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The perceptive judge

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ABSTRACT

This article puts judicial perception at the centre of adjudication and of what makes a judge a good judge. It offers a philosophical and empiricist account of judicial perception. Judicial perception is presented as a special ethical, character-dependent skill that a judge needs in order to adequately attend and respond to the cases he is confronted with. In this account ‘thick (legal) concepts’ play a vital role. Throughout the text Ian McEwan’s novel *The Children Act* is used as an illustrative source.

KEYWORDS

The morality of adjudication; virtue jurisprudence; moral and judicial perception; law as skilled action; thick concepts and law; law and literature; McEwan’s *Children Act*

1. Introduction

Among fellow judges, Fiona Maye was praised, even in her absence, for crisp prose, almost ironic, almost warm and for the compact terms in which she laid out a dispute. The Lord Chief Justice himself was heard to observe of her in a murmured aside at lunch: ‘Godly distance, devilish understanding, and still beautiful.’¹

This is a passage from McEwan’s novel *The Children Act*, one of those rare novels that give voice to the ‘internal point of view’ of a judge.² In particular, McEwan offers a remarkably clear account of how the quality of Maye as a judge is largely constituted by the way she *perceives* the cases she is confronted with. As readers we are invited to empathically engage with what Maye sees when the parties in a legal dispute appear before her in court, with how she takes in their respective situations and with what she deems to be an adequate judicial response.

From the perspective of legal theory, it is this feature of McEwan’s novel that makes it so interesting. Up until today the way judges perceive and, connected to this, their perceptive ability have received little attention in legal discourse – at least not as part of a normative approach to adjudication. Adjudication is most often conceptualised as a practice in which judges consciously apply rules and principles. To date, the focus has predominantly been on the actual decisions judges take, the underlying justificatory rules and principles, and the meaning of the decision for the legal system. The capacity of judgment – understood as an exclusively intellectual capacity – is considered to be central for a good judge.

This article, by contrast, puts judicial perception at the centre of adjudication and of what makes a judge a good judge. It offers a philosophical and empiricist account of

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¹Ian McEwan, *The Children Act* (Vintage Books 2014) 13.

²HLA Hart, *The Concept of Law* (Clarendon Law Series, 3th edn, Oxford University Press 2012 [1961]) 90–91.

judicial perception. Judicial perception is presented as a special ethical – and thus character-dependent – skill that a judge needs to adequately attend and respond to the cases he is confronted with.

I will proceed as follows. First, I briefly elaborate the claim that judicial perception has received little attention in legal discourse and how this is, at least on the conceptual level, related to dominant philosophical premises in practical philosophy. Next, the central features of judicial perception will be laid out, and subsequently the question of how we can best account for the substantial and legal bearing of the results of judicial perception will be addressed. We shall see that ‘thick (legal) concepts’ play a vital role in this regard. Finally, I will briefly explain what role explicit rules, principles and reflection play in an account of adjudication that gives a prominent place to judicial perception and how the idea that adjudication is also a reason-giving practice is accommodated for. McEwan’s novel is used throughout as an illustrative source.

2. Legal discourse and (not) taking perception seriously

As suggested in the introduction, one of the reasons why the perceptive ability of judges has received little attention in legal discourse is arguably that adjudication is often understood as a form of decision-making by way of rule or principle application.

Questions as to how a judge should perceive a legal case are hardly dealt with, at least not as part of discussions on the nature and justification of adjudication.³ This is also expressed by the fact that in legal theory concrete legal cases are hardly discussed. The cases that are discussed are typically the so-called ‘hard cases’ for which rules or principles do not offer easy outcomes, for instance because they conflict or are vague.

This perception-evasive approach to adjudication is most clearly epitomised by Dworkin’s theory of adjudication.⁴ To arrive at the right decision(s) Dworkin’s ideal judge ‘Hercules’ must give priority to the general rather than to the concrete. For each and every case he must ‘step back’ and interpret settled law in the best light, that is, in the light of the most convincing background theory of political morality, and apply it to the case in order to get the right outcome.⁵ How Hercules actually ‘perceives’ the cases he is confronted with remains unclear and seems to be a peripheral issue.⁶

Sure, an important critique on this fixation on rule and principle application has been voiced by the Legal Realists and later on by members of the Critical Legal Studies Movement.⁷ In his provocative book *Courts on Trial*, Jerome Frank for instance stressed the importance of the selection and valuation of the facts in legal proceedings for the outcome of a legal case: ‘[n]o matter how certain the legal rules may be, the actual

³See for a critique on the marginal place that issues of EPF (evidence, proof and fact-finding) still have in legal education: William Twining, ‘Taking Facts Seriously – Again’ (2005) 55 *Journal of Legal Education* 360.

⁴See for instance: Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); *A Matter of Principle* (Harvard University Press 1985); *Law’s Empire* (Harvard University Press 1986); *Justice for Hedgehogs* (Harvard University Press 2011).

⁵Dworkin, *Taking Rights Seriously* (n 5) 105–23; *Law’s Empire* (n 5) 255; Ronald Dworkin, ‘In Praise of Theory’ (1997) *Arizona State Law Journal* 353.

⁶Lawrence B Solum, ‘The Rule of Law and Equity’ in Ian Shapiro (ed), *The Rule of Law (Nomos XXXVI)* (New York University Press 1994) 128.

⁷Brian Leiter, ‘American Legal Realism’ in W Edmundson and M Golding (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2005); David Kairys, ‘Introduction’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Basic Books 2010).

decisions of judges will remain at the mercy of the courts' fact-finding.⁸ Frank held that if judicial decision-making is to have any objective bearing, more intellectual energy should be put into studies of the way those who participate in a legal proceeding (should) deal with the facts.⁹

Indeed, in the aftermath of Frank's work, issues of fact-finding, of proof and evidence started to receive considerable attention both in legal literature and in practice.¹⁰ Yet to date these topics are still relatively marginal in jurisprudence and legal education.

In addition and more importantly, the issue of 'fact-finding' is generally considered to be a value-free matter for which either technical, scientific expertise or common sense is needed. In so far as perception is held to play a role in the domain of 'fact-finding', it is generally treated as neutral and extra-legal knowledge. Because judicial perception – as it will be laid out below – assumes matters of values and facts are inextricably linked, it is not surprising that this capacity has hardly received attention in legal scholarship.

This perception-evasive feature of legal discourse is not fortuitous, nor an idiosyncrasy or an arbitrary mistake. Rather, it fits an analytical strand in practical philosophy that hinges heavily on some influential and mutually related (meta-)ethical premises.

Before concluding this section, I will briefly go into these premises, because together they can offer, at least on the conceptual level, a rationale for why judicial perception has received relatively little attention in legal discourse.

