I think, puts too much emphasis on emotions, particularity, and subjectivity, and too little on reasoned analysis or general rules. The legal storytellers often give us striking and challenging narratives without providing us the analysis necessary to move from story to action, a movement the storytellers would clearly like us to make. They often tell us little about how to make choices among competing stories (since competing and conflicting stories there surely will be); simply assume that their stories will "work" without exploring the complex relations between storytellers and listeners that is the preoccupation of much narrative theory in other disciplines; give us no guidance in assessing how typical their stories are; and valorize the emotional reactions such stories are designed to produce without adequately affirming the need for reasoned argument too. As a result, readers not already loyal to the storyteller's cause are often at a loss about how to evaluate the stories and their normative and policy implications.[74]

Legal scholarship, of course, comes in nearly endless varieties. Much of it is unrelated to the categories I have just mentioned and, in any event, is wonderfully impressive and arouses none of the concerns I have discussed.[75] But too many of us in the academy today seem to have lost a balance that I think the study of law needs, a balance between the rational and the nonrational, analysis and common sense, generalization and particularization, the ideal and the real. This is the balance that makes up wisdom and good judgment, and that, I think, our present and future judges need to hear in our writings and in our teaching.

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73. KRONMAN, *supra* note 31, at 247, 249 (discussing Duncan Kennedy and Roberto Unger, respectively).

74. *See* Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES, *supra* note 18; *see also* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

75. Within legal theory itself, in fact, there has recently been a small but significant revival of a self-consciously "pragmatist" approach to law that explicitly seeks to avoid some of the pitfalls I have discussed. *See* PRAGMATISM IN LAW & SOCIETY (Michael Brint & William Weaver eds., 1991); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569–1928 (1990); RICHARD A. POSNER, OVERCOMING LAW 1–29, 387–405 (1995); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1332 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

If we recognize how central nonrational qualities are to both judging and lawyering, we in law teaching should be somewhat uneasy about what we are doing. Overwhelmingly, we train our students in rational analysis—building theories, developing policies, manipulating doctrines. We pursue concepts not wisdom, reward analysis not good sense. To the extent we aspire to be models for our students, it is typically in these respects. But I think we should try putting more value on wisdom and judgment than we currently do. I will readily concede that the scholar of genius is typically an extremist, not wise, and that, to scholars of genius, calling for wisdom may seem like a call for mediocrity. But few of us are geniuses whose transcendent talent and visionary insight can justify a lack of good sense. We should consider good sense, wisdom, and judgment part of the currency of our professional lives—part of how we value ourselves and others, part of what we hope to teach our students and convey in our scholarship. *How* to teach wisdom and intuitive good sense is quite another question, of course, and a murderously difficult one. These may be qualities that cannot be defined or taught by rules, and the only effective way to learn them may be by example, by watching mind and character analyze legal problems day-by-day, and by seeing the manner and habit of good judgment in action. But is it not possible to provide these examples by how we teach and by the substance and the tone of what we write?

I have said that the stakes are somewhat larger than I have let on. That is also because much of what I have said about law seems clearly true to me about ordinary life too—indeed, someone like my dear friend Owen Fiss would probably say that of course they are true of ordinary life, they simply have no place in law.[76] But given the larger resonance for me, I would like to close by recalling the last sentences of one of the great, if quite unfashionable, novels written this century, Saul Bellow's *Mr. Sammler's Planet.*

The elderly Mr. Sammler, a civilized intellectual refugee crankily at odds with the vulgar vitality of New York City in the 1960s, has already observed in the book's opening paragraph that "[i]ntellectual man had become an explaining creature. . . . [But f]or the most part, in one ear out the other. The soul . . . had its own natural knowledge."[77] At book's end, Mr. Sammler is standing in a hospital room over the dead body of his friend Elya Gruner, feeling stripped of yet one more thing. He removes the sheet covering Elya's

76. Fiss, *supra* note 40, at 801.
77. SAUL BELLOW, MR. SAMMLER'S PLANET 3 (1970).

face, looks at it, and in a mental whisper comes as close as this man gets to prayer:

> "Remember, God, the soul of Elya Gruner, who, as willingly as possible and as well as he was able, and even to an intolerable point, and even in suffocation and even as death was coming was eager, even childishly perhaps (may I be forgiven for this), even with a certain servility, to do what was required of him. . . . He was aware that he must meet, and he did meet—through all the confusion and degraded clowning of this life through which we are speeding—he did meet the terms of his contract. The terms which, in his inmost heart, each man knows. As I know mine. As all know. For that is the truth of it—that we all know, God, that we know, that we know, we know, we know."[78]

We know it, perhaps, even before we see it—but certainly we know it when we see it.

78. *Id.* at 313.