

An Interdisciplinary Analysis of the Use of Ethical Intuition in Legal Compliance Decisionmaking for Business Entities

Eric C. Chaffee

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

74 Md. L. Rev. 497 (2015)

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

AN INTERDISCIPLINARY ANALYSIS OF THE USE OF ETHICAL INTUITION IN LEGAL COMPLIANCE DECISIONMAKING FOR BUSINESS ENTITIES

ERIC C. CHAFFEE*

I. INTRODUCTION

Amanda Appleton is a mid-level associate in the business law department of Boxer & Boxer LLP, a large international law firm. Her practice focuses on advising companies on matters relating to the regulation of publicly traded securities. She is well respected at the firm, and her prognosis for making partner is excellent.

At 11:30 AM yesterday morning, Paul Pratt, a partner in the business law department, called Appleton with an assignment. Global Giant Corporation is preparing to make various public disclosures by filing a Form 10-K with the Securities and Exchange Commission (“SEC”). Pratt asked Appleton to research whether some of the proposed disclosures might be considered manipulative or deceptive in violation of various securities laws and regulations. Pratt told Appleton to report back to him by 9:00 AM the following morning.

It’s now 4:38 AM, and Appleton sits staring out of the window of her twenty-third floor office. She has reviewed the relevant statutes, regulations, case law, and treatises, and she can find no authority that the proposed statements will be viewed as manipulative or deceptive by a court or the SEC. Still, when she first saw the proposed disclosures, she could not help feeling that the disclosures are manipulative and deceptive. She is deeply conflicted about what to tell Pratt.

Situations similar to this hypothetical occur regularly in practice. Although the law is expansive, it is not comprehensive. Often, clarifying the law comes at the risk of a client’s interests, and lawyers are called upon to be odds makers in addition to competent researchers, communicators, and advocates. In many circumstances, clients’ and colleagues’ hopes about what the law might be are in direct conflict with a lawyer’s intuitions about what the law likely is.

© 2015 Eric C. Chaffee.

* Professor of Law, The University of Toledo College of Law; J.D., University of Pennsylvania Law School; B.A., The Ohio State University. This Article benefited from discussions with scholars too numerous to mention. I would like to offer special thanks to Professors Susan R. Martyn, Agnieszka McPeak, and Rosalind Simson for providing feedback and advice that contributed greatly to this Article. I would also like to thank Christine Gall, Esq. for her encouragement while drafting this work. The views set forth in this essay are completely my own and do not necessarily reflect the views of any employer or client either past or present.

This Article explores what role a lawyer's ethical intuitions should play in making decisions about legal compliance matters in the business world. Lawyers must choose between either helping clients minimally comply with the law or providing them with some ethical counsel in addition to legal advice. This Article suggests that a lawyer's ethical intuitions can provide useful information in helping a client comply with its legal and extra-legal duties.

In this Article, the term "ethical intuition" is used to designate the feeling that a specific action is good, evil, or morally neutral, i.e., the unconscious recognition of the moral qualities of an action without a resort to reason. The exact source and nature of ethical intuitions, however, remain open for debate. Some would argue that ethical intuitions are emotional responses to particular situations.¹ Others would suggest that ethical intuitions are more similar to reflex responses to moral dilemmas.² Still others would claim that ethical intuitions are conditioned responses based on previous experiences.³ Perhaps all of these hypotheses are correct. The purpose of this Article, however, is not to take a position on the source of ethical intuitions, and because of the issue's complexity, the true nature of ethical intuitions will be left for another day.

Before progressing, the metes and bounds of the subject matter of this Article should be defined. As a moral theory, ethical intuitionism is controversial because it suggests that morality is subjective and relativistic. Critics of this Article are likely to fail to appreciate the nuanced and precise manner in which ethical intuitions should be used in legal compliance matters relating to business entities.

To be clear, this Article is not an attempt to develop a moral theory or normative system based on ethical intuitionism, but it is an explanation of how lawyers can better help to protect business entities through the use of ethical intuitions. One must remember the famous words of Oliver Wendell Holmes, Jr., in *The Path of the Law* in which he stated, "The law is full of phraseology drawn from morals, and by the mere force of language contin-

1. See, e.g., Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 19 (2003) (discussing the role of emotion in moral decisionmaking); Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1004 (2003) (arguing that the impulse to blame, i.e., intuition, is "a combination of cognitive and emotional responses to bad events").

2. See, e.g., Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1609 (2005) (noting "the increasingly more recognized assumption that moral judgment derives from intuitive disgust reflexes rather than from a more calculated process of ratiocination and moral reasoning").

3. See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 542-43 (1988) (stating that moral intuitions are based at least in part upon "shared cultural heritage of what constitutes a good argument for a proposition").

ually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds.”⁴ He continued, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁵ In recent years, the legal academy has seen a proliferation of moral theories regarding what the law *ought* to be. Although these moral theories are often interesting and sometimes useful, this Article aims at the use of ethical intuition to determine what the law *is* in the Holmesian tradition. In advocating for the use of ethical intuition in legal compliance matters, this Article provides a mechanism for predicting how courts, legislatures, administrative agencies, and the public might respond to a business’s actions. The issue of whether ethical intuitions provide the foundations of morality will not be addressed.

This Article is also limited to advocating for the use of ethical intuitionism in legal compliance matters facing business entities. Ethical intuitionism is controversial in part because humans have widely varying intuitions on many social issues, including abortion, the use of military force, and gun control. However, from securities regulation, to product labeling, to truth in advertising, to dealing fairly with labor, most of the legal compliance issues facing businesses relate to the commission of some form of misrepresentations against the government, equity holders, creditors, employees, or the public.⁶ Even if the particular compliance issue does not directly involve fraud or misrepresentations, such as illegal dumping of toxic waste or bribery of government officials in violation of the Foreign Corrupt Practices Act, misrepresentations and deceptions are usually somehow involved because businesses almost invariably prefer to hide their bad behavior from the public, government, and business partners.⁷ Most people agree that de-

4. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897).

5. *Id.* at 461.

6. See Bernard W. Bell, *Theatrical Investigation: White-Collar Crime, Undercover Operations, and Privacy*, 11 WM. & MARY BILL RTS. J. 151, 154 (2002) (stating that “many white-collar offenses involve deception . . . [but,] many traditional crimes involve use of force”) (footnote omitted); Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 519 n.57 (1994) (“There is no commonly accepted definition of white-collar crime, but most writers conclude that it includes bribery, embezzlement, fraud (other than welfare fraud), price-fixing, and insider trading—in general, nonviolent economic crimes that include some degree of fraud, collusion, or deception, and that lack an element of face-to-face interpersonal force.”); John Hasnas, *Between Scylla and Charybdis: Ethical Dilemmas of Corporate Counsel in the World of the Holder Memorandum*, 44 VAL. U. L. REV. 1199, 1209 (2010) (“[W]hite collar crime almost always consists of crimes of deception.”); Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 606 (2006) (noting that the conduct being examined for criminality in white collar crime cases “is often based on ethical lapses, betrayals of trust, and deceptions”).

7. See Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 406 (1993) (“The white collar criminal’s goal is to conceal all evidence that a crime has been committed while preserving the patina of legality surrounding the normal conduct of business.”).

ception is wrong,⁸ and intuition is one of the best mechanisms for determining deception and misrepresentations.⁹ This Article focuses on the use of intuition in this less controversial context and leaves discussions of the use of intuition in other contexts for later articles.

In addition, this Article does not advocate for the subordination of established legal duties to ethical intuitions. In the event that a legal duty is clear, a lawyer has an ethical obligation to help the client to comply with that duty, regardless of that lawyer's intuitions about what the law ought to be.¹⁰ This Article advocates for the use of ethical intuition only in circumstances in which the client's legal obligations are less than certain. Use of ethical intuition should be viewed as only part of the due diligence in determining how a client should behave to conform to the law.¹¹ Legal re-

8. See Donald Braman, Dan M. Kahan & David A. Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1538 (2010) ("Generally speaking, when someone commits a wrong—murder, rape, theft, or fraud, say—we share an intuitive sense that the wrongdoer should be punished."); Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 72 (2013) (noting that a "common moral intuition [exists] that deception is wrong and the law should discourage it, or at the very least, not encourage it"); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2011) ("[T]here appears to be an enormous amount of agreement about intuitions of justice across all demographics, at least with regard to the core of wrongdoing—physical aggression, taking property without consent, and deceit in exchanges.").

9. See Kate Greenwood, *The Ban on "Off-Label" Pharmaceutical Promotion: Constitutionally Permissible Prophylaxis Against False or Misleading Commercial Speech?*, 37 AM. J.L. & MED. 278, 290–91 (2011) (noting that "[c]ourts often rely on their common sense and intuition in determining whether deception has occurred" and providing various examples of this phenomenon); Paula Schaefer, *Harming Business Clients With Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251, 265 (2011) ("Ignoring moral intuitions about a business client's plan often means ignoring the basis for liability, such as a lack of good faith or fraudulent intent.").

10. Beyond the requirement that a lawyer comply with the law as a citizen of the jurisdiction in which the lawyer resides, the rules of professional conduct in most, if not all, jurisdictions specifically require a lawyer to comply with the law in the course of representing clients. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (2013) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."); *id.* r. 8.4(b)–(c) (providing that a lawyer may not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). Lawyers in most, if not all, jurisdictions are permitted to incorporate other considerations into their advice to clients, including moral and social considerations, but no jurisdiction has rules of professional conduct that permit violation of the law. See *id.* r. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

11. See generally Richard A. Epstein, *Intuition, Custom, and Protocol: How to Make Sound Decisions with Limited Knowledge*, 2 N.Y.U. J.L. & LIBERTY 1 (2006) (discussing the reasons why protocol and custom should be considered in addition to intuition when attempting to make sound decisions with limited knowledge).

search and analytic reason must be at the heart of the calculus in determining what a client's legal and extralegal duties are likely to be.

The remainder of this Article is structured in the following manner. Part II discusses the recognition of the role of ethical intuition in moral decisionmaking in a variety of different academic disciplines, including metaethics, cognitive neuroscience, moral psychology, and behavioral economics. Part III and Part IV respectively discuss the importance of using ethical intuition in legal compliance matters and the various concerns that the use of ethical intuition creates. Part V explains how ethical intuition can be employed by lawyers in counseling businesses in compliance matters. Finally, Part VI contains brief concluding remarks.

Ultimately, this Article advances existing scholarship in three main ways. First, this Article highlights a growing acknowledgement by academics in various disciplines of the role of intuition in moral decisionmaking. Simply put, the recognition of the use of intuition in moral decisionmaking has broad interdisciplinary support from scholars and scientists in a variety of academic fields.¹² The second purpose of this Article is to help import the broad interdisciplinary recognition of the use of intuition in moral decisionmaking into legal scholarship. A small number of excellent law review articles have been written discussing the use of intuition in moral decisionmaking and its relationship to the law.¹³ These articles, however, stop short of discussing the broad interdisciplinary movement that has developed regarding the use of intuition in moral decisionmaking and tend to focus on one or two academic disciplines in addition to law. No existing law review article juxtaposes the recognition by philosophers, scientists, and social scientists that intuition plays a role in how individuals make moral decisions.¹⁴ The third purpose of this Article is to break new ground by exploring the uses and applications of ethical intuitions in legal compliance matters facing business entities.¹⁵

12. See *infra* Part II (discussing the growing recognition of the role of intuition in moral decisionmaking in various academic disciplines, e.g., philosophy, science, psychology, and economics).

13. See, e.g., Epstein, *supra* note 11; Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007); R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381 (2006).

14. Oliver R. Goodenough and Kristin Prehn have written a book chapter that discusses the broad interdisciplinary recognition of the role of ethical intuition in moral reasoning and the importation of this recognition into the study of law and justice. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, in *LAW AND THE BRAIN* 77 (Semir Zeki & Oliver Goodenough eds., 2006). This Article deepens the discussion begun in that chapter, imports it into the legal journals, and applies it to legal compliance in the business world.

15. The legal academy has already shown an interest in this issue. In 2007, Professor Milton Regan published an article exploring the relationship between ethical intuitions and organizational

II. THE RISE OF ETHICAL INTUITIONISM

The importance of intuition in moral decisionmaking has been recognized by numerous academic disciplines. This Article highlights that recognition in the fields of philosophy, science, psychology, and economics by specifically examining the recognition of the importance of intuition in metaethics, cognitive neuroscience, moral psychology, and behavioral economics.¹⁶ In addition, the final subsection of this Part will explain that most people employ ethical intuition when they resort to practical reasoning in the context of everyday moral dilemmas. To be clear, however, this Part is not designed to be an exhaustive literature review of the study of ethical intuition within academic circles, or even within the disciplines discussed. It is only designed to provide an introduction to a variety of academic disciplines that have well-known scholars who acknowledge the role of intuition in moral decisionmaking.