One such premise is that as far as practical matters are concerned, a strict dichotomy exists between the natural world and the world of values. How things are and how they should be are categorically different issues.¹¹ Also the capacities needed to attain knowledge in both fields are modally distinct. Whereas the natural world is either the object of commonly shared and thus unproblematic basic capacities, like perception, or of scientific research, knowledge of values is to be generated by means of discursive argument.

A second premise is that despite the said dichotomy between the world of facts and the world of values, knowledge about both domains is understood as propositional, as a *knowing that* as opposed to a *knowing how*.¹² In both domains knowledge is subject to the same formal rules, i.e. those of theoretical reason, because – to use Kantian terms – reason is 'only one and the same'.¹³ Like natural science, practical reason should strive towards systematisation, that is, towards consistency, coherency, generality and completeness. Additionally, in the same way that one's personal features are supposed to be irrelevant in matters of science, these may not interfere with matters of value either. All factors that characterise someone's individuality must be 'turned off'.¹⁴ Practical

⁸Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1973 [1949]) 15.

⁹See for an interesting interpretation of Frank's jurisprudence, which stresses its normative bearing and even qualifies it as virtue-jurisprudence *avant la lettre*: Charles L Barzun, *Jerome Frank and the Modern Mind* (Virginia Public Law and Legal Theory Research Paper No. 2009–01) SSRN <<https://ssrn.com/abstract=1460697>> accessed 14 May 2017.

¹⁰William Twining, 'Taking Facts Seriously' (1984) 34 *Journal of Legal Education* 22, 24.

¹¹This dichotomy is introduced by Hume's separation-thesis, which, roughly put, boils down to the idea that one cannot uncontroversially infer an 'ought' from an 'is': cf David Hume, *A Treatise of Human Nature* (Penguin Books 1985 [1740]) section 3.1.1. John McDowell sees this 'dualism of norm and nature' as the source of all 'the familiar dualisms of modern philosophy': John McDowell, *Mind and World* (Harvard University Press 1996) 93–94.

¹²See: Gilbert Ryle, 'Knowing How and Knowing That' (1945) 46 *Proceedings of the Aristotelian Society* 1.

¹³Immanuel Kant, *Immanuel Kant: Practical Philosophy* (The Cambridge Edition of the Works of Immanuel Kant, Cambridge University Press 1996) 237–8.

¹⁴Within contemporary practical philosophy this impersonal and detached ideal of judgment is most famously expressed by John Rawls' device of the 'veil of ignorance', which aims to prevent that moral judgments be polluted by situated

reason must be character-independent and in this sense exclusively intellectual and impersonal.

A final and related premise is that practical reason is problem – and judgment-centred.¹⁵ It is typically expressed in deliberate choices people make in difficult and clearly confined choice situations.¹⁶ These situations require people to step back and consciously deliberate about what to do. Ethical life thus primarily consists of human beings actively and consciously imposing their values on an in itself disenchanted and value-neutral world. People's daily, less problematic, unreflective and habitual ways of coping with value-laden situations are merely phenomenological corollaries or side issues.

As said, these mutually related premises that are dominant within analytical practical philosophy can at least on the conceptual level provide a rationale for the perception-evasive character of legal discourse. This rationale would go as follows. Adjudication is in essence a judgment-centred institutional practice that seeks to resolve problems for complex choice-situations. It does so by imposing rules and principles on an in itself value-free state of affairs, i.e. on well-confined constellations of facts. The central task for judges is then to solve these legal cases, these problems, in a reasonable and systematised way. For this purpose, the central ability judges need is that of judging, an exclusively intellectual, impersonal and conscious activity for which the judge should 'turn off' his personal features. Other features that from the 'internal point of view' may characterise adjudication and give expression to the (for instance pre-reflective and unproblematic, natural) way a good judge experiences and thinks about a legal case can be simply ignored as negligible phenomenological accessories.

As we shall see below, by assigning judicial perception a prominent place in our understanding of adjudication, these very premises are – albeit implicitly – rejected.

3. Philosophical background

Before the central features and implications of judicial perception will be expounded, first the philosophical stage will be set.

In the beginning of Western thought both Plato and Aristotle addressed the issue of perception in relation to knowledge. Notably Aristotle stressed the importance of perception for practical wisdom as invaluable for people's lives, social practice and society to flourish.¹⁷ He called practical wisdom the 'eye of the soul' and asserted that perception has both a cognitive dimension and a sensual dimension to it.¹⁸

In line with his embodied account of perception in Aristotle's ethics we find the suggestion that perception is a kind of skill or expertise in the empiricist sense.¹⁹ In the same way that we become builders by building and cithara-players by playing the cithara, we learn to

considerations that derive from one's particular place in society, one's class position, one's social status and so on: John Rawls, *A Theory of Justice* (Harvard University Press 1999 [1971]) 118–23.

¹⁵For prototypical examples of this 'judgement centred' approach to ethics see: Jean Piaget, *The Moral Judgment of the Child* (Free Press 1935); John Rawls, 'Outline of a Decision Procedure for Ethics' (1951) 60 *The Philosophical Review* 177.

¹⁶Michael Oakeshott, 'The Tower of Babel' in Stanley G Clarke and Evan Simpson (eds), *Anti-Theory in Ethics and Moral Conservatism* (State University of New York Press 1989); Iris Murdoch, 'Vision and Choice in Morality' in Peter Conradi (ed), *Existentialists and Mystics: Writings on Philosophy and Literature* (Penguin Books 1997) 76–98.

¹⁷Aristotle, *Nicomachean Ethics* (Oxford University Press 2002) 1144a30–31.

¹⁸*ibid* 1142a15–171142a 25–31.

¹⁹For this interpretation I draw on Matt Stichter, 'Ethical Expertise: The Skill Model of Virtue' (2007) 10 *Ethical Theory and Moral Practice* 183, 191–3.

perceive well by trying to perceive well on all kinds of occasions.²⁰ One acquires capacity to adequately perceive in relation to practical matters most of all through training, imitation and experience and to a lesser degree by explicit teaching and theoretical understanding. Hence, it is not surprising that according to Aristotle one should take recourse to the views of the elderly as part of one's development, for 'they have an eye, formed from experience'.²¹

In non-Western intellectual traditions such as Taoism, Confucianism and Buddhism, perception has also been acknowledged as a crucial source of ethical knowledge that one can develop analogous to a skill.²² One of the most influential Buddhist philosophers, Nagarjuna, describes the eye as 'the faculty or power of sight, yielding a view, an idea, a judgment, of the nature of things'.²³ According to Nagarjuna one can acquire a clear vision by cleansing the eye of flesh, which is perverted, 'associated with defilements and prompted by afflictions'.²⁴ Only by practising meditation can one try to extinguish this perversion so as to clearly see the true nature of things.²⁵

In contemporary Western moral philosophy, particularly in the field of modern virtue-ethics, various accounts of practical wisdom exist that assign a central place to perception. Neo-Aristotelian perceptive theories of practical wisdom have for instance been proposed by John McDowell, David Wiggins, and Martha Nussbaum.²⁶ In a more Platonic vein Iris Murdoch and also Lawrence Blum have developed an account of moral wisdom in which perception plays a vital role.²⁷

Recently, cognitive science has offered empirical support for the idea that perception is crucial for ethical knowledge and that it can be understood as a kind of well-developed skill or expertise. Cognitive scientists have shed light on the role of perception in all kinds of skills such as medicine, chess and martial arts.²⁸ These findings have in turn been used as corroborations and sources of inspirations for a variety of perceptive approaches to practical wisdom.²⁹

Drawing on the insights of said philosophical traditions for our account of judicial perception, it is helpful to differentiate between 'simple' perception, 'skilled' perception and

²⁰Aristotle (n 17) 1103a31–1103b2.

²¹ibid 1142a27–28; 1143b12–14.

²²See for a brief discussion of the account these traditions offer of ethical expertise: Francisco J Varela, *Ethical Know-How: Action, Wisdom, and Cognition* (Stanford University Press 1992).

²³Ramanan K Venkata, *Nagarjuna's Philosophy: As Presented in the Maha-Prajnaparamita-Sastra* (Motilal Banarsidass Publishers 1966) 120.

²⁴ibid 125.

²⁵ibid 126.

²⁶John McDowell, 'Virtue and Reason' in John McDowell (ed), *Mind, Value and Reality* (Harvard University Press 1998) 50–73; David Wiggins, 'Deliberation and Practical Reason' in Amélie O Rorty (ed), *Essays on Aristotle's Ethics* (University of California Press 1980), 221–40; Martha C Nussbaum, 'The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality' in *Love's Knowledge: Essays on Philosophy and Literature* (Oxford University Press 1990) 168–95.

²⁷Lawrence Blum, 'Moral Perception and Particularity' (1991) 101 *Ethics* 701; Murdoch, 'Vision and Choice in Morality' (n 16), 76–98; Iris Murdoch, 'The Idea of Perfection' in Peter Conradi (ed), *Existentialists and Mystics: Writings on Philosophy and Literature* (Penguin Books 1997) 299–336.

²⁸See for instance: Benjamin Bloom, 'The Hands and Feet of Genius: Automaticity' (1986) *Educational Leadership* 70; Hubert Dreyfus and Stuart Dreyfus, *Mind over Machine: The Power of Human Intuition and Expertise in the Era of the Computer* (The Free Press 1986); Anders K Ericsson and Neil Charness, 'Expert Performance: Its Structure and Acquisition' (1994) 49 *American Psychologist* 725; Stuart E Dreyfus, 'The Five-Stage Model of Adult Skill Acquisition' (2004) 24 *Bulletin of Science Technology & Society* 177.

²⁹e.g. Varela, *Ethical Know-How* (n 22); Jennifer Wright, 'The Role of Moral Perception in Mature Moral Agency' in Jeremy J Wisniewski (ed), *Moral Perception* (Cambridge Scholar Publishing 2007).

‘ethical’ perception.³⁰ For as we shall see in the next section, judicial perception will be presented as a species of ethical perception. Despite their telling differences, these forms of perception have in common that they consist of an understanding that is embodied, situated, involved and hence also linked to a certain phenomenology.

Simple perception is at work in perceiving what has been qualified – albeit not undisputedly – as ‘low level’ properties, including basic colours, motions and shapes.³¹ It concerns the ability to grasp for instance that an apple lies on the table or that a flower is red. For these kinds of features of the world we simply assume that people are equally situated to perceive adequately, as this ability is intimately linked to specific sense-organs that – other things being equal – all people possess.

By contrast, *skilled perception* is a *refined* kind of perception that one needs for more complicated matters. It is, for instance, operative in making the right move in a game of chess, or in recognising that a patient is psychotic. This kind of perception is exclusively open to a well-confined group of experts whom have gone through certain developmental stages that are characterised by instruction, imitation, training and experience.³² It is because of having successfully proceeded through these stages that experts can see things that a novice or a layman cannot perceive. As a general rule experts do not reflectively solve well-determined problems, nor do they ‘step back’ and consciously invoke abstract rules or algorithms to solve these problems. They possess what has been described as a ‘responsiveness to normative significance in a concrete situation’.³³ This kind of *knowing how* or expertise will typically be unreflective and is often connected to an experience of ‘flow’.³⁴

All this is not to deny that explicit rules and principles and conscious deliberation do have a function in (the development of) skilled perception. They are most useful for novices, and incidentally for experts, for instance in completely new situations, in case of a breakdown or in situations when experts (have to) give reasons for their judgments and actions.³⁵

Ethical perception is a *special* kind of skilled perception, a refined kind of responsiveness to situations in which the interests of others are at stake.³⁶ It enables one to take in and respond to the subtle features of the *ethical* environment that one is confronted with. One needs this ability for instance to see that a remark made during a professional meeting is discriminatory, that a particular family-relation is exploitative, or that an animal is treated cruelly. Normally ethical experts do not need to explicitly deliberate

³⁰Bridget Clarke, ‘The Lens of Character: Aristotle, Murdoch, and the Idea of Moral Perception’ (PhD dissertation, University of Pittsburgh 2003) 27–28.

³¹ibid 29.

³²Dreyfus, ‘The Five-Stage Model’ (n 28).

³³Erik Rietveld, ‘McDowell and Dreyfus on Unreflective Action’ (2010) 53 *Inquiry* 183, 187; 202. ‘By this way of describing skillful unreflective action Rietveld formulates an alternative to McDowell’s ‘responsiveness to reasons’.

³⁴Hubert L Dreyfus, ‘What is Moral Maturity? Towards a Phenomenology of Ethical Expertise’ in Mark A Wrathall (ed), *Skillful Coping Essays on the Phenomenology of Everyday Perception and Action* (Oxford University Press 2014) 148; Evan Thompson, *Mind in Life: Biology, Phenomenology, and the Sciences of Mind* (The Belknap Press of Harvard University Press 2007) 314–15.

³⁵Dreyfus, ‘The Five-Stage Model’ (n 28) 180; Hubert L Dreyfus, ‘Overcoming the Myth of the Mental: How Philosophers can Profit from the Phenomenology of Expertise’ in Mark A Wrathall (ed), *Skillful Coping Essays on the Phenomenology of Everyday Perception and Action* (Oxford University Press 2014) 188.

³⁶For this discussion of ethical perception, I largely draw on Wright, ‘The Role of Moral Perception in Mature Moral Agency’ (n 29).

about ethical matters either, again because possessing this skill leads one to more or less directly perceive a situation as value-laden and as requiring a certain response.³⁷

Like all forms of refined perception, ethical perception is developed predominantly by means of *Bildung*, i.e. of training and experience within a specific socio-cultural practice.³⁸ *Bildung* leads one to develop – to quote McDowell – ‘one’s sensitivities to kinds of similarities between situations’.³⁹ Studying ethical codes and ethical treatises will in any case not suffice, for these by themselves are unable to produce the kind refined sensitivity that leads one to perceive in a particular way.

Importantly, compared to other refined skills ethical perception is more directly linked with an agent’s character, that is, with a person’s desiderative and emotional make-up and his central concerns. In the words of Martha Nussbaum, ethical perception is a ‘complex response of the entire personality ...’.⁴⁰ Whereas an altruist, a sadist and a racist may be equally equipped to appreciate a wine’s bouquet, things are different with ethical perception; character flaws and failures can lead to perceptive failure in the ethical domain.⁴¹

Its intimate relation with one’s character, but also its other-regarding dimension explains why, unlike other skills, ethical perception has intrinsic ethical value. In the ethical realm we have reason to praise a person for his correct perception independently of his actions or decisions that stem from it.⁴² In addition, perceiving well in the ethical realm often implies that one is responsive towards a concrete other, and this is in itself a form of respect and thus of value.

If one is to develop ethical perception, a crucial obstacle that must be overcome is ‘amour propre’, an undue concern for the protection of one’s own interests, including the protection of one’s self-image (and connected to this one’s tendency towards cognitive dissonance and embracing all kinds of illusions).⁴³

Consequently, in addition to training and experience, the practice of self-critique and of introspection also plays a vital role in refining one’s ethical lens. Or as Murdoch has put it: ‘As moral agents we have to try to see justly, to overcome prejudice, to avoid temptation, to control and curb imagination, to direct reflection.’⁴⁴ Because this kind of reflection is concerned with the appropriateness of one’s perceptive results, it is highly concrete. And

³⁷Maurice Mandelbaum, *Phenomenology of Moral Experience* (John Hopkins Press 1955) 48; Dreyfus, ‘Overcoming the Myth of the Mental’ (n 35) 184; Varela, *Ethical Know-How* (n 22). Varela (n 22) 5 illustrates this point nicely in the following passage: ‘You are walking down the sidewalk thinking about what you need to say in an upcoming meeting and you hear the noise of an accident. You immediately see if you can help. You are in your office. The conversation is lively and a topic comes up that embarrasses your secretary. You immediately perceive that embarrassment and turn the conversation away from the topic with a humorous remark. Actions such as these do not spring from judgment or reasoning ...’

³⁸McDowell, *Mind and World* (n 11) 87–88.

³⁹McDowell, ‘Virtue and Reason’ (n 26) 64.

⁴⁰Martha C Nussbaum, ‘Aeschylus and Practical Conflict’ (1985) 95 *Ethics* 233, 309.

⁴¹Obviously, the claim that ethical perception is intimately linked to one’s character is sensitive to the situationist’s view that robust character-traits do not exist. See for strong replies to this idea: Julia Annas, ‘Comments on John Doris’s “Lack of Character”’ (2005) 71 *Philosophy and Phenomenological Research* 636; John Sabini and Mauri Silver, ‘Lack of Character: Situationism Critiqued’ (2005) *Ethics* 535.

⁴²Blum, ‘Moral Perception and Particularity’ (n 27) 713; Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2001) 309.

⁴³Albeit meant for the context of lawyering, see for a relevant overview of social causes of self-delusion and cognitive dissonance: David Luban, ‘Integrity: Its Causes and Cures’ (2003) 72 *Fordham Law Review* 279.

⁴⁴Murdoch, ‘The Idea of Perfection’ (n 27) 332.

because of the ongoing – albeit offline – concern with the actual object of perception at stake, this form of reflective thought can also be highly involved.⁴⁵

Given the intimate link with one's character, it may not come as a surprise that the data that are relevant for assessing a person's perceptive abilities in the domain of ethics are not limited to definite acts of judging or choosing. These data are wide-ranging and include all kinds of beings and doings, such as emotions, inner thoughts, gestures, mimic, intonation and jokes and all other kinds of spontaneous reactions.⁴⁶ For all these data may reveal a 'person's total vision of life'.⁴⁷

Obviously, people are not equally situated to get things right. We all have different starting points, different personal features, different defects and traumas and so on, all influencing both our ability to perceive well and our chances for making progress. It is also for this reason that having a clear vision on ethical matters is not something that is fully under one's control. Ethical perception always boils down to a complex combination between doing and being done.

4. Judicial perception: its central features

Now that the philosophical stage has been set, let's turn to judicial perception. I take judicial perception to be a species of ethical perception, an other-regarding,⁴⁸ character-dependent professional skill that operates in an institutional, judicial context.⁴⁹ Judicial perception enables a judge to reliably and adequately attend and respond to the cases he is confronted with. This includes having a keen eye for the situational and organisational influences that may sabotage his vision, and – as we shall see in the next section – it also includes a refined sensitivity for how best to motivate one's decisions in a concrete case.

Judicial perception must be assigned a prominent place in adjudication, as adjudication deals with individual cases and thus with 'particulars'.⁵⁰ How to respond to said particulars is not a matter of application of rules or principles, since they will always come in different, unique constellations that are unfathomable and not determinable in advance.⁵¹ Adequately grasping particulars requires a special kind of sensitivity on the part of a judge.

Judicial perception is also needed because the practice of adjudication encompasses a variety of judicial responses other than judgments or decisions; think for instance of empathetic acknowledgments of the weight of the interests at stake during court sessions. The adequacy of and the normativity involved in these immediate and not necessarily propositional responses cannot be accounted for by the idea of conscious rule or principle

⁴⁵I will come back to this point when discussing judicial perception and the role of reflection therein.

⁴⁶Murdoch, 'Vision and Choice in Morality' (n 16) 78–82.

⁴⁷*ibid* 80.

⁴⁸Adjudication is other-regarding in that it authoritatively addresses and determines the interests and rights of concrete citizens.

⁴⁹Because judicial perception is understood as a character-dependent quality, it of course fits within a tradition that can be qualified as virtue-jurisprudence, which has been famously introduced by Lawrence Solum. However, for reasons of space I will not delve into the exact differences between my account of judicial perception and other virtue-ethical approaches to legal reasoning such as those of Lawrence Solum, Amalia Amaya and Claudio Michelon. See Lawrence B Solum, 'Virtue Jurisprudence: A Virtue-Centered Theory of Judging' (2003) 34 *Metaphilosophy* 178; Claudio Michelon, *Practical Wisdom in Legal Decision-Making* (University of Edinburgh School of Law Research Paper 2010–13) SSRN <<https://ssrn.com/abstract=1585929>> accessed 14 May 2017; Amalia Amaya, 'Virtue and Reason in Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan 2011) 123–43.

⁵⁰Aristotle (n 17) 1111a1b15–17; 1142a21–26.

⁵¹*ibid* 1104a1–10; Nussbaum, 'The Discernment of Perception' (n 26) 66–75; Wiggins, 'Deliberation and Practical Reason' (n 26) 233.

application. They presuppose the kind of situational sensitivity that is encompassed by the idea of judicial perception.

By presenting judicial perception as a skill, this account does emphatically not rely on a distinct, single judicial faculty or a special sense-organ that judges possess.⁵² Judicial perception is acquired primarily by means of practice, training and experience.⁵³ Perceptive judges have been immersed in all kinds of social practices – think of family and friendships – that provide the opportunity to refine one’s ethical sensibilities. A perceptive judge has in any case started the ‘work of attention’ long before becoming a judge and over a rather extensive period of time.

Of course, the professional *Bildung* by means of legal training and extensive experience in legal practices also plays a crucial role in the development of judicial perception. Ideally, legal education is a practice in which students learn to deal, also in a non-intellectualist way, with issues of legal qualification. For instance, by being confronted with a broad spectrum of legal cases fully embedded in their social context, without the relevant facts already selected or established and without these situations already labelled as pertaining to a particular legal domain.⁵⁴

Moreover, instead of asking students to forget about their background experience and personal concerns as a ‘burden’ that hinders the ‘legal point of view’, this experience and these concerns are mobilised as a vital resource for both self-knowledge and for obtaining an engaged form of legal understanding. As to the judiciary itself: this institution not only provides for the opportunity to gain experience in actual practice, but it can also provide for role models, exemplary judges that novice-judges can emulate.⁵⁵

Being a character-dependent skill, within judicial perception the personal and the professional are inextricably linked.⁵⁶ When trying to perceive well, a judge engages his intellectual, as well as his emotional and sensual side for better or worse (where character flaws are concerned).⁵⁷ Judicial perception thus challenges the widely made distinction between a professional role and the private person and, related, between legal reasoning and legal ethics.

By implication, and in line with what has been put before about ethical perception, if we are to assess the perceptive qualities of a judge, a broad variety of data is potentially relevant in the sense that it may reveal something about a judge’s sensitivities. Think for instance of a judge who continuously makes discriminatory or sexist jokes or remarks during lunch – arguably like the one about Maye’s appearance by one of her colleague

⁵²In this sense, the account of judicial perception offered seeks to rebut the critique raised against a reliance on an obscure idea of intuition in perceptive approaches to practical and legal reasoning. McCormick for instance, rejects an intuitionist theory of moral and legal perception: see Neil McCormick, ‘Particulars and Universals’ in Zenon Bańkowski and James MacLean (eds), *The Universal and the Particular* (Ashgate 2006) 10–13. In a similar vein, Twining argues that Llewellyn’s famous notion of ‘situational sense’ suffers from obscurity: see William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge University Press 2012) 220. In addition, McDowell notoriously criticised intuitive approaches to practical reason: see John McDowell, ‘Values and Secondary Qualities’ in John McDowell (ed), *Mind, Value and Reality* (Harvard University Press 1998) 133.

⁵³Iris van Domselaar, ‘Moral Quality in Adjudication. On Judicial Virtues and Civic Friendship’ (2015) 1 *Netherlands Journal of Legal Philosophy* 24, 37–39.

⁵⁴Austin Serat, ‘Crossing Boundaries: From Disciplinary Perspectives to an Integrated Conception of Legal Scholarship’ in Austin Serat (ed), *Law in the Liberal Arts* (Cornell University Press 2004) 84.

⁵⁵Sure, learning from role models is not tantamount to merely imitating them. Once a novice has some experience, he or she can start to select what he deems valuable and at a certain stage he can even start to challenge the example: cf Julia Annas, ‘Being Virtuous and Doing the Right Thing’ (2004) 78 *Proceedings and Addresses of the American Philosophical Association* 61, 69; Amalia Amaya, ‘Exemplarism and Judicial Virtue’ (2013) 25 *Law & Literature* 422, 439.

⁵⁶Amaya, ‘Virtue and Reason in Law’ (n 49); Domselaar, ‘Moral Quality in Adjudication’ (n 53) 31.

⁵⁷cf Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1995) 105.

judges cited in the beginning of this article – or who is very sensitive to other people’s opinion and approval. These ways of doing may be an indication of a failure of sight that directly bears upon the quality of his perceptive results in a judicial setting.

Now, one could say that Fiona Maye, the protagonist of McEwan’s novel, is an illustration of a judge who possesses judicial perception. That is, Maye has ample experience as a juvenile judge, she does not first invoke abstract rules and principles in order to see and appreciate what she is confronted with, but rather displays a refined kind of perception in her spontaneous and highly subtle situational discriminations.

What is more, McEwan also gives us insight into how Maye’s perceptive qualities are linked to her personal features, to both her strengths and her weaknesses. We for instance know that Maye is mildly tempered, that she is not so easily influenced by emotional appeals of others, and that she is used to critically monitoring herself. These features all bear upon Maye’s perceptive results.

In addition, the novel illustrates that perceiving well amounts to an involved, engaged form of legal understanding. Maye does not merely grasp the legal bearing of a case by means of her intellect, but also by means of her emotions. For instance, we get to see this in the Siamese Twins case in which Maye is requested to grant a hospital permission to separate the twins, as they would otherwise both die.⁵⁸ The operation would inescapably lead to the death of one of the twins, the one called Matthew. Although Maye is certain of the rightness of her decision, she is nonetheless haunted by a sense of loss, pain and anxiety. McEwan writes: ‘For a while, some part of her had gone cold, along with Matthew. She was the one who had dispatched a child from the world, argued him out of existence in thirty-four elegant pages.’⁵⁹

Arguably theories of adjudication that exclusively focus on (the justification of) judicial decisions would explain this phenomenology of the decision’s aftermath as merely stemming from Maye’s difficulty to subordinate her own subjectivity to the objective legal bearing of the case. However, from the perspective of judicial perception this emotional reaction can well be understood as a form of legal understanding. A perceptive judge experiences the appropriate sense of regret and ethical distress in reaction to the loss caused by one’s decision.⁶⁰ Had Fiona not been troubled at all, we could question whether she had indeed fully grasped what was at stake in this case.⁶¹

The Siamese Twins case moreover illustrates how getting the legal bearing of a case right can be valuable in and of itself, independently of the actual decision.⁶² For although

⁵⁸McEwan, *The Children Act* (n 1) 23–29. This fictional case is based upon a real-life case that appeared before the court of Appeal for England and Wales: see *Re A (children) (conjoined twins)* [2001] Fam 147; [2000] 4 All ER 961. The case received considerable attention from legal scholars. See for instance Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press 2008) 171–81.

⁵⁹McEwan, *The Children Act* (n 1) 31.

⁶⁰cf Rosalind Hursthouse, ‘Two Ways of Doing the Right Thing’ in Colin Farrelly and Lawrence Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan 2008) 245–55; Louis Wolcher, *Law’s Task: The Tragic Circle of Law, Justice and Human Suffering* (Ashgate 2008) 80–88; Iris van Domselaar, ‘The Fragility of Rightness: Adjudication and the Primacy of Practice’ (PhD dissertation, University of Amsterdam 2014) 293–8; *On Tragic Legal Choices* (Law and Justice Across Borders Research Paper No. 2017–01) SSRN <<https://ssrn.com/abstract=2914228>> accessed 14 May 2017.

⁶¹Interestingly, in the context of nursing it has been asserted that the extent to which one is engaged, emotionally involved and feels responsible for one’s responses, is indicative for one’s perceptive abilities: see Patricia Benner, ‘From Novice to Expert’ (1982) 82 *The American Journal of Nursing* 402.

⁶²This is a clearly ‘Murdochian’ feature of the account of judicial perception offered. One difference between McDowell’s and Murdoch’s account of ethical perception is that the former is inextricably linked with action whereas the latter is not. See for an instructive comparison of both accounts: Clarke, ‘The Lens of Character’ (n 30).

the qualification of the case that the hospital puts afore could lead to the decision that Maye in the end opts for, she nonetheless rejects it. The hospital's 'frame' that 'separating the twins was analogous to turning off Matthew's life-support machine, which was Mark [...]' would according to Maye obscure that the actual operation requires that Matthew's body will be cut open and his aorta will be taken out, obviously most severe infringements of his bodily integrity.⁶³ Maye's concern with getting her vision right is not only conducive for a correct outcome, but also part of what it means to be respectful to the parties involved.

Of course, disagreements about vision will occur. These can by no means be solved by invoking abstract rules and principles, but rather require the kind of persuasion that is most likely to influence someone's vision. As McDowell has put it, this kind of persuasion must be 'exactly as creative and case-specific as the capacity to discern [the situation] itself'.⁶⁴

Attempts to repair a failure of sight of one's opponent will not necessarily succeed. Silence or the acknowledgement of difference of vision will sometimes be the only recourse to 'settle' the matter. In the end, at least from a conceptual point of view, sometimes the only thing left for a judge is to say – not necessarily explicitly – 'this is how I see it'.⁶⁵

So far we have not yet discussed how judicial perception as a species of ethical perception relates to the particularly institutional values that are involved. In this context I will only discuss the relation of judicial perception with impartiality. A judge must be impartial as a precondition for the legitimacy of judicial decisions.⁶⁶ Assigning a prominent place to judicial perception is at any rate not tantamount to opening the door for partiality; developing one's judicial perception means that one tries to prevent that (egotistical) interests, biases and commitments pollute one's way of attending and responding to a case.⁶⁷

Nonetheless, judges who try to perceive well may indeed prove vulnerable to partiality, because of the often immediate, involved and spontaneous character of their endeavour. Even those judges who we may qualify as experts in judicial perception can go astray. Perceptive judges are not flawless.

We get to see an illustration of a rather tragic flaw when Judge Fiona Maye is confronted with the case of Adam Henry. In this case she has to decide whether to grant a hospital permission to compel Adam to treatment for leukaemia, which among other things entails a blood transfusion. Adam – an adolescent boy of almost 18 – and his parents refuse to give permission because of their religious obligations as Jehovah's Witnesses.

Before making a decision, Maye wants to see the boy for herself. She wants to 'immerse herself in the intricacies' and 'fashion a judgement formed by her own observations'.⁶⁸ 'Let's give him a name', she firmly says to her law clerk before he gives her the documents of the case.⁶⁹ She subsequently visits Adam in the hospital ('there was much to take in'),⁷⁰

⁶³McEwan, *The Children Act* (n 1) 27.

⁶⁴McDowell, 'Virtue and Reason' (n 26) 149.

⁶⁵Solum, 'Virtue Jurisprudence' (n 49) 20.

⁶⁶William Lucy, 'The Possibility of Impartiality' (2005) 25 *Oxford Journal of Legal Studies* 3, 6–7.

⁶⁷*ibid* 15.

⁶⁸McEwan, *The Children Act* (n 1) 35.

⁶⁹*ibid* 48.

⁷⁰*ibid* 99.

talks with him and even plays music with him, all to adequately appreciate Adam's 'understanding of his situation'.⁷¹

Through her actual encounter and interaction with Adam, Maye gets access, so to say, to the bearings of Adam's situation, it brings him in view in a manner that informs her understanding of the case. Indeed, this encounter has the character of a 'flow', her perceptions and responses are direct, sometimes non-propositional, spontaneous, highly sophisticated and subtle, with only in the background a keen awareness of what she does and why. Seemingly, Maye indeed lets herself be guided by the demands of the situation.⁷²

At the same time, by being genuinely open and involved, by immersing herself in this flow and by following her spontaneous impulses, Maye proves vulnerable to losing her professional sight. Her involvement gradually becomes too personal in that it gets infused with her own latent personal themes and needs. The fact that she does not have children herself, that she finds herself in a marriage crisis from which she wants to escape, that throughout her life she has put a lot of effort into suppressing her own vulnerabilities, suddenly play their part in her way of coping with Adam. Bluntly put: because of the impact of Maye's encounter with the particular she loses her impartiality and a tragedy unfolds. Despite being an expert, Maye's attempt to perceive well proves to be a far from safe endeavour.

5. Thick value concepts and judicial perception

At this point a legitimate objection could be made that I have not yet sufficiently explained why the results of judicial perception would have any substantial and legal bearing and why they do not end up being empty of (conceptual) content.

Below I shall try to address this concern by stressing the important role of thick value concepts in judicial perception. Thick value concepts are to be distinguished from thinner concepts such as 'right', 'good', 'just' or 'reasonable', which only on a most general and abstract level formulate a bare outline of a particular concern. To cite Simon Kirchin, with thin concepts 'we get little if any sense what the object is like beyond the fact that the user of the concept likes (or dislikes) it ...'.⁷³

Thick value concepts, by contrast, have considerable descriptive content; they give a relatively clear idea of the object described, for instance a situation, a person or an act.⁷⁴ Because of their descriptive content, thick concepts have been qualified as 'world-guided', meaning that the world imposes constraints on the way they are used.⁷⁵ Their import largely depends upon their concrete 'contour', the culturally and locally determined elaboration of the central concerns that these concepts address.⁷⁶ This contour is constituted by the implicit agreement that exists in

⁷¹ibid 89.

⁷²How exactly this aspect of being immersed is to be reconciled with the idea of agency and of freedom is a topic that I will not discuss here due to reasons of scope. It needs to be seriously addressed elsewhere.

⁷³Simon Kirchin, 'Introduction: Thick and Thin Concepts' in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press 2013) 2.

⁷⁴Jonathan Dancy, 'In Defence of Thick Concepts' (1995) 20 *Midwest Studies in Philosophy* 263, 263. Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press 2002) 34–35.

⁷⁵Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana Press 1985) 141.

⁷⁶Bernard Williams, 'Liberalism and Loss' in Mark Lilla, Ronald Dworkin and Aileen Kelly (eds), *The Legacy of Isaiah Berlin* (The New York Review of Books 2001) 94.

shared ways of doing things, or to express it in Wittgensteinian terms, in a ‘form of life’ shared by members of a social-cultural context.⁷⁷ Hence, whether a certain type of behaviour is an instance of bullying is not an issue that a concrete individual can decide upon.

As the example of bullying illustrates, besides their descriptive content thick value concepts come with an evaluative attitude towards the object so described.⁷⁸ In applying a thick value concept, the evaluation is entangled in the description, so to say.⁷⁹ Because of this intimate link between the descriptive and the evaluative, it is not surprising that the application of thick value concepts has an intellectual, emotional and a sensual dimension to it.⁸⁰ To qualify a situation as an instance of ‘bullying’ rather than of ‘playing’ has direct implications for the phenomenological level. In the former case one will experience a sense of disapproval, a sense of being upset, of wishing the situation to stop.

In scholarly work on thick value concepts we find a wide range of examples of concepts that are qualified as such, for instance cruelty, courage, rude, (dis)honest, (in)considerate, loyal, destructive, inelegant, lie, vulgar, lewd, and gauche.⁸¹ These can be used in different areas of human life – albeit that in different domains their meaning may differ.

Thick value concepts also play a prominent role in more specific (professional) practices and institutions. Often these concepts form constellations that are fully interwoven with the particular social good that the specific practice seeks to realise – think of health or justice – and the kind of social and professional relations that are involved. They address specific and concrete needs and interests in a relatively direct way.⁸²

In order for thick value concepts to have practical bearing people must of course be able to adequately apply them. As they comprise a complex constellation of facts and because in one way or another they involve the interests of others, the application of thick concepts requires the kind of ethical perception that I expounded above. Consequently, despite the fact that their import is largely determined by a shared ‘form of life’, the application of thick value concepts is far from tapping into an impersonal network of public meaning, but rather is a highly personal endeavour.⁸³ The adequacy of their use is partly constituted by the progress that an individual has made in the course of his life in continually reassessing the appropriateness of their use.

Importantly, this process of struggling and wrestling with how to use thick concepts does not require that one ‘steps back’ and takes a purely reflective or detached point of view. Their meaning can be worked out in close connection with the object at stake and by using the self-same sensibilities.⁸⁴

⁷⁷Ludwig Wittgenstein, ‘Philosophical Occasions 1912–1951’ in JC Klagge and A Nordmann (eds), *Cause and Effect: Intuitive Awareness* (Hackett 1993) 397; Ludwig Wittgenstein, *Philosophical Investigations* (Wiley-Blackwell 2010 [1953]) para 241.

⁷⁸Williams, *Ethics and the Limits of Philosophy* (n 75) 141.

⁷⁹Putnam, *The Collapse of the Fact/Value Dichotomy* (n 74) 37; Jonathan Dancy, ‘Practical Concepts’ in Simon Kirchin (ed), *Thick Concepts* (Oxford University Press 2013) 263.

⁸⁰An important debate is whether the descriptive content of thick concepts is necessarily linked to one particular or unique evaluation. I think there are good reasons to include in our understanding of thick value concepts also multi-attitude concepts, whose evaluative import is not fixed: cf *ibid* 44–45.

⁸¹Williams, *Ethics and the Limits of Philosophy* (n 75) 129, 140; Putnam, *The Collapse of the Fact/Value Dichotomy* (n 74) 35.

⁸²In the case of healthcare, we may for instance find that thick concepts such as (in)discrete, diligent, empathic, trustworthy, and abuse play a vital role in keeping the practice going.

⁸³Murdoch, ‘The Idea of Perfection’ (n 27) 322.

⁸⁴Iris Murdoch famously discussed the example of a mother (M) who grapples with how to ‘see’ her daughter in law (D). In her ‘offline’ thoughts when alone M questions whether she rightly sees her as ‘bumptious’ or ‘unpolished’. This kind of reflection is thus post-hoc, but still highly concrete and vivid. According to Murdoch in these reflective episodes M still

What does all this entail for judicial perception? My claim is that thick value concepts are essential for judicial perception in that they provide the content due to which judges can cope with cases in a relatively direct and immediate way. Part of what it means for a judge to possess judicial perception is to become skilful in using thick value concepts. As a consequence, in order to secure the quality of adjudication and of a legal order as a whole, thick (legal) concepts must – as Bernard Williams has famously put it – not only be ‘cherished’, but also the preconditions for their flourishing must be guaranteed.⁸⁵ Rigorous attempts to systematise adjudication may for instance form a threat to thick concepts. That is, they do not neatly form a ‘seamless web’ and hence may lose their validity. Also, when judges are only ‘reviewing’ draft sentences that a court clerk has prepared, chances are that thick concepts will not be used as in this process the mediation with the concrete particular is simply absent.

Obviously this claim is far from radical. Western legal orders indeed include a broad variety of thick value concepts. These are in one way or another related to the basic interests that these orders protect, such as life and property, all kinds of freedoms, equality, a social-economic minimum and the protection of the vulnerable. Think for instance of concepts such as abusive, neglect(ed), brutal, unreliable, robbery, murder, damage, deceit, discriminatory, harsh-handed, caring, lovingly, needy, dangerous, loyal, insulting, abduction, suffering, well-being and so on. Codified or not, one is likely to find these concepts – not necessarily explicitly – in the considerations of judges when determining citizens’ rights and duties.

In addition, settled law contains more specifically *legal* thick value concepts that have a more technical meaning, a more specific contour that is embedded in the ‘form of life’ or habitus of legal professionals.⁸⁶ Both kinds of thick value concepts – which may overlap⁸⁷ – mediated by the refined sensibilities on the part of legal practitioners, are part of what constitutes law.

Back to judge Fiona Maye, who – as we can read – indeed engages with a range of thick (legal) concepts, especially with that of the welfare and well-being of children. McEwan gives us a clear sense of how these concepts infuse not only Maye’s perception of the cases she is confronted with, but also her overall take on the role of law and adjudication in family disputes. Maye’s understanding of certain strictly legal value concepts largely hinges on a professional ‘form of life’, i.e. on legal practice and legal tradition – as is shown in her referring to previous cases – but also on philosophical traditions and on the contour these concepts have in society at large and on her own, personal grasp of them. This grasp is far from static or impersonal, but is partly constituted by her individual learning process.

‘looks at D, she attends to D, she focuses her attention’: *ibid* 317–19; see for this point also McDowell, ‘Virtue and Reason’ (n 26) 162–3.

⁸⁵Williams, *Ethics and the Limits of Philosophy* (n 75) 117.

⁸⁶Think of concepts such as gross negligence, infringement, culpable homicide, trespass, hate-speech, libel, abusive process, fair trial, disability discrimination, distortion of competition, assistance, good faith, constitutional, tortuous: cf David Enoch and Kevin Toh, ‘Legal as a Thick Concept’ in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press 2013) 264.

⁸⁷This raises the interesting question about the exact relation between both kinds of meaning of the same term. Wang and Solum in this regard, I think rightly, argue that the general meaning does constrain the meaning of the legal version: Linghao Wang and Lawrence B Solum, ‘Confucian Virtue Jurisprudence’ in Amalia Amaya and Ho Hock Lai (eds), *Law, Virtue and Justice* (Hart Publishing 2013) 127.

For instance, while lying awake in her bed, pondering the case of Adam Henry and his tragic fate, Maye suddenly recognises she had naively ignored the social dimension involved in the legal concept of welfare. By not having adequately grasped the urgency of Adam's need for contact, she had failed to adequately appreciate the risk she took by addressing Adam in such a personal way before her actual judgment and by then abandoning him thereafter.⁸⁸ Her approach and her decision led him to break with his religion and with the community that up until then had exhaustively carried and filled his life. Although her personal approach and her contact with Adam suggested otherwise, in the end she gave him nothing to rely on in return.

The scene also illustrates that making progress in one's understanding of thick value concepts may come with painful feelings such as regret and remorse. Sometimes it is only through these troublesome experiences that one is compelled to revise one's understanding of a concept.⁸⁹

Maye's way of coping with the case of Adam Henry also shows that being a perceptive judge is not an all or nothing matter. A judge may be better at perceiving some aspects of judicial reality than others. A perceptive judge need not be equally skilled in the application of all kinds of thick concepts, in relation to all kinds of persons, in all kinds of situations. Self-knowledge in this regard can help a perceptive judge to accommodate for these differences.⁹⁰

6. Giving reasons and the role of rules and (engaged) reflection

It is common ground that in a liberal society the exercise of state power must be motivated by public reasons that citizens can understand and endorse. As a practice in which one group of citizens exercises state power over others in a rather direct way, this demand is urgent for adjudication as well.⁹¹ Hence, it is important to stress that judicial perception is not at odds with adjudication being a reason-giving practice par excellence, nor with assigning a prominent (albeit not an action-guiding) role to legal rules and principles.⁹² Codified rules and principles for instance provide invaluable communicative resources that judges need in order to motivate their decision vis-à-vis the concrete parties involved, as well as to the public at large.

However, exactly which rules and principles a perceptive judge will use and in what way – for instance exclusively in one's judgments or also during a court session – and about what things to remain silent, is also a matter of situational appreciation and at least partly of judicial perception as well. What is more, in this account the justificatory reasons that a perceptive judge offers – be it rules, salient facts or otherwise – need not

⁸⁸McEwan, *The Children Act* (n 1) 212–13.

⁸⁹Dreyfus and Dreyfus also stress the role of feelings of regret in the development of a skill: cf Hubert Dreyfus and Stuart Dreyfus, 'Towards a Phenomenology of Moral Expertise' (1991) 14 *Human Studies* 229, 193. See for the importance of an engaged way of acknowledging loss for making moral progress in law: Domselaar, 'The Fragility of Rightness' (n 60) 300; Domselaar, *On Tragic Legal Choices* (n 60) 29–30.

⁹⁰For instance, by the choice (not) to work in a particular area of law.

⁹¹Martin Shapiro, 'The Giving Reasons Requirement' (1992) 179 *University of Chicago Legal Forum* 179; David Dyzenhaus and Michael Taggart, 'Reasoned Decisions and Legal Theory' in Douglas E Edin (ed), *Common Law Theory* (Cambridge University Press 2007).

⁹²Here I disagree with Tim Dare who seems to hold that virtue-ethical approaches to law and morality cannot acknowledge the reason-giving dimension of these practices: cf Tim Dare, 'Virtue Ethics and Legal Ethics' (1998) 28 *Victoria University Wellington Law Review* 141, 144–7.

be (or even: can never be) his or her actual motivating reasons.⁹³ A perceptive judge will oftentimes be, to phrase it in Iris Murdoch's terms, 'moved in a manner which [he or she is] at a loss to explain'.⁹⁴

Moreover, as with all kinds of skilled perception, rules and principles (of professional conduct) are also of help to judges who feel insecure in a concrete case, for instance because the case involves a legal field that they are not well acquainted with, or involves a situation where biases and rationalisations clearly loom. They are specifically relevant as 'rules of thumb' for students and junior judges who are still at the beginning of a process of learning.⁹⁵

This brings us to the importance of reflection, conscious thought and 'stepping back'. These activities – in either an online or an offline situation – are understood as part and parcel of judicial perception. Being a perceptive judge also consists of self-consciously reflecting on the quality of one's perceptive results, or thinking about how to best motivate one's decisions. In this regard no sharp line exists between thinking and perceiving; thinking can be a way of trying to get a clear sight of legal reality.⁹⁶

Said reflective activities are far from detached, disembodied and cool. Rather they are involved and engaged, as – again – McEwan's description of Maye's pondering on Adam's case in a state of half-sleep nicely illustrates. 'Without faith, how open and beautiful and terrifying the world must have seemed to him. With that thought she slipped back into a deeper sleep and woke minutes later to the singing and the sighing of the gutters.'⁹⁷

7. Conclusion

The aim of this article was to present judicial perception as a special ethical, character-dependent skill that is indispensable for coming to grasp with the legal case a judge is confronted with.

The notion of skill involved in judicial perception was used in an empiricist sense, meaning that in order to become a perceptive judge one needs training, practice, experience, imitation and a rather concrete and involved form of (self)reflection, more than theoretical understanding and thus more than explicit teaching. Typically, the perceptive results of an expert judge yield an immediate, spontaneous, and experiential kind of legal understanding, that is, when mediated by a broad range of thick (legal) concepts.

However, this is not to deny the importance of 'stepping back', for instance to reflect on one's perceptive results or as part of the discursive but nonetheless highly situated practice of motivating one's decisions in a written judgment. As such the article has shed light on different skilful, embodied and rich ways of attending and responding to one's judicial environment, which legal philosophy needs to further explore.

⁹³cf Dreyfus, 'Overcoming the Myth of the Mental' (n 35) 113. See for an illuminating discussion on the demand of sincerity in law and adjudication Mathilde Cohen, 'Sincerity and Reason-Giving: When May Legal Decision Makers Lie' (2010) 59 DePaul Law Review 1091.

⁹⁴Iris Murdoch, 'Nostalgia for the Particular' in Peter Conradi (ed), *Existentialists and Mystics: Writings on Philosophy and Literature* (Penguin Books 1997) 58.

⁹⁵Nussbaum, 'The Discernment of Perception' (n 26) 68.

⁹⁶cf Linda Ross Meyer, 'Is Practical Reason Mindless?' (1998) 86 Georgetown Law Journal 647, 654–5.

⁹⁷McEwan, *The Children Act* (n 1) 212.

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