A. *Metaethics*

Although metaethics¹⁷ arguably did not develop as a distinct academic discipline until the beginning of the twentieth century,¹⁸ philosophers and

culture. See Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007). The article was so well-received that it was selected as the 2007 American Association of Law Schools annual meeting article. *Id.* Rather than focusing on legal compliance matters, however, the article focused on the role of ethical intuitions in how organizations function. *Id.* Professor Regan's article created the need for an article discussing how ethical intuitions might be used by a lawyer to assist a business entity in complying with its legal and extra-legal duties. This Article is designed to fulfill that need.

16. Metaethics, cognitive neuroscience, moral psychology, and behavioral economics are highlighted, because they show the broad appeal of ethical intuitionism. These disciplines appeal to individuals with disparate views about what is to be most highly valued in academic study. Metaethics, cognitive neuroscience, and behavioral economics respectively represent fields that emphasize the good, the real, and the efficient. Philosophers who study ethics usually place an emphasis on what constitutes good, and they use the findings of scientists and economists to validate their theories about how good can be achieved. Scientists tend to put aside the theories of philosophers and economists in favor of what can be proven about how the world really exists. Finally, economists tend to use philosophy and science as a tool for understanding how society can function most efficiently. In short, philosophers, scientists, and economists often have very different views of the world. Moral psychology will be discussed, because that discipline offers sophisticated models of how the mind functions. Moreover, psychology provides the bridge between cognitive neuroscience and behavioral economics, because psychology studies the link between neural structures and behavior. In fact, two of the luminaries in the behavioral economics movement, Daniel Kahneman and Amos Tversky, were trained as psychologists. Of course, the importance of intuition in moral decisionmaking has been recognized in other academic fields as well, for example, religious studies and political science.

17. Metaethics is a branch of the field of philosophy known as ethics. Metaethics traditionally entails moral semantics, moral epistemology, and moral metaphysics. See Terry Horgan & Mark Timmons, *Introduction*, in *METAETHICS AFTER MOORE* 1, 1 (Terry Horgan & Mark Timmons eds., 2006) ("Whereas normative ethics is concerned to answer first-order *moral* questions about what is good and bad, right and wrong, virtuous and vicious, metaethics is concerned to answer second-order *non-moral* questions, including (but not restricted to) questions about the se-

religious scholars initially recognized the role of ethical intuition in moral decision-making centuries ago.¹⁹ For example, during the thirteenth century, Thomas Aquinas suggested that human beings know first moral principles through a form of ethical intuition that he referred to as “synderesis.”²⁰ According to Aquinas, synderesis allows individuals to know the first principles of natural law, which, according to him, is divine in its origins.²¹ Human beings then use reason, which he calls “conscience,” to develop secondary principles and to apply these principles to specific situations.²²

Similarly, during the eighteenth century, David Hume wrote of the central role in moral decisionmaking of what he called “sentiment.” He used the term “sentiment” to describe intuitive emotion, which he contrasted with analytic reasoning.²³ As explained in *A Treatise of Human Nature*, Hume believed that sentiment plays a key role in moral decisionmaking because moral judgments influence actions, and reason alone is insufficient to inspire human beings to act.²⁴ Hume wrote, “Morality . . . is more properly felt than judg’d of; tho’ this feeling or sentiment is commonly so soft and

mantics, metaphysics, and epistemology of moral thought and discourse.”). Beyond metaethics, the remainder of the field of ethics is comprised of normative ethics and applied ethics. Normative ethics focuses on the establishment of standards, guidelines, and norms regarding how people ought to behave. See PETER A. ANGELES, *THE HARPERCOLLINS DICTIONARY OF PHILOSOPHY* 95 (2d ed. 1992) (defining the normative ethics as “moral philosophy that provides humanity with general guidelines or knowledge about such things as (a) what is good and right (bad and wrong), (b) what people ought to do (and ought not to do) in specific situations, (c) what should be pursued in life, (d) how life should be lived, and (e) what we should do to others and what they should do to us”). Applied ethics involves the application of moral principles to particular situations and circumstances. The fields of metaethics, normative ethics, and applied ethics often overlap and blur.

18. See *infra* note 33 and accompanying text.

19. The claim that ethical intuition plays a role in moral decisionmaking falls within the field of metaethics. This claim has moral epistemological overtones, because it suggests that morality is learned at least in part based on intuition. The claim also has moral metaphysical overtones, because it suggests a source of morality and that morality exists based at least in part on the dialectic between the mind and the external world. See *supra* note 17 (explaining that metaethics entails both moral epistemology and moral metaethics).

20. 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I, q. 79, art. 12 at 407 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948) (“Wherefore the first practical principles, bestowed on us by nature, do not belong to a special power, but to a special natural habit, which we call *synderesis*. Whence *synderesis* is said to incite to good, and to murmur at evil, inasmuch as through first principles we proceed to discover, and judge of what we have discovered. It is therefore clear that *synderesis* is not a power, but a natural habit.”).

21. *Id.*

22. See *id.* art. 13 at 407–08 (discussing the role of conscience in moral reasoning).

23. DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* 107–15 (Prometheus Books 2004) (1777) (discussing the role of sentiment in moral decisionmaking).

24. DAVID HUME, *A TREATISE OF HUMAN NATURE* 457 (2d ed. 1985) (1739–40) (“Since morals . . . have an influence on the actions and affections, it follows, that they cannot be deriv’d from reason Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular.”).

gentle, that we are apt to confound it with an idea”²⁵ Under Hume’s analysis, human beings use sentiment, i.e., emotion and intuition, to decide how to act when confronted with a moral dilemma.²⁶

In addition to Hume’s sentimentalism, throughout the seventeenth, eighteenth, and nineteenth centuries, many other philosophers recognized the role of ethical intuition in moral decisionmaking. For example, in the seventeenth and eighteenth centuries, Henry More,²⁷ John Balguy,²⁸ Samuel Clarke,²⁹ Ralph Cudworth,³⁰ and Richard Price³¹ each advanced moral theories based at least in part on the idea that intuition plays a role in morality. In the nineteenth century, Henry Sidgwick also advanced a moral theory involving ethical intuitionism, and he dedicated a substantial number of pages in *The Methods of Ethics* and *Outlines of the History of Ethics for English Readers* to discussing the different moral theories based on ethical intuitionism.³²

All of this set the stage for the popularization of ethical intuitionism by British philosophers in the early twentieth century. In 1903, G.E. Moore published *Principia Ethica*, which has been recognized as the beginning of metaethics as a separate field of philosophy.³³ Although Moore was reluctant to be labeled an “intuitionist,” Moore has become one of the most influential proponents of the role of ethical intuition in moral decisionmaking, based on the ideas that he expressed in *Principia Ethica*.³⁴ Moore argues that “good” is an indefinable property because good is basic and has no parts.³⁵ Moore claims that moral theorists commit what he refers to as a

25. *Id.* at 470.

26. Hume did acknowledge the close relationship between sentiment and reason relating to moral judgments. In *An Enquiry Concerning the Principles of Morals*, Hume wrote, “[R]eason and sentiment concur in almost all moral determinations and conclusions.” HUME, *supra* note 23, at 5.

27. See HENRY MORE, ENCHIRIDION ETHICUM (Edward Southwell trans., Literary Licensing, LLC 2011) (1667).

28. See JOHN BALGUY, THE FOUNDATIONS OF MORAL GOODNESS (Nabu Press 2011) (1728).

29. See SAMUEL CLARKE, A DISCOURSE CONCERNING THE UNCHANGEABLE OBLIGATIONS OF NATURAL RELIGION (Gale ECCO, Print Editions 2010) (1738).

30. See RICHARD CUDWORTH, A TREATISE CONCERNING ETERNAL AND IMMUTABLE MORALITY (Garland Publishing, Inc., 1970) (1731).

31. See RICHARD PRICE, REVIEW OF THE CHIEF QUESTIONS AND DIFFICULTIES OF MORALS (General Books, LLC 2009) (1757).

32. HENRY SIDGWICK THE METHODS OF ETHICS (Thoemmes Press ed., 1996) (1907); HENRY SIDGWICK OUTLINES OF THE HISTORY OF ETHICS FOR ENGLISH READERS (LONDON, MACMILLAN & CO. 1886).

33. G.E. MOORE, PRINCIPIA ETHICA (Thomas Baldwin ed., rev. ed. 1993) (1903); Horgan & Timmons, *supra* note 17, at 1 (“Metaethics, understood as a distinct branch of ethics, is often traced to G. E. Moore’s 1903 classic *Principia Ethica* . . .”).

34. See MOORE, *supra* note 33, at 35–36 (discussing Moore’s viewpoints on intuitionism).

35. See *id.* at 61 (“‘Good,’ then, if we mean by it that quality which we assert to belong to a thing, when we say that the thing is good, is incapable of any definition, in the most important sense of the word . . . because it is simple and has no parts.”).

“naturalistic fallacy,” when they attempt to define “good” in terms of the natural properties of something that they believe to be good, because this does not define good itself.³⁶ Moore argues that good is a property of which human beings have an intuitive awareness, because “good” cannot otherwise be proven.³⁷ In Moore’s view, “good” does not have a concrete definition, and human intuition is required to know and understand what is “good.”³⁸

Other early twentieth century scholars built upon Moore’s work. For example, in 1912, H.A. Prichard published *Does Moral Philosophy Rest on a Mistake?*³⁹ Prichard argues that all normative systems of ethics are attempts to justify and explain preconceived feelings of obligation and intuitions about how one ought to act.⁴⁰ Prichard claims that moral philosophy is simply an attempt to prove and rationalize preexisting intuitions about what constitutes right and wrong.⁴¹ Moore also influenced W.D. Ross, and in his 1930 treatise *The Right and the Good*, Ross argued that basic ethical truths are self-evident and form the foundation of prima facie ethical duties.⁴² Ross provides a nonexclusive list of these duties, which include duties of fidelity, reparation, gratitude, justice, beneficence, self-improvement, and non-maleficence.⁴³ Ross’s system of morality ultimately requires a balancing of the duties created from these self-evident truths.⁴⁴

During the latter half of the twentieth century, the popularity of normative ethical theories based on intuitionism waned.⁴⁵ The focus of many moral theorists shifted from ethical intuition to analytic reasoning.⁴⁶ Some academics even began to use the term “intuitionism” in a pejorative manner.⁴⁷

Even during this period, however, moral theorists still recognized the role of ethical intuition in moral decisionmaking. For example, in *A Theory of Justice*, John Rawls discussed a state of being that he termed “reflective equilibrium” in which ethical intuitions of justice are in balance with analytical principles of justice.⁴⁸ Reflective equilibrium is reached by a pro-

36. *Id.* at 61–62.

37. *Id.* at 35.

38. *Id.*

39. H.A. Prichard, *Does Moral Philosophy Rest on a Mistake?*, 21 MIND 21 (1912).

40. *Id.* at 21–22.

41. *Id.*

42. W.D. ROSS, THE RIGHT AND THE GOOD 39–41 (1930).

43. *Id.* at 21.

44. *Id.*

45. See Philip Stratton-Lake, *Introduction to ETHICAL INTUITIONISM: RE-EVALUATIONS 1* (Philip Stratton-Lake ed., 2002) (noting that “during the 1950s and 1960s intuitionism was rejected out of hand as an utterly untenable theory”).

46. *Id.*

47. *Id.*

48. JOHN RAWLS, A THEORY OF JUSTICE 42–43 (Harvard Univ. Press rev. ed. 1999).

cess through which intuitions and analytic principles are adjusted through self-reflection until a person's set of beliefs is rendered coherent.⁴⁹ Rawls's theory of reflective equilibrium is appealing, because it explains both the role of ethical intuition and analytic thinking in moral decisionmaking.

In recent years, ethical intuitionism has experienced a reemergence. Various scholars have advanced moral theories based at least in part on the recognition that ethical intuition plays a role in moral decisionmaking.⁵⁰ A partial explanation for the resurgence of ethical intuitionism as a moral theory is that science now validates that human beings make moral decisions based at least in part on intuition.

B. Cognitive Neuroscience

Although the field of cognitive neuroscience⁵¹ has roots that extend back centuries, the term "cognitive neuroscience" is a relatively recent entry into the scientific lexicon. The term was coined by Michael Gazzaniga and George Miller in New York City during the late 1970s.⁵² The rapid development of this field has occurred as a result of the invention of various neuroimaging technologies within the past half-century.⁵³

49. *Id.*

50. See, e.g., ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2004); MICHAEL HUEMER, *ETHICAL INTUITIONISM* (2005). See generally Thomas Baldwin, *The Three Phases on Intuitionism*, in *ETHICAL INTUITIONISM: RE-EVALUATIONS*, *supra* note 45, at 92–112.

51. Cognitive neuroscience is the study of how the physical structures and functions of the brain relate to the conscious and unconscious operations of the mind. See Michael S. Gazzaniga, Karl W. Doron & Chadd M. Funk, *Looking Toward the Future: Perspectives on Examining the Architecture and Function of the Human Brain as a Complex System*, in *THE COGNITIVE NEUROSCIENCES* 1247, 1247 (Michael S. Gazzaniga ed., 4th ed. 2009) ("The aim of cognitive neuroscience is to advance our understanding of the organization and function of the human brain and, ultimately, to solve the mystery of how the human brain creates the human mind."). Scientists who work in the field seek to explain in physical terms how the mind operates and how the process of human thought occurs. *Id.* The field can be viewed as a branch of both neuroscience and psychology, or it can be described as a hybrid between the two because of its close relationship with both disciplines. See Brenda Milner, Larry R. Squire & Eric R. Kandel, *Cognitive Neuroscience and the Study of Memory*, 20 *NEURON* 445, 445 (1998) ("Cognitive neuroscience originated in two disciplines: in *psychology*, in the development of rigorous methods for analyzing behavior and cognition, and in *systems neurobiology*, in the effort to understand the structure and function of neuronal circuits of the sensory and motor systems of the brain.").

52. Although the location of the event is debatable, Michael Gazzaniga and George Miller are credited with coining the term "cognitive neuroscience" during the 1970s. Compare John T. Bruer, *Mapping Cognitive Neuroscience: Two-Dimensional Perspectives on Twenty Years of Cognitive Neuroscience Research*, in *THE COGNITIVE NEUROSCIENCES*, *supra* note 51, at 1221 ("Michael Gazzaniga and George A. Miller coined the name *cognitive neuroscience* in 1976, over martinis at the Rockefeller University Faculty Club."), with Goodenough & Prehn, *supra* note 14, at 84 (reporting that the term "cognitive neuroscience" was "coined, the story goes, during a New York taxi ride in the late 1970s").

53. See Goodenough & Prehn, *supra* note 14, at 84 ("Although cognitive neuroscience was well launched before the advent of such imaging technologies as PET and fMRI, the availability

Prior to the development of sophisticated neuroimaging technologies beginning in the late 1950s, scientists had to rely almost exclusively on lesion studies to conduct research on the subject matter that currently falls within the field of moral cognitive neuroscience.⁵⁴ The term “lesion” designates abnormal tissue that in most cases has been created by disease or trauma.⁵⁵ Lesion studies are studies of this abnormal tissue. These studies have many shortcomings. In the absence of brain scan technology, lesion studies in many cases can be conducted only postmortem, and lesion studies reveal information regarding brain structure, while leaving uncertainty as to brain activity.⁵⁶

Perhaps, the most famous lesion study in the field of moral cognitive neuroscience⁵⁷ is the case of Phineas P. Gage.⁵⁸ In the summer of 1848, Gage worked as a construction foreman for the Rutland & Burlington Railroad and was in charge of a group of men who were in the process of laying down track for the Railroad’s expansion into Vermont.⁵⁹ In the process of clearing stone for the track, Gage accidentally detonated explosive powder that he had inserted into a hole in a rock.⁶⁰ The force of the explosion drove an iron rod that Gage had been using to pack the explosive through his left cheek, through the front of his brain, and through the top of his skull.⁶¹ Remarkably, Gage lived and recovered physically with the exception of los-

of non-intrusive methods that allow us to establish functional connections between mental tasks and specific anatomical structures has increased its power and accelerated its application.”).

54. See Elissa M. Aminoff et al., *The Landscape of Cognitive Neuroscience: Challenges, Rewards, and New Perspectives*, in *THE COGNITIVE NEUROSCIENCES*, *supra* note 51, at 1255–56 (“Historically, the ability to draw conclusions regarding the necessity of a brain structure to perform a particular cognitive operation has been limited to lesion studies in animals and the rare occurrence of focal lesions in humans due to brain insults or surgery. In recent years, new methodological techniques such as transcranial magnetic stimulation (TMS) have enabled the noninvasive manipulation of cortical activity in healthy individuals.”).

55. See Goodenough & Prehn, *supra* note 14, at 84.

56. *Id.*

57. This Article exclusively focuses on moral cognitive neuroscience, which is the study of how the physical structures and functions of the brain relate to the conscious and unconscious moral operations of the mind. In some regards, metaethics can be viewed as a form of moral cognitive neuroscience because metaethics focuses on understanding how the moral mind functions. Moral cognitive neuroscience is distinct from metaethics, however, because moral cognitive neuroscience focuses on the physical structures and functions of the brain whereas metaethics focuses on the functioning of the mind itself and usually does not emphasize how the brain is physically structured and operates.

58. See generally ANTONIO DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (Penguin Books 2005) (1994) (providing an in-depth examination of Phineas Gage’s accident and his importance to the field of moral cognitive neuroscience); MALCOLM MACMILLAN, *AN ODD KIND OF FAME: STORIES OF PHINEAS GAGE* (2000) (providing a detailed discussion of Phineas Gage’s life and his historical significance).

59. DAMASIO, *supra* note 58, at 3–4 (describing the circumstances surrounding Gage’s accident).

60. *Id.*

61. *Id.*

ing vision in his left eye.⁶² Though his memory, intelligence, and linguistic abilities were unaffected,⁶³ the damage to the prefrontal cortices of his brain, however, negatively impacted his moral character and diminished his ability to make good moral choices.⁶⁴

Gage's story is significant to the field of moral cognitive neuroscience because it validates that certain regions and systems in the brain play a significant role in moral decisionmaking. At the time of Gage's injury, the concept that different areas of the brain might be responsible for different mental functions was not a new one. For example, in the late 1700s, Franz Josef Gall developed and championed phrenology, a pseudoscience that suggested that different parts of the brain have different roles in mental activity.⁶⁵ Gage's story helped to prove that different structures in the brain play a role in moral reasoning. This revelation validates the underlying premise of moral cognitive neuroscience that the physical structures and functions of the brain relate to the conscious and unconscious moral operations of the mind.

The story of Phineas Gage and the stories of other individuals with ventromedial prefrontal cortex damage also help validate the importance of intuition and emotion in moral decisionmaking. In the 1990s, Antonio Damasio undertook extensive study of Gage's case and patients with similar ventromedial prefrontal cortex damage.⁶⁶ In his book *Descartes' Error: Emotion, Reason, and the Human Brain*, Damasio links the ventromedial prefrontal cortex to the systems in the brain that form the basis for emotional processing.⁶⁷ He concludes that emotion and feeling are "indispensable for rationality" and moral decisionmaking.⁶⁸ Importantly, Damasio does not undercut the role of rationality and analytic thought; he argues only that emotion and feeling have a role to play in rational behavior.⁶⁹ Other scien-

62. *Id.* at 8 ("Gage regained his strength and . . . his physical recovery was complete. Gage could touch, hear, and see, and was not paralyzed of limb or tongue. He had lost vision in his left eye, but his vision was perfect in the right.").

63. *Id.* at 11 (noting that after Gage's accident that he displayed "apparent intactness" of his "attention, perception, memory, language, [and] intelligence").

64. *Id.* at 8 (noting that after the accident "Gage was no longer Gage" because of his inability to make good moral decisions).

65. See FRANZ JOSEF GALL, ON THE FUNCTIONS OF THE BRAIN AND OF EACH OF ITS PARTS: ON THE ORIGIN OF THE MORAL QUALITIES AND INTELLECTUAL FACULTIES OF MAN, AND THE CONDITIONS OF THEIR MANIFESTATION (Winslow Lewis trans., Boston, Marsh, Capen & Lyon 1835).

66. DAMASIO, *supra* note 58.

67. *Id.* at 61 ("If the ventromedial sector [of the brain] is included in the lesion, bilateral damage to prefrontal cortices is consistently associated with impairments of reasoning/decision making and emotion/feeling.").

68. *Id.* at xvi-xvii.

69. *Id.*

tists have reached similar conclusions about the role of the ventromedial prefrontal cortex and emotion in rational decisionmaking.⁷⁰

In addition to lesion studies, the development of neuroimaging technologies such as functional magnetic resonance imaging (fMRI) have allowed for significant advances in the field of moral cognitive neuroscience. When fMRI is employed, magnetic fields and radio waves are used to monitor blood flow in the brain that is associated with neural activity.⁷¹ The fMRI process produces images that show which portions of the brain are active at the time when the imaging occurs.⁷² Thus, fMRI technology makes it possible to link activities in the brain to operations of the mind.⁷³

Jorge Moll and his colleagues have conducted a number of studies using fMRI technology to investigate brain activity in moral decisionmaking.⁷⁴ Based on these studies and after reviewing the work of others, Moll and his colleagues have identified many of the areas of the brain that are commonly involved in moral cognition.⁷⁵ After juxtaposing his research with research regarding the structures of the brain commonly associated with emotion, Moll and his colleagues have recently written that “[m]oral emotions play a central role in both implicit and explicit moral appraisals, being an essential ingredient for human social cognition.”⁷⁶ Put another

70. See Steven W. Anderson, Antoine Bechara, Hanna Damasio, Daniel Tranel & Antonio R. Damasio, *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCIENCE 1032, 1034 (1999) (observing that in individuals with prefrontal cortex damage “emotional responses to social situations and behavior in situations that require knowledge of complex social conventions and moral rules were inadequate”); Hanna Damasio, Thomas Grabowski, Randall Frank, Albert M. Galaburda & Antonio R. Damasio, *The Return of Phineas Gage: Clues About the Brain from the Skull of a Famous Patient*, 264 SCI. 1102, 1102 (1994) (describing the role of the ventromedial prefrontal cortex and emotion in rational decisionmaking).

71. See Aminoff et al., *supra* note 54, at 1255–58 (discussing the use of functional magnetic resonance imaging (fMRI) as a tool for exploration in the field of cognitive neuroscience).

72. See *id.*

73. *Id.*

74. See Jorge Moll, Paul J. Eslinger & Ricardo de Oliveira-Souza, *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQUIVOS DE NEURO-PSIQUIATRIA 657 (2001); Jorge Moll, Ricardo de Oliveira-Souza, Ivanei E. Bramati & Jordan Grafman, *Functional Networks in Emotional Moral and Nonmoral Social Judgments*, 16 NEUROIMAGE 696 (2002); Jorge Moll, Ricardo de Oliveira-Souza, Paul J. Eslinger, Ivanei E. Bramati, Janaina Mourao-Miranda, Pedro Angelo Andreiuolo & Luiz Pessoa, *The Neural Correlates of Moral Sensitivity: A Functional Magnetic Resonance Imaging Investigation of Basic and Moral Emotions*, 22 J. NEUROSCIENCE 2730 (2002).

75. See Jorge Moll, Roland Zahn, Ricardo de Oliveira-Souza, Frank Krueger & Jordan Grafman, *The Neural Basis of Human Moral Cognition*, 6 NATURE REVIEWS NEUROSCIENCE 799, 800 (2005). *But see id.* (noting some “differential findings” regarding the possible activation of additional areas of the brain in the process of moral cognition).

76. See Jorge Moll, Ricardo de Oliveira-Souza, Roland Zahn & Jordan Grafman, *The Cognitive Neuroscience of Moral Emotions*, in 3 MORAL PSYCHOLOGY 1 (Walter Sinnott-Armstrong ed., 2008).

way, Moll and his colleagues have determined that moral reasoning contains at least some non-analytic, intuitive components.⁷⁷

The recognition that emotion and intuition play a role in moral decisionmaking is in some regard unremarkable because individuals prone to antisocial and immoral behavior are commonly defined by their emotional deficiencies. For example, psychopaths and others with anti-social personality disorders are diagnosed by their emotional deficits, such as lack of empathy and lack of remorse.⁷⁸ The groundbreaking contribution of Damasio, Moll, their respective colleagues, and others working in the field of moral cognitive neuroscience is locating the areas of the brain that are associated with moral decisionmaking and demonstrating that many of those areas are responsible for emotional processing as well. Notably, moral cognitive neuroscience research has also demonstrated that psychopaths and others individuals with antisocial personality disorders tend to show dysfunction in the areas of the brain that are commonly associated with emotional moral decisionmaking.⁷⁹

To be clear, although emotion and intuition play a role in fueling moral decisionmaking, analytic reason has a role to play also. Professor Joshua Greene and his colleagues have conducted various studies employing fMRI technology to track emotional engagement in moral decisionmaking. Initially, these studies suggested that the role of emotion and intuition tends to

77. See also Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517 (2002) (synthesizing a variety of findings relating to moral cognitive neuroscience that suggest a major role for emotion and affective intuition in moral reasoning).

78. See Robert D. Hare & Craig S. Neumann, *Psychopathy as a Clinical and Empirical Construct*, 4 ANN. REV. CLINICAL PSYCHOL. 217, 219–21 (2008) (providing a commonly used checklist for determining psychopathy that includes various affective factors, such as lack of remorse, shallow affect, callousness, and lack of empathy).

79. See, e.g., Kent A. Kiehl, *A Cognitive Neuroscience Perspective on Psychopathy: Evidence for Paralimbic System Dysfunction*, 142 PSYCHIATRY RES. 107, 120–22 (2006) (reviewing and synthesizing cognitive neuroscience research on affective processes in psychopathy); Kent A. Kiehl, Andra M. Smith, Robert D. Hare, Adrianna Mendrek, Bruce B. Forster, Johann Brink & Peter F. Liddle, *Limbic Abnormalities in Affective Processing by Criminal Psychopaths as Revealed by Functional Magnetic Resonance Imaging*, 50 BIOLOGICAL PSYCHIATRY 677, 682 (2001) (reporting on the results of a study “support[ing] the hypothesis that criminal psychopathy is associated with abnormalities in the function of structures in the limbic system and frontal cortex while engaged in processing of affective stimuli”); Jurgen L. Muller, Monika Sommer, Katrin Dohnel, Tatjana Weber, Tobias Schmidt-Wilcke & Goran Hajak, *Disturbed Prefrontal and Temporal Brain Function During Emotion and Cognition Interaction in Criminal Psychopathy*, 26 BEHAV. SCI. & L. 131, 143 (2008) (reporting on the results of an fMRI study that “support the notion that emotion–cognition interaction is disturbed in psychopaths”); Adrian Raine & Yaling Yang, *Neural Foundations to Moral Reasoning and Antisocial Behavior*, 1 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 203, 210 (2006) (concluding that “the rule-breaking, immoral behavior of antisocial and psychopathic individuals may in part be due to impairments in those brain regions subserving moral cognition and emotion; [and] while impairments to the moral emotional system may be primary in antisocials, disruption of moral cognitive and cognitive-emotional systems are also possible”).

be greater in circumstances in which “personal” moral dilemmas are being addressed.⁸⁰ For purposes of this research, “personal” moral dilemmas were defined as situations “(i) likely to cause serious bodily harm, (ii) to a particular person, (iii) in such a way that the harm does not result from the deflection of an existing threat onto a different party.”⁸¹ An “impersonal” moral dilemma was defined as a dilemma that fails to meet the criteria for a personal moral dilemma.⁸² Professor Greene and his colleagues posed various moral dilemmas to participants in the studies and used fMRI technology to monitor brain activity in response to these moral dilemmas.⁸³ The studies demonstrated systematic variations in the use of emotion in moral decisionmaking based on whether the moral dilemma posed was personal or impersonal.⁸⁴ Based upon methodological concerns regarding this research, which Greene and his colleagues acknowledged and embraced,⁸⁵ Greene and his colleagues have conducted additional research and have refined their theories.⁸⁶ They now believe that the role of emotion and intuition in moral decisionmaking tends to vary based on whether an individual is making deontological moral judgments, which are moral decisions about rights and duties, or consequentialist moral judgments, which are moral decisions about the “greater good,” and they believe that emotion and intuition is more closely linked to deontological moral judgments.⁸⁷ Notable, none of

80. See Joshua D. Greene, R. Brian Sommerville, Leigh E. Nystrom, John M. Darley & Jonathan D. Cohen, *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001).

81. See Greene & Haidt, *supra* note 77, at 518–19 (summarizing earlier research by Joshua Greene and his colleagues investigating the role of emotion in moral decisionmaking involving “personal” and “impersonal” dilemmas).

82. *Id.*

83. See Greene et al., *supra* note 80, at 2106–07 (explaining the experiments conducted by Greene and his colleagues).

84. *Id.* at 2107.

85. Compare Jonathan McGuire, Robyn Langdon, Max Coltheart & Catriona Mackenzie, *A Reanalysis of the Personal/Impersonal Distinction in Moral Psychology Research*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 577 (2009) (criticizing the methodology used in the research conducted by Greene and his colleagues), with Joshua D. Greene, *Dual-Process Morality and the Personal/Impersonal Distinction: A Reply to McGuire, Langdon, Coltheart, and Mackenzie*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 581 (2009) (embracing and responding to that criticism).

86. See, e.g., Joshua D. Greene, Sylvia A. Morelli, Kelly Lowenberg, Leigh E. Nystrom & Jonathan D. Cohen, *Cognitive Load Selectively Interferes with Utilitarian Moral Judgment*, 107 COGNITION 1144 (2008).

87. See Joshua D. Greene, *The Secret Joke of Kant’s Soul*, in 3 MORAL PSYCHOLOGY, *supra* note 76, at 35–36 (“[D]eontological judgments tend to be driven by emotional responses, and . . . deontological philosophy, rather than being grounded in moral reasoning, is to a large extent an exercise in moral rationalization. This is in contrast to consequentialism, which . . . arises from rather different psychological processes, ones that are more ‘cognitive,’ and more likely to involve genuine moral reasoning.”); Joseph M. Paxton & Joshua D. Greene, *Moral Reasoning: Hints and Allegations*, 2 TOPICS COGNITIVE SCI. 511, 513 (2010) (“According to Greene, deontological moral judgments, judgments that are naturally regarded as reflecting concerns for rights and duties, are driven primarily by intuitive emotional responses. At the same time, Greene et al. argue

this research suggests that emotion and intuition or analytic reasoning yield correct answers to moral dilemmas. This research does evidence that emotion and intuition have a role to play in moral decisionmaking.

C. Moral Psychology and Behavioral Economics

The recognition of the role of intuition in moral decisionmaking has led to the development of sophisticated models as to how moral decisionmaking actually occurs. As previously discussed, a number of philosophers have created moral systems with intuition as a foundation.⁸⁸ The early twentieth century British ethical intuitionists, for example, Moore, Prichard, and Ross, represent the strongest use of intuition as a foundation for a moral system.⁸⁹ Each of these individuals believed that intuition based upon the dialectic between the mind and the external world is the foundation of morality itself.⁹⁰

Other philosophers, such as John Rawls, have taken a more moderate approach that allows a place for both analytic and intuitive processes in moral reasoning. As previously explained, in *A Theory of Justice*, Rawls discusses a state of being that he termed “reflective equilibrium” in which ethical intuitions of justice are in balance with analytical principles of justice.⁹¹ Rawls states that his theory of justice is “a theory of moral sentiments . . . setting out the principles governing our moral powers, or, more specifically, our sense of justice.”⁹² He continues, “[t]here is a definite if limited class of facts against which conjectured principles can be checked, namely, our considered judgments in reflective equilibrium.”⁹³ Put simply, Rawls proposes a dual-process moral theory in which both intuition and analytic reasoning play a role.

Unlike Rawls and the other philosophers discussed in this Article, those who study moral psychology and behavioral economics are more concerned about how moral decisionmaking occurs, rather than whether a particular decision is right or wrong. Remarkably, however, scholars in both fields have also developed dual-process theories of how moral decisionmaking occurs.

In the field of moral psychology, a debate has long raged over whether analytic reason or emotion and intuition fuel moral decisionmaking. Sig-

that utilitarian/consequentialist judgments, judgments aimed at promoting the greater good, are supported by controlled cognitive processes that look more like moral reasoning.”).

88. *See supra* Part II.A (discussing the use of ethical intuitionism as the basis for a variety of moral theories).

89. *See supra* notes 33–44 and accompanying text.

90. *See supra* notes 33–44 and accompanying text.

91. RAWLS, *supra* note 48, at 42.

92. *Id.* at 44.

93. *Id.*

mund Freud, for instance, argued that what he termed the “super-ego” governs moral behavior through the moral sense of guilt. In *Civilization and Its Discontents*, Freud wrote:

The super-ego is an agency . . . , and conscience is a function which we ascribe . . . to that agency. This function consists in keeping a watch over the actions and intentions of the ego and judging them, in exercising a censorship. The sense of guilt, the harshness of the super-ego, is thus the same thing as the severity of the conscience.⁹⁴

Similarly, in *New Introductory Lectures on Psycho-Analysis*, Freud wrote, “The super-ego applies the strictest moral standard to the helpless ego which is at its mercy; in general it represents the claims of morality, and we realize all at once that our moral sense of guilt is the expression of the tension between the ego and the super-ego.”⁹⁵ Thus, Freud believed that moral decisionmaking occurs at least in part based on the moral sense of guilt.

At the opposite end of the spectrum, Lawrence Kohlberg advanced a theory of moral cognitive development based upon reasoning and reflection. Building upon earlier work by Jean Piaget,⁹⁶ Kohlberg argues that moral development occurs in a series of six stages.⁹⁷ In the first stage, which Kohlberg refers to as “The Punishment and Obedience Orientation,” a child assumes that the physical consequences determine the rightness or wrongness of an action.⁹⁸ In the second stage, “The Instrumental Relativist Orientation,” notions of reciprocity, sharing, and fairness begin to emerge as the child begins to believe that rightness consists of satisfying one’s own needs and occasionally the needs of others to obtain some personal benefit.⁹⁹ Next, in stage three, “The Interpersonal Concordance or ‘Good Boy-Nice Girl’ Orientation,” the child equates good behavior with what pleases others or help them.¹⁰⁰ In Kohlberg’s fourth stage, the “Society Maintaining Orientation,” the child equates rightness with adherence to authority, doing one’s duty, and maintaining social order.¹⁰¹ In the fifth stage, “The

94. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (1930), reprinted in 21 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 136 (James Strachey ed. & trans., 1964).

95. SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS (1930), reprinted in 22 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 61 (James Strachey ed. & trans., 1964).

96. See generally JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Marjorie Gabain trans., Free Press 1965) (1932).

97. See LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 17–19 (1981)

98. *Id.* at 17.

99. *Id.*

100. *Id.* at 18.

101. *Id.*

Social Contract Orientation,” the rightness is determined by one’s obligation to society and preservation of individual rights.¹⁰² During this stage, Kohlberg states, “[t]he result is an emphasis on the ‘legal point of view,’ but with an emphasis on the possibility of changing law in terms of rational consideration of social utility.”¹⁰³ In the sixth and final stage, “The Universal Ethical Principle Orientation,” right comes to be defined by self-chosen moral principles “appealing to logical comprehensiveness, universality, and consistency.”¹⁰⁴ As evidenced by the six stages, Kohlberg’s view of moral cognitive development is a theory based upon analytic reasoning slowly displacing hedonistic intuitions.¹⁰⁵

Kohlberg, however, is not without his critics. Carol Gilligan, for example, faults Kohlberg’s research and theory for being androcentric.¹⁰⁶ Gilligan is particularly troubled by the lack of female participants in the empirical study that gave birth to Kohlberg’s theory of moral cognitive development.¹⁰⁷ Gilligan offers an additional theory of moral cognitive development that focuses on the moral development of women.¹⁰⁸ The ultimate result of this theory of development is a moral system based on emotion, which Gilligan terms an “ethic of care.”¹⁰⁹ Gilligan writes, “As we have listened for centuries to the voices of men and the theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak.”¹¹⁰ She continues, “Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in failure of connection.”¹¹¹ Gilligan’s research and writing suggests that intuition and emotion may also have a role in moral development.¹¹²

102. *Id.* at 18–19.

103. *Id.*

104. *Id.* at 19.

105. *Id.* at 17–19.

106. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 18 (1982)

107. *Id.* at 18 (reporting that “in the research from which Kohlberg derives his theory, females simply do not exist. Kohlberg’s . . . six stages that describe the development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys whose development Kohlberg [had] followed for a period of over twenty years.”).

108. *Id.* at 173.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

More recently, Jonathan Haidt has also criticized rationalist models in moral psychology.¹¹³ In the place of these rationalist models, Haidt offers a social intuitionist model.¹¹⁴ As Haidt describes it, “[t]he central claim of the social intuitionist model is that moral judgment is caused by quick moral intuitions and is followed (when needed) by slow, ex post facto moral reasoning.”¹¹⁵ Haidt provides a variety of reasons to doubt primacy of analytic reasoning in moral decisionmaking. First, Haidt argues that intuition is “ubiquitous” in the moral decisionmaking process, rather than the process being fueled by analytic reasoning.¹¹⁶ Second, Haidt claims that “the reasoning process is more like a lawyer defending a client than a judge or scientist seeking [the] truth”¹¹⁷ because individuals regularly seek to validate their moral intuitions with post hoc reasoning.¹¹⁸ Third, Haidt argues that post hoc reasoning often creates the illusion of objective reasoning, when intuition is the real basis for moral decisionmaking.¹¹⁹ Fourth, Haidt argues that moral action correlates more with moral emotion, rather than with moral reasoning.¹²⁰ In Haidt’s view, “moral reasoning is rarely the direct cause of moral judgment.”¹²¹ Thus, in Haidt’s social intuitionist model, emotion and intuition are the driving force behind moral decisionmaking.¹²²

Some scholars have tried to find a middle ground between rationalist theories and intuitionist theories of moral decisionmaking. Joshua Greene, for example, has used his moral cognitive neuroscience research to develop a dual-process theory of moral decisionmaking.¹²³ In describing this theory, Greene suggests “both intuitive emotional responses and more controlled cognitive responses play crucial and, in some cases, mutually competitive roles” in moral judgment.¹²⁴ He links intuition and analytic reasoning to different categories of moral decisionmaking. Greene writes,

113. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) (“This article reviews evidence against rationalist models and proposes an alternative: the social intuitionist model.”).

114. *Id.*

115. *Id.* at 817.

116. *Id.* at 819 (noting that evidence exists that “moral judgment works like other kinds of judgment, in which most of the action is in the intuitive process”).

117. *Id.* at 820.

118. *Id.* at 822 (“Under . . . realistic circumstances, moral reasoning is not left free to search for truth but is likely to be hired out like a lawyer by various motives, employed only to seek confirmation of preordained conclusions.”).

119. *Id.* at 823 (arguing that “[p]eople have quick and automatic moral intuitions, and when called on to justify these intuitions they generate post hoc justifications out of a priori moral theories”).

120. *Id.*

121. *Id.* at 815.

122. *Id.* at 830.

123. Joshua D. Greene, *The Cognitive Neuroscience of Moral Judgment*, in THE COGNITIVE NEUROSCIENCES, *supra* note 51, at 987, 991.

124. *Id.*

“this theory associates controlled cognitive processing with utilitarian (or consequentialist) moral judgment aimed at promoting the ‘greater good.’”¹²⁵ He continues, “this theory associates intuitive emotional processing with deontological judgment aimed at respecting rights, duties, and obligations.”¹²⁶ This model is similar to dual-process models of moral decisionmaking that have been proposed in the past. Remarkably, however, science is now validating these dual-process theories of moral judgment through recently developed brain scan technology.

A similar sort of debate over the role of intuition in decisionmaking has also raged in the field of economics. Notably, prior to writing *The Wealth of Nations*, Adam Smith, who is viewed by some as the father of modern economics, authored *The Theory of Moral Sentiments*.¹²⁷ In that work, Smith argues that all individuals are endowed with moral sentiments,¹²⁸ and that moral sentiments play a leading role in making moral judgments.¹²⁹ When an individual is guided by that person’s “passions,” the individual’s actions are judged by others’ moral sentiments.¹³⁰ He writes,

When the original passions of the person principally concerned are in perfect concord with the sympathetic emotions of the spectator, they necessarily appear to this last just and proper, and suitable to their objects; and, on the contrary, when, upon bringing the case home to himself, he finds that they do not coincide with what he feels, they necessarily appear to him unjust and improper, and unsuitable to the causes which excite them.¹³¹

Adam Smith’s moral sentimentalism is somewhat unsurprising because he was a member of the Scottish Enlightenment and was contemporaries with and likely influenced by David Hume who, as previously mentioned, championed a theory of moral sentimentalism.¹³²

Of course, Smith portrayed humans as being more rational and calculating in his later treatise, *The Wealth of Nations*.¹³³ In that work, he wrote, “It is not from the benevolence of the butcher, the brewer, or the baker that

125. *Id.*

126. *Id.*

127. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (Liberty Classics 1976) (1759).

128. *Id.* at 47 (“How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it.”).

129. *Id.* at 58.

130. *Id.*

131. *Id.*

132. *See supra* notes 23–26 and accompanying text (discussing Hume’s theory of Moral Sentimentalism).

133. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., The Modern Library 1937) (1776).

we expect our dinner, but from their regard to their own interest.”¹³⁴ This conception of humans as rational, self-interested, utility-maximizers has been termed by some to be “homo economicus” or the “economic human.” Although this narrow view of human nature may be a useful simplification for purposes of developing economic theory, it fails to entail the full range of human decisionmaking.¹³⁵ Remarkably, this conception of human nature has dominated much of modern economics from the days of Adam Smith to the present.¹³⁶

In recent years, however, with the rise of behavioral economics, economists have begun to focus more on how individuals actually make decisions, rather than assuming consistent utility-maximizing rationality. For example, Daniel Kahneman has proposed a dual-process approach for understanding human decisionmaking. In *Thinking, Fast and Slow*, Professor Kahneman argues that two systems are responsible for decisionmaking.¹³⁷ The first system is based upon intuitive thought, which he writes, “is more influential than your experience tells you, and it is the secret author of many of the choices and judgments you make.”¹³⁸ The second system is based upon deliberate thought.¹³⁹ As Professor Kahneman describes it, intuitive system can be described as “fast” thinking and the deliberate system can be described as “slow” thinking.¹⁴⁰ Together, these two systems tell the story of how humans actually make decisions.¹⁴¹

What ultimately can be learned from the debates in the fields of philosophy, psychology, and economics that are discussed above is that intuition has a role to play in moral decisionmaking. This Article does not assert that intuition yields ethically correct solutions to moral problems. Simply,

134. *Id.* at 14.

135. See John Stuart Mill, *On the Definition of Political Economy; and On the Method of Philosophical Investigation in that Science*, 26 LONDON & WESTMINSTER REV. 1, 12 (London, Longmans, Green, Reader, and Dyer 1836) (“What is now commonly understood by the term ‘Political Economy’ is not the science of speculative politics, but a branch of that science. It does not treat of the whole of man’s nature as modified by the social state, nor of the whole conduct of man in society. It is concerned with him solely as a being who desires to possess wealth, and who is capable of judging of the comparative efficacy of means for obtaining that end.”).

136. See Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 3 (8th ed. 2011) (arguing that the purpose of economics is “to explore the implications of assuming that man is a rational maximizer of his ends in life”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1060 (2000) (noting that the conception of human beings as rational, self-interested, utility-maximizers pervades modern economics because “[r]ational choice theory is the heart of modern microeconomic theory”).

137. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

138. *Id.* at 13.

139. *Id.*

140. *Id.*

141. *Id.*

all this Article suggests is that intuition is employed in reaching conclusions when confronted with moral questions.

D. Resort to Practical Reason

An additional ground for believing that intuition is a part of the moral decisionmaking process is that it reflects how most people actually make moral decisions. The majority of people resort to intuition, which also could be termed “practical reason,” when confronted with ethical dilemmas.¹⁴² In everyday life, when confronted with moral issues, few people spend time thinking about the following questions: What would Immanuel Kant do, if faced with a similar situation? Or, what would John Stuart Mill do? Most people simply opt for what intuitively seems like the best solution.

Some individuals do try to conform themselves to certain moral systems. Even with that being the case, intuition still plays a role. For example, although most individuals when faced with an ethical quandary do not ask themselves what Kant or Mill would do, many Christians ask the following question when faced with a difficulty ethical decision: What would Jesus do? During the 1990s, evangelical Christians even popularized this question as a means for determining how to behave.¹⁴³ With that said, even if one chooses to conform one’s behavior to Christian orthodoxy, intuition still has a role to play. For instance, the Ten Commandments play a fundamental role in both Christianity and Judaism. One of the Commandments provides: “Thou shalt not bear false witness against thy neighbour.”¹⁴⁴ The question of what constitutes “false witness” or a misrepresentation is often one that is determined by intuition. Although certain misrepresentations can be easily discerned, especially those that can be judged quantifiably, de-

142. See John Darley, *Realism on Change in Moral Intuitions*, 77 U. CHI. L. REV. 1643, 1653 (2010) (“The folk theory that people hold about punishment is a naturalistic one, in the sense that people intuitively feel that the core prohibitions against physical harms, unauthorized takings, and deception in exchanges have a moral rightness that stems from forces that exist beyond the mere agreements of interacting individuals.”); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 3 (2007) (“[S]ocial science evidence suggests that judgments about justice, especially for violations that might be called the core of criminal wrongdoing, are more the product of intuition than reasoning.”).

143. See also Bill Broadway, *Fashion Testament; For Christian Teens, ‘WWJD’ Bracelet Is an Attention-Getting Badge of Faith*, WASH. POST, July 12, 1997, at B7 (reporting that “[f]rom beaches to mountains, coast to coast, Christian teenagers are in hot pursuit of bracelets marked with the letters ‘WWJD.’”); Mike Burke, *Little Reminders of Faith: Teens Can’t Get Enough of WWJD Paraphernalia*, CHI. DAILY HERALD, Mar. 1, 1998, at Neighbor 1 (reporting that the letters “WWJD” “can be seen on everything from T-shirts and caps to bumper stickers and stationery”); Emily Nussbaum, *Status is . . . for Evangelical Teen-Agers; Jewelry for Jesus*, N.Y. TIMES (Nov. 15, 1998), <http://www.nytimes.com/1998/11/15/magazine/status-is-for-evangelical-teen-agers-jewelry-for-jesus.html> (reporting on the wearing of “WWJD” bracelets among evangelical Christian teenagers during the late 1990s).

144. *Exodus* 20:16 (King James).

termining whether many assertions are misrepresentations can be incredibly difficult, and often can be discovered only by resorting to intuition.¹⁴⁵ In short, even in rigid moral systems, intuition still often comes into play.

III. THE IMPORTANCE OF ETHICAL INTUITIONISM IN LEGAL COMPLIANCE

Up to this point, a great deal has been said about the role of intuition in moral decisionmaking, and very little has been said about the importance of moral intuition in legal compliance for business entities. In this Part, the role of moral intuition in providing insights into the foundations of law, assisting in the discovery of the law, and protecting business entities will be discussed.

A. *Moral Intuition Provides Insights into the Foundations of Law*

Although not a substitute for legal research, moral intuition can be used to gain insight into the foundations of law. This is because laws are institutionalized norms in a democratic society that are created to some extent based on the moral intuitions of the populace. Moreover, legislators and judges use moral intuitions in their own decisionmaking processes in creating law.

At least in part, laws in a democratic society are built upon moral intuitions regarding what should be legally punishable. As previously discussed, when faced with moral problems, the vast majority of individuals resort to some extent to moral intuition to resolve those problems.¹⁴⁶ When public outcry occurs regarding some form of behavior in a democratic society, legislatures and other regulators often respond to that outcry by passing laws and regulations.¹⁴⁷ This outcry is often based at least in part upon the practical reason, i.e., the collective intuition, of the public.¹⁴⁸ In addition,

145. See *supra* note 9 and accompanying text (discussing the proposition that intuition is one of the best mechanisms for determining deception).

146. See *supra* Part II.D (suggesting that most people resort to practical reason, i.e., intuition, when faced with moral issues).

147. See Frederick K. Beutel, *An Outline of the Nature and Methods of Experimental Jurisprudence*, 51 COLUM. L. REV. 415, 432 (1951) (“Often [laws] are the product of impassioned emotions rather than systematic study. . . . As a result of this haphazard practice, most current laws are carried along by the force of inertia until they either become obsolete or are repealed due to . . . public clamor . . .”); Michael D. Guttentag, *Is There a Law Instinct?*, 87 WASH. U. L. REV. 269, 271 (2009) (“The view that legal systems are a product of instinct is consistent with a growing recognition among scholars that innate predispositions play a crucial role in shaping many aspects of human behavior.”).

148. See Singer, *supra* note 3, at 542 (“Law is based, to some substantial extent, on our intuitive judgments of right and wrong, fairness and unfairness, justice and tyranny.”). Notably, the pressure that the public places upon politicians to pass laws and regulations is not always rational. See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 630 (“[T]here is a burgeoning literature describing how the availability heuristic results in a skewed assessment among the public as

because most individuals resort to some extent to their moral intuitions to define what is acceptable behavior, laws must at least in some regard conform to those intuitions. This is because to be legitimate in a democratic society, laws must to some extent conform to collective intuitions of justice.¹⁴⁹

Moreover, the public is not alone in their use of moral intuition to create law because legislators and judges use moral intuitions in their own decisionmaking processes to create law. Of the two categories, legislators and judges, the assertion that legislators use moral intuition to some extent in their creation of law is likely less controversial because legislators are not required to have legal training prior to undertaking their duties in creating and fine-tuning the law.

With that said, intuition is often a gap-filler when analytic reasoning fails a judge. For example, in *Jacobellis v. Ohio*,¹⁵⁰ the Supreme Court of the United States overturned the conviction of Nico Jacobellis, a manager of a motion picture theater, for two counts of possessing and exhibiting an obscene film in violation of Ohio law.¹⁵¹ The case centered on the issue of whether a French film called *Les Amants* (“*The Lovers*”), was obscene, and therefore, not entitled to protection under the First Amendment.¹⁵² In overturning the conviction, the majority of the Court produced four opinions, including concurrences, and the opinion of the Court was written by Justice William Brennan with only Justice Arthur Goldberg joining.¹⁵³ The most famous language from the case, however, comes from the concurrence of Justice Potter Stewart.¹⁵⁴ In declaring that First Amendment protections are severely limited in regard to “hard-core pornography,” Justice Stewart wrote, “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.”¹⁵⁵ He continued, “But I know it when I see it, and the motion picture involved in this case is not that.”¹⁵⁶ As evidenced by Justice Stewart’s statement, intuition has a role to play in the analytic framework of the law in certain circumstances.

to the relative likelihood of various calamities, and therefore misplaced pressure on elected representatives to enact laws that will redress virtually nonexistent harms.”).

149. See John M. Darley, *Citizens’ Assignments of Punishments for Moral Transgressions: A Case Study in the Psychology of Punishment*, 8 OHIO ST. J. CRIM. L. 101, 106, 112 (2010) (arguing that “a society that has in place a criminal justice code that is persistently deviant from the shared moral intuitions of the community risks losing the unforced obedience of its members to its laws”).

150. 378 U.S. 184 (1964).

151. *Id.* at 185–87.

152. *Id.* at 186–87.

153. *Id.* at 185.

154. *Id.* at 197 (Stewart, J., concurring).

155. *Id.*

156. *Id.*

In terms of legal compliance for business entities, moral intuition has a special role to play because many of the legal compliance issues facing businesses relate to the commission of some form of misrepresentation against the government, equity holders, creditors, employees, or the public. For example, during the 1930s, Congress promulgated the Securities Act of 1933¹⁵⁷ and the Securities Exchange Act of 1934¹⁵⁸ as a means of preventing fraud, deceit, and other misrepresentations in the purchase and sale of securities.¹⁵⁹ As Justice Arthur Goldberg accurately described it while writing for the majority in *SEC v. Capital Gains Research Bureau, Inc.*,¹⁶⁰ “A fundamental purpose, common to [the Securities Act and the Securities Exchange Act], was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”¹⁶¹ Put simply, one of the fundamental purposes of both the Securities Act and Exchange Act is preventing misrepresentations to the government, equity holders, creditors, employees, and the public. In fact, from securities regulation to product labeling to truth in advertising to dealing fairly with labor, most legal compliance issues facing legal entities relate to the commission of some form of misrepresentation against the government, equity holders, creditors, employees, or the public.¹⁶² Although in certain situations the line between truth and misrepresentation is clear, it is not in many instances. As a result, judges, lawyers, business people, and members of the public have to simply rely on a “know it when I see it” approach, similar to Justice Stewart in *Jacobellis*,¹⁶³ in determining when the line between puffery and misrepresentation worthy of sanction has been crossed.

157. 15 U.S.C. §§ 77a–77aa (2012).

158. *Id.* §§ 78a–78nn.

159. See Eric C. Chaffee, *Standing Under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser-Seller Requirement*, 11 U. PA. J. BUS. L. 843, 851–52 (2009) (discussing the passage of the Securities Act of 1933 and the Exchange Act of 1934 as a means to prevent fraud, deceit, and other misrepresentations in the purchase and sale of securities and suggesting that the Securities Act and the Exchange Act and arguing these Acts were needed to supplement a state law system that was “largely ineffective in preventing fraud”); see also Eric C. Chaffee, *Beyond Blue Chip: Issuer Standing to Seek Injunctive Relief Under Section 10(b) and Rule 10b-5 Without the Purchase or Sale of a Security*, 36 SETON HALL L. REV. 1135, 1138–40 (2006) (discussing the advent of federal securities law in the United States in the shadow of the stock market crash of 1929 and the ensuing Great Depression).

160. 375 U.S. 180 (1963).

161. *Id.* at 186.

162. See *supra* notes 6–7 and accompanying text (noting that most legal compliance issues for business entities relate to the prevention of some form of fraud or misrepresentation).

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

B. Moral Intuition Assists in Discovering the Law

Because laws are to some extent the institutionalized collective moral intuitions of society, moral intuition can assist in discovering the law. Moral intuition can suggest the need for additional legal research, limit information gathering costs, and help to answer difficult legal questions.

When attempting to discern the law, moral intuition can be a powerful tool for discovering the law. In the hypothetical at the beginning of this Article, for example, the attorney's intuitions about whether proposed disclosures might be considered manipulative or deceptive in violation of securities law suggested the need to dig deeper in terms of her research.¹⁶⁴ The attorney has reason to trust her intuition because intuitions of justice tend to be shared across our society. As reported in a recent article, Professors Paul Robinson and John Darley write, "Social science research demonstrates that people's intuitions of justice are quite nuanced and that, for the punishment of serious wrongdoing, our intuitions are widely shared across societies and demographics."¹⁶⁵ In a follow-up article, Professors Paul Robinson, Robert Kurzban, and Owen Jones argue, "[A]cross demographics, even across cultures, humans share nuanced intuitions (1) about what constitutes serious wrongdoing, (2) that serious wrongdoing should be punished, and (3) about the relative blameworthiness of offenders."¹⁶⁶ In terms of legal compliance for business entities, individual intuition about the fairness of a particular action can be useful in determining when follow-up legal research is required because individual intuition can give insight into the institutionalized moral intuitions of society that are memorialized in laws and regulations. Although moral intuitions can vary from person to person, those seeking to discover the law can employ their intuitions as a means of determining when they need to dig deeper in terms of their research.

In addition to suggesting when additional research is necessary, moral intuition can also reduce information gathering costs. Attorneys representing business entities are often forced to make legal compliance decisions with limited time, with limited financial resources, and based upon incomplete information about how the decision might impact the future of the business entities that they represent. This can be especially true when a business entity is entering into a transaction because time may be of the essence in closing the deal. Attorneys representing business entities must be careful to avoid "paralysis by analysis," and this often means that legal advice must be given in a world of limited time, limited resources, and limited information. Moral intuition can help to limit information gathering costs because it can help to give guidance when paucities of time, resources, and

164. *See supra* Part I.

165. *See* Robinson & Darley, *supra* note 142, at 3–4.

166. Robinson, Kurzban & Jones, *supra* note 13, at 1639.

information exist. As previously mentioned, moral intuition can give insight into the law and suggest the need for further research. As a result, such intuition can give guidance when a deal needs to be slowed down to be considered more fully. It can also give insight as to whether a deal may have a long-term negative impact on the company based upon how the government, equity holders, creditors, employees, and the public might perceive it. Of course, thorough and exhaustive research is the ideal when it comes to providing legal advice. In many instances, however, based on the fast pace of the business world, moral intuition may be a necessary evil when time, resources, and information are scarce.

Moral intuition is also useful to help answer difficult legal questions to which traditional legal research may have no answer. First, moral intuition can help to fill in gaps in the law that courts and other regulators have not yet filled. As illustrated by the hypothetical at the start of this Article and as discussed in the introduction, although the law is expansive, it is not comprehensive.¹⁶⁷ Because the law is based at least in part upon institutionalized moral intuitions, where legal research reaches its outer limits, intuition can provide insights about how a court may fill in the gaps in the law. This is not to claim that law and morality are coexistent; this is only to claim that moral intuition may provide some insight as to how courts and other regulators might react. Second, moral intuition also helps to provide insight into what a jury might do in the event that circumstances lead to litigation. Although judges work hard to instruct juries on how to go about applying the facts to law, research demonstrates that almost invariably juries make decisions of guilt and liability without regard for jury instructions.¹⁶⁸ Because most people resort to their moral intuitions at least in part when assigning blame, intuition can be a powerful tool in answering how a jury might respond to a particular action by a business entity.

C. Moral Intuition Helps to Protect Business Entities

Moral intuition is especially useful in helping to protect business entities from legal and social sanctions. Although the role of legal research and analytic reasoning should not be underplayed, moral intuition assists business entities in determining their legal obligations, assists businesses to avoid traps set for those entities attempting minimum compliance, and helps

167. *See supra* Part I.

168. *See* Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1538–39 (2012) (“The standard story told about juries and the law is that the legal instructions jurors receive at the end of the trial are little more than window dressing—either the jurors simply ignore the instructions or they are hopelessly confused by the legal guidance the instructions purport to give. . . . An alternative view of jury instructions is that the legal system is ambivalent or even opposed to interfering with juries as they apply their laypersons’ sense of justice.”)

to shield businesses from extra-legal punishment for socially reprehensible behavior.

As previously discussed, business managers and lawyers representing business entities are often forced to make decisions with limited time, with limited financial resources, and based upon incomplete information.¹⁶⁹ Intuition can be a valuable resource in determining how to comply with the law in those situations involving one or more of those limitations. Intuition can suggest the need for additional legal research, limit information gathering costs, and help to answer difficult legal questions. Intuition is not superior to exhaustive legal research and exhaustive legal reasoning. Intuition, however, is often a necessary evil for coping with paucities of time, financial resources, and information.

Intuition also helps business managers and lawyers avoid the traps set for those attempting minimum compliance with the law. As previously discussed, much of the wrongdoing in the business world is based upon misrepresentations to the government, equity holders, creditors, employees, or the public.¹⁷⁰ Because of the breadth of the federal mail fraud statute¹⁷¹ and the federal wire fraud statute,¹⁷² many misrepresentations can quickly be transformed into federal cases involving substantial criminal sanctions. Under the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹⁷³ the federal mail fraud and wire fraud statutes are also predi-

169. *See supra* Part III.B (arguing that intuition assists in discovering the law in situations in which time, resources, and information are scarce).

170. *See supra* notes 6–9 and accompanying text (arguing that most legal compliance issues involve some sort of misrepresentation to other parties and that intuition offers a tool for determining when a misrepresentation may occur and preventing it).

171. 18 U.S.C. § 1341 (2012) (“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.”).

172. *Id.* § 1343 (“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”).

173. *Id.* §§ 1961–1968.

cate crimes,¹⁷⁴ and as a consequence, they can create increased criminal liability, if a pattern of racketeering activity can be established.¹⁷⁵ Moreover, RICO also creates a private cause of action for civil recovery with treble damages and attorney's fees.¹⁷⁶ As a result, because a definitive test for what constitutes a misrepresentation can be difficult to articulate and no bright line rule for what constitutes a misrepresentation exists, intuition can help discern when a misrepresentation may be occurring and thereby help to prevent substantial civil and criminal liability.¹⁷⁷

Similarly, intuition can also be useful in discerning the contours of the fiduciary duties of care and good faith owed by officers, directors, and other managers within business entities. Within a business entity, the duty of care is procedural in nature and requires officers, directors, and other business managers to reasonably inform themselves of matters germane to the operation of the business entity.¹⁷⁸ As with all reasonableness standards, what constitutes "reasonableness" remains uncertain until a court determines the issue after litigation occurs. Obviously, officers, directors, or other business managers should thoroughly inform themselves regarding the operations of the business entities that they serve. Intuition can give some assurance to those managers and the lawyers advising them that they have adequately informed themselves or that they should be digging deeper.

Intuition may be even more useful in determining the obligations entailed by the duty of good faith. At its heart, the duty of good faith is the duty of officers, directors, and other business managers not to act reprehensibly in their operation of and service to business entities.¹⁷⁹ Although breaches of the duty are often coupled with breaches of other fiduciary duties, for example, the duty of care and the duty of loyalty, the duty of good faith also may render unlawful certain behavior that may not violate the other traditional fiduciary duties.¹⁸⁰ Because "good faith" is an inherently

174. *Id.* § 1961(1) (providing a definition of the types of "racketeering activity" that constitute predicate crimes for a RICO violation).

175. *Id.* § 1962 (detailing the types of activity that are rendered unlawful under the RICO statute).

176. *Id.* § 1964(c).

177. *See supra* note 9 (providing various sources for the proposition that intuition is one of the best mechanisms for determining fraud).

178. *See Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (providing one of the leading opinions on the duty of care and holding that directors have a duty of care that requires them to consider all information "reasonably" available to them).

179. *See* Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 564 (2008) ("Good faith is not a new concept in corporate law. It has been called an 'immutable ingredient' of the business judgment rule, for example, setting forth the law's expectation that directors will take honest and prudent business risks in the best interests of the company and its shareholders."); *see generally* Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006).

180. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 16 (2005) ("Many corporate law decisions discuss good faith,

ambiguous term that raises questions of morality, intuition provides one means of prospectively discerning the requirements of good faith prior to its obligations being defined by a court in litigation.

Moreover, intuition can also be useful in determining business entities' responsibilities in terms of the transactions that they enter. For example, in contract law, the doctrine of unconscionability and the duty of good faith are concepts used to punish business entities for opportunistic behavior that may not be easily definable using analytic reason and legal research. Although courts have made numerous efforts to define "unconscionability," the metes and bounds of the doctrine remain less than clear.¹⁸¹ In terms of the spectrum of circumstances that might constitute unconscionability, some circumstances are clearly legally permissible or unconscionable, but a great many circumstances are far from certain.¹⁸² Intuition can help to provide some insight as to which contracts will be held unconscionable when legal research and analytic reasoning reaches its outer limits. Likewise, the duty of good faith is often used in contract law to punish behavior that is reprehensible that cannot be clearly defined.¹⁸³ As a result, intuition can be

but a significant trend has emerged in a handful of recent decisions that not only discuss a fiduciary duty of good faith but also rely upon it as the basis of the decision. These cases suggest that good faith is more than just a new spin on old dicta." (footnote omitted); see also *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66–67 (Del. 2006) (holding that an "intentional dereliction of duty," which is "a conscious disregard for one's responsibilities" is not covered by traditional definitions of the duty of care or the duty of loyalty). But see *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (recasting the duty of loyalty and holding that "[i]t also encompasses cases where the fiduciary fails to act in good faith").

181. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction." (footnote omitted)); *Waters v. Min Ltd.*, 587 N.E.2d 231, 233 (Mass. 1992) (holding that "[u]nconscionability must be determined on a case-by-case basis, with particular attention to whether the challenged provision could result in oppression and unfair surprise").

182. See Mark A. Glick, Darren Bush & Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 391–92 (2002) (noting that because the definition of substantive unconscionability "is ambiguous, the 'unconscionability' of a particular term or contract is highly subjective" (footnote omitted)); Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 187 (2006) ("Determinations about unconscionability are subjective. To date no one has been able to articulate an objective standard."); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 484 (2008) ("Decisions based on unconscionability are fact sensitive and, to a great extent, reflect trial judges' subjective determinations. As a result, although there are now many cases that address unconscionability, they have little value as precedents." (footnote omitted)).

183. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

a key tool in determining the enforceability of contracts that may be vital to a business organization's existence.¹⁸⁴

Intuition can be especially useful in shielding business entities from the extra-legal punishments for socially reprehensible behavior. Even if the law is absolutely clear as to the permissibility of a certain action by a business entity, that action still may not be in the best interests of the business entity because of the extra-legal sanctions that the behavior may yield. Because most individuals resort to intuition and practical reason in making moral decisions, intuition may be a resource when determining what extra-legal punishments may be incurred for a legally permissible action that violates moral or social standards.¹⁸⁵ Intuition can help to inform business counsel and business managers that failing to perform on a legally unenforceable contract may engender scorn from future contracting partners and hurt a business's prospects in the future. In addition, intuition can also help to inform a business's managers and counsel that questionable employment and environmental practices may create backlash from potential consumers of that business's products.

To provide a more concrete example, during the 1970s, the Ford Motor Company ("Ford") manufactured and sold a subcompact automobile known as the "Pinto."¹⁸⁶ Due to a design flaw, the gas tank of the car could be easily punctured and lead to an explosion during a collision.¹⁸⁷ Rather than fix the design flaw, Ford's management did a cost-benefit analysis and determined that it would be cheaper to pay tort settlements, instead of paying the \$11 per vehicle cost to repair the problem.¹⁸⁸ *Mother Jones*, a non-profit magazine, eventually broke the story regarding the design defect and the cost-benefit analysis employed by Ford to determine the how to fix the issue.¹⁸⁹ As a result, a public fiasco ensued, and Ford suffered substantial long-term damage to its reputation and substantial tarnishment of its trademarks.¹⁹⁰ Even if Ford had correctly calculated the cost-benefit analysis,

184. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369–70 (1980) ("Yet neither courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance [in contract law]. The good faith performance doctrine consequently appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable and inconsistent applications." (footnotes omitted)).

185. See *supra* Part II.D (suggesting that most individuals resort to practical reason, i.e., intuition, when faced with moral issues).

186. See Mark Dowie, *Pinto Madness*, MOTHER JONES (Sept./Oct. 1977), <http://www.motherjones.com/politics/1977/09/pinto-madness>.

187. *Id.*

188. *Id.*

189. *Id.* (reporting that "Ford waited eight years because its internal 'cost-benefit analysis,' which places a dollar value on human life, said it wasn't profitable to make the changes sooner.").

190. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1013–14 (1991) (reporting that Ford Motor Company's behavior regarding the Pinto is "still being

which it likely did not, the company suffered severe extra-legal punishment based on public perception of its management's behavior.¹⁹¹ Although Ford's management may have acted rationally in attempting to minimally comply with the law and in determining what legal punishments might befall it based upon the design defect in the Pinto, some reliance upon and deference to intuition as to how the public might react to the callousness of management's behavior potentially would have quickly, easily, and cheaply prevented the extra-legal punishments suffered by Ford in that case.

IV. CONCERNS ABOUT THE USE OF ETHICAL INTUITIONISM IN LEGAL COMPLIANCE

Some judges, lawyers, and academics will find the notion to be unsettling that intuition has a role to play in discerning and determining the law. This is because such an assertion beckons forth thoughts of the fierce debate in the United States that has waged among proponents of legal formalism and proponents of legal realism throughout the twentieth century to the present. As will be explained below, the applicability of the formalism versus realism debate to the subject matter of this Article is limited. However, a brief exploration of this topic should be undertaken.

To grossly oversimplify the debate, legal formalists believe that judges decide cases based on legal rules and analytic reasoning,¹⁹² but legal realists believe that judges decide cases founded upon notions of fairness and politics in relation to the facts of the particular case.¹⁹³ In a sense, the debate between legal formalists and legal realists mirrors the eternal debate over whether the letter of the law or the spirit of the law should and does dominate.

Although the debate between legal realism and legal formalism might appear to have great applicability to this work, this Article has intentionally not ventured into the debate between legal realism and legal formalism for three main reasons. First, most legal realists believe that matters are adjudicated based on notions of fairness, depending on the particular facts of a case.¹⁹⁴ With that said, however, arguing that those notions of fairness are founded upon intuition requires taking an additional step that some legal re-

mentioned with a surprising frequency and discussed with a surprising intensity" (footnote omitted)).

191. *Id.*

192. See Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 50 (Martin P. Golding & William A. Edmundson eds., 2005) ("'Formalism' . . . held that judges decide cases on the basis of distinctively *legal* rules and reasons, which justify a unique result in most cases (perhaps *every* case).").

193. *Id.* ("The Realists argued . . . that careful empirical consideration of how courts *really* decide cases reveals that they decide not primarily because of law, but based (roughly speaking) on their sense of what would be 'fair' on the facts of the case.").

194. *Id.*

alists would not be willing to take. Second, legal realism centers on adjudication of cases.¹⁹⁵ This Article is about protecting business entities from a myriad of issues relating to compliance with the law, which often do not involve adjudication, for example, selection for prosecution, nuisance litigation, increased governmental scrutiny, increased regulation, and extra-legal punishments. Forcing this Article into the cast of a piece on legal realism would be a disservice because the topic of this work entails much more than mere adjudication. Third, legal formalism and legal realism involve strong claims about how adjudication occurs, and those terms carry a substantial amount of baggage because of the endless debate about which theory is correct. Arguably, legal formalism could be viewed as a defense of legal research and analytic reasoning in judicial decisionmaking, and legal realism could be viewed as a defense of notions of fairness, including possibly intuitions of justice, in judicial decisionmaking. Similar to the dual-process models for moral decisionmaking that were discussed earlier in this work,¹⁹⁶ however, this Article argues that both analytic reasoning and intuitive reasoning have a role to play in making legal compliance decisions for business entities. The dual-process model offered here gives prominence to analytic reasoning and legal research and uses intuition as a gap-filler when reasoning and research fails or is exhausted. In fact, this Article proposes something that is related to but separate and apart from the realism versus formalism debate.

Regardless of the realism versus formalism debate, the use of intuition in making legal compliance decisions raises a variety of other concerns. The remainder of this Part will address many of those concerns: that intuition is not necessarily a theory of how to reach correct moral decisions, that intuition can yield incorrect conclusions about the state of the law, and that moral intuition can vary. Even though each of these concerns has some validity, the use of intuition when correctly employed in making legal compliance decisions, on balance, has more benefits than harms.¹⁹⁷

A. Intuition Is Not Necessarily an Ethical Theory of How to Make Correct Moral Decisions

This Article is definitely not a defense of moral intuition as a theory as to how individuals should or do make correct moral decisions. As detailed earlier in this work, philosophers throughout the ages have advanced ethical theories based upon moral intuitionism, and such theories continue to be

195. *Id.* at 51.

196. *See supra* Parts II.A–C (describing several models of dual-process decisionmaking that entail processes for both intuition and analytic reasoning, including those advanced by John Rawls, Joshua Greene, and Daniel Kahneman).

197. *See infra* Part V (discussing methods by which intuition can be incorporated into the process of making legal compliance decisions).

advanced today.¹⁹⁸ This Article, however, makes no claim that intuition yields correct moral judgments. The assertion being made by this Article is only that intuition often plays a role when individuals make moral decisions, i.e., decisions about right and wrong. Whether intuition actually is the foundation of morality is an issue better left for another day. Relatedly, arguments that attack this Article on the grounds that it is advocating for ethical intuitionism as a moral theory are misplaced and ignore the realities of what is being asserted within this work, which is only that intuition has a role to play in making legal compliance decisions.

Although some individuals may be relieved by the fact that this Article is not a defense of intuitionism as a theory of how to make correct moral judgments, others may be disturbed. Because this Article does not propose a moral theory based upon ethical intuitionism, some may fault its contents because it fails to provide guidance as to what the law ought to be; creates the potential for abuse based on behavior designed to manipulate or deceive others' intuitions; and may create quagmires in which law, morality and intuition conflict.

Some might fault this Article for failing to provide guidance as to what the law ought to be. Such an argument, however, misses the point of this Article. This Article is designed to assist legal practitioners in finding the law when legal research and analytic reasoning is at an end, or when paucities of time, information, and resources demand it. It is also designed to help legal academics better prepare their students for the realities of the practice of law. At heart, this work focuses on determining what the law *is*, rather than conjuring what the law *ought* to be. Confusion about the purpose of this Article is understandable because so much of current legal scholarship focuses on theories of how the law *ought* to function. This Article serves a different purpose, however, describing the role that intuition can and should play in finding what the law *is*.

In addition, because this Article does not assert that the use of intuition yields correct moral judgments, another potential criticism of this piece is that its content will help to train lawyers to manipulate the intuitions of those seeking to regulate business entities and those in transactions with such entities. This criticism actually has some merit. Famously, Daniel Kahneman, who is discussed earlier in this Article, along with his frequent co-author, Amos Tversky, spent much of their careers cataloguing the mental shortcuts that people commonly use to reduce cognitive workload, which Kahneman and Tversky term "heuristics."¹⁹⁹ Although these heuristics of-

198. See *supra* Part II.A (detailing the development of ethical intuitionism as a distinct ethical theory and as a philosophic movement).

199. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) (arguing that "people rely on a limited number of heuristic

ten prove to be useful tool in most individuals' decisionmaking processes, Kahneman and Tversky noted that heuristics can lead to severe and habitual errors in judgment.²⁰⁰

Notably, Kahneman was awarded the 2002 Nobel Memorial Prize in Economic Sciences for his research in heuristics and human decisionmaking, and Tversky would have shared this prize but for his passing in 1996.²⁰¹ In keeping with Kahneman's and Tversky's research, if intuition does not always yield correct moral decisions and if heuristics and other sorts of intuitions can be catalogued and understood, someone could use that information to manipulate the intuitions of those seeking to regulate business entities and those in transactions with such business entities.

Concerns about the manipulation of intuitions are of course valid considering the role that intuition plays in filling gaps in the law and the role that intuition serves in understanding how a judge, a jury, a prosecutor, a regulator, a legislature, or members of the general public might react to certain behavior by a business entity.

These types of concerns, however, are nothing new and have been written about since the time of Plato, if not earlier. In Plato's writings of Socrates found in the *Gorgias*, Plato reveals Socrates' concerns regarding the unprincipled use of oratory because morality is not inherent to oratory.²⁰² After determining "oratory is a source of persuasion,"²⁰³ Socrates goes on to call oratory a "knack" and "flattery."²⁰⁴ As Socrates puts it, "what cosmetics is to gymnastics, sophistry is to legislation, and what pastry baking is to medicine, oratory is to justice."²⁰⁵ The reason for this is that "[i]f you make someone an orator, it's necessary for him to know what's just and what's unjust, either beforehand, or by learning it . . . afterward."²⁰⁶ In essence, Socrates is arguing that knowledge of oratory must be coupled with knowledge of what is just and unjust, or oratory can be used as a tool for manipulation and achieving bad ends.

principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations").

200. *Id.* (reporting that "heuristics are quite useful, but sometimes they lead to severe and systemic errors").

201. See Daniel Kahneman, Princeton Univ., Nobel Prize Lecture: Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice (Dec. 8, 2002), available at http://nobelprize.org/nobel_prizes/economics/laureates/2002/kahnemann-lecture.pdf (discussing the research that led to Kahneman being awarded the Nobel Memorial Prize in Economic Sciences in 2002).

202. Plato, *Gorgias*, in PLATO: COMPLETE WORKS 791 (John M. Cooper ed., Donald J. Zeyl trans., Hackett Publishing Company 1997) (c. 380 B.C.E.).

203. *Id.* at 798.

204. *Id.* at 807.

205. *Id.* at 809.

206. *Id.* at 804.

A similar sort of argument can be made about knowledge of how intuition functions. This knowledge potentially gives the power to persuade without giving knowledge of what is just and unjust. As a result, the potential for abuse is beyond peradventure.

A variety of responses can be offered to this concern. First, understanding how intuition functions is not advocating for misuse of that knowledge in a similar way that understanding how oratory functions is not advocating misuse of it. A lawyer is bound by the rules of professional responsibility despite the fact that the lawyer may have knowledge and skills that could be abused.²⁰⁷ Second, understanding that intuition can be deceived in how the law is formulated and how the actions of business entities are perceived can help lawyers better protect their clients. If a lawyer understands that intuition and oratory can be abused, that lawyer can better protect the lawyer's clients from less scrupulous attorneys who might engage in intentional deception and also reckless, negligent, or innocent deceptions of intuition.

In addition, because this Article acknowledges that intuition may not necessarily provide a means for making correct moral decisions, some may criticize its contents because it may create quagmires in which law, morality, and intuition conflict. For example, morality may suggest one result, yet the intuitions of the public may suggest another. For example, at one point in the history of the United States, as a result of ingrained prejudice, many white individuals would likely have some intuitions favoring segregation. Yet, today, almost uniform agreement exists that segregation is morally wrong. Worse yet, situations may occur in which morality and intuition suggest a result, and the law mandates another outcome. Moreover, in the worst case scenario, intuition, morality, and the law may all three suggest different outcomes to a given issue. In essence, accepting that intuition has a role to play in making legal compliance decisions for business entities may actually complicate the life of a lawyer because it adds an additional variable into the decisionmaking process.

This Article takes the strong stance that when a business entity's obligations are clear under the law that an attorney has an unwavering obligation to help their client comply with those obligations regardless of what morality and intuition might suggest. Although the rules of professional conduct in most, if not all, jurisdictions require an attorney to behave ethically, those rules make it clear that an attorney's primary obligation is to

207. See MODEL RULES OF PROF'L CONDUCT r. 8.4(c)–(d) (2013) (providing that lawyers may not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice”); see also *supra* note 10 and accompanying text (noting that lawyers under the rules of professional responsibility that are in place in most, if not all, jurisdictions have an explicit obligation to follow the law).

comply with the edicts of the law.²⁰⁸ Any good professional responsibility professor can create a myriad of examples in which intuition, morality, and the law might conflict. In some circumstances, civil disobedience may be warranted. However, this Article begins with the presumption that exhaustive legal research should be at the heart of any legal compliance decision, and that intuition should be used only to suggest what the outcome might be when legal research is exhausted; to help cope with deficits in time, information, and resources; and to suggest what sorts of extra-legal sanctions might occur based upon a given decision. Once the primacy of legal research has been asserted, the claim becomes ludicrous that the extra information provided by intuition should be ignored based on it complicating the decisionmaking process. Ignoring the information provided by intuition would be similarly bizarre as an attorney ignoring electronic legal research databases, such as, Lexis and Westlaw, because they provide too many new sources of information that might complicate the attorney's life. Intuition should simply be treated as another tool at a lawyer's disposal for purposes of effectively advising clients.

B. Intuition Can Yield Incorrect Conclusions About the State of the Law

As discussed in the previous subpart, concerns that intuition does not necessarily provide an ethical theory for making correct moral decisions can be overcome. However, a number of the points mentioned in the previous subpart give rise to a second category of concerns regarding the use of intuition in making legal compliance decisions. This second category relates to the worry that intuition can yield incorrect conclusions about the state of the law. As discussed in the previous subsection, for example, research conducted by Kahneman and Tversky suggests that some of the heuristics, i.e., the mental shortcuts that people commonly use to reduce cognitive workload, which can be equated to a type of intuition, can lead to severe and habitual errors in judgment.²⁰⁹ In addition, one of the examples offered in the previous subpart suggested that some individuals may have intuitively felt that segregation was acceptable in the United States at various points in this nation's history, even though nearly universal agreement currently exists that segregation is wrong.²¹⁰ Such errors in intuition obviously also extend to the law. Even well-trained law professors, attorneys, and judges

208. See *supra* notes 10, 207 and accompanying text (discussing a lawyer's obligations under the ABA Rules of Professional Conduct, which have been adopted in most jurisdictions in the United States and which are similar to the rules in most, if not all, of the remaining jurisdictions).

209. See *supra* notes 199–201 and accompanying text (discussing Kahneman's and Tversky's research on heuristics and the cognitive errors that heuristics can yield).

210. See *supra* Part IV.A (discussing situations in which morality and intuition may be in conflict).

are sometimes surprised when they discover that the law is different from what they intuitively thought it to be.

The concern that intuition can yield incorrect conclusions about the state of the law is a valid one. At times, a lawyer's intuitions about the law may be blatantly wrong and at times, individuals' intuitions can be deceived. In addition, not all intuitions about fairness have been incorporated into the law. In the remainder of this subpart, these concerns will be addressed. Ultimately, despite the validity of the concerns about intuition sometimes yielding incorrect conclusions about the law, on balance, intuition remains a useful tool in making legal compliance decisions for business entities, especially when intuition is correctly incorporated into the decisionmaking process.²¹¹

This Article freely and unequivocally admits that intuitions relating to the law can be blatantly wrong. With that said, intuition remains a valuable tool in making legal compliance decisions for business entities for a variety of reasons. First, the model proposed within this Article emphasizes the primacy of legal research. As a result, even if intuitions about the state of the law relating to compliance decisions are erroneous, extensive and exhaustive legal research will in many cases remedy this problem. Second, in cases in which extensive and exhaustive legal research does not yield a clear answer as to the state of the law, intuition may still be valuable as a tool for determining the state of the law and the repercussions of a legal compliance decision. As explained at length in this Article, most people base decisions about right and wrong at least in part upon intuition,²¹² and it makes sense to consider intuition when legal research does not yield a clear answer. For example, in the hypothetical at the beginning of this Article, intuition may offer the best course to proceed because the state of the law is unclear, and because some aspects of the law, such as the existence of a misrepresentation, often must be determined in part by a resort to intuition.²¹³ This is true regardless of whether intuition is sometimes incorrect. Third, intuition is likely the best tool available considering what extra-legal punishments might occur as a result of legal compliance decisions. Legal research is a tool for finding the law but offers little insight as to what extra-legal repercussions might occur based on a legal compliance decision, e.g., public outrage, the unwillingness of previous allies to enter into future transactions, and the inability to obtain credit. Because so many people resort to practical reason, i.e., intuition, in making decisions relating to extra-

211. See *infra* Part V (discussing how to incorporate intuition into the process of making legal compliance decisions).

212. See *supra* Part II.D (noting that most individuals resort to practical reason, i.e., intuition, when faced with a moral problem).

213. See *supra* note 9 (providing various sources for the proposition that intuition is one of the best mechanisms for determining fraud).

legal punishments, intuition is one of the more useful tools in predicting what sorts of extra-legal punishments a legal compliance decision might yield. This is true regardless of whether intuition is sometimes wrong. Fourth, the practice of law occurs in the real world, rather than in the classroom, and as a result, those making legal compliance decisions often must deal with deficits of time, information, and resources. As a result, intuition at times may be a necessary evil in dealing with the realities of practicing law. Fifth, analytic reasoning and legal research frequently yields inconclusive and incorrect results in determining legal compliance issues, and no one would claim that they should be ignored as tools for finding the law, even though they are imperfect. Similarly, intuition may at times yield incorrect results about legal compliance decisions, but that is no reason to dismiss it from the decisionmaking process completely.

A related concern about the use of intuition in making legal compliance decisions is that intuition can be deceived. In the previous subpart, concerns were discussed relating to the uncoupling of knowledge of intuition from a method for making morally correct decisions.²¹⁴ In essence, one reason to be weary of the knowledge of how intuition functions is because an unscrupulous attorney or business person could use that knowledge to manipulate other individuals by manipulating their intuitions.²¹⁵ In this subpart, however, a slightly different concern is advanced, which changes the focus from the deceiver to the deceived. The notion underlying the current concern is that intuition can be subject to deception to a degree and to an extent that legal research and analytic reasoning cannot. One might argue that relying strictly on legal research and analytic reasoning would prevent the possibility of intuition being intentionally, recklessly, negligently, or accidentally deceived.

Concerns regarding intuition being deceived are valid, but these concerns do not justify ignoring intuition as a tool in making legal compliance decisions. Deception in regard to legal research is obviously a rarity. Computer hackers do not commonly hack electronic databases to mislead those conducting legal research, and attorneys do not commonly break into opposing counsels' offices to rewrite research memoranda with erroneous statements about the law. With that said, analytic reasoning is by no means immune from deception and from the chance of grievous error. In fact, the research conducted by Kahneman and Tversky on heuristics relates largely to intuitive leaps that are commonly made and that are commonly incorrect in the analytic reasoning processes of most individuals.²¹⁶ Moreover, the

214. *See supra* Part IV.A (discussing the concerns relating to the use of intuition not necessarily yielding morally correct judgments).

215. *See supra* Part IV.A.

216. *See supra* notes 199–201 and accompanying text (discussing Kahneman's and Tversky's research on heuristics).

factual development of many legal issues commonly involves deception, as parties disagree over the underlying facts of matters and intentionally, recklessly, negligently, or accidentally misrepresent the facts creating legal problems. No one would suggest that fact development should be ignored as part of assessing a legal matter, and intuition should not be ignored either simply because it may fall victim to deception.

Even if intuition may at times be deceived, it cannot be ignored as a tool for making legal compliance decisions because, as explained above, intuition is inherent to the creation of the law. In addition, intuition often determines the types of legal and extra-legal punishments that befall business entities when those entities behave in ways that disappoint society's collective intuitions of justice. The fact that intuition may yield incorrect results and may be deceived is an unfortunate reality. However, intuition remains an integral part of how legal and extra-legal punishments are distributed.

In fact, for an attorney charged with protecting a business entity, understanding how intuition can be deceived is essential to protecting a client's interests. Attorneys can help prevent the decisionmakers of a business entities from having their intuitions misled. Attorneys can also be vigilant in making sure that the intuitions are not misled by those who might regulate or sanction the business entities that they represent.

An additional reason why intuition can yield incorrect conclusions about the law is that not all intuitions about fairness have been incorporated into the law. The law is not coexistent with morality, and as a result intuitions of justice are not always the subject of legal mandates.²¹⁷ For example, in contract law, courts may permit the "efficient breach" of contracts in situations in which it is expedient to fail to comply with one's contractual obligations and pay damages.²¹⁸ Efficient breach is permitted, despite the fact that many people intuitively feel that breaking one's word is wrong.²¹⁹

Even if not all intuitions about fairness have been incorporated into the law, intuition remains a valuable tool in making legal compliance decisions. Knowing whether something that may be viewed as reprehensible can be legally pursued is an incredibly difficult task. The law is extensive with a myriad of tools for punishing those who may draw public distain. Even if a particular legal compliance decision is legally permissible, if it enrages the public's practical reason, i.e., collective intuitions of justice, the business entity may still suffer in a variety of different ways, including erroneous prosecution, nuisance litigation, increased governmental scrutiny, and the

217. See *supra* notes 4–5 and accompanying text (discussing Oliver Wendell Holmes, Jr.'s views on the boundary between law and morality and his belief that the two are not coexistent).

218. See generally Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975 (2005).

219. *Id.*

creation of new onerous regulations. Moreover, to fixate only on the legal permissibility of a legal compliance decision would be a mistake. Intuition can also be an incredibly useful tool in determining the extra-legal punishments that might result from legally permissible reprehensible conduct, for example, consumer backlash, the inability to enter into business alliances, and the lack of available credit.

C. Intuitions Can Vary Among and Within Groups of Individuals

The previous subpart dealt with the general concern that intuition may yield incorrect conclusions about the state of the law because intuition may be subject to error, intuition may be deceived, and intuitions of justice may not be incorporated into the law. The subpart left open the issue of why intuitions about the law potentially may be subject to error beyond circumstances in which deception has occurred or the particular intuition has not been adopted into the law. The chief reason that an individual's intuition may erroneously predict the legal and extra-legal implications of a legal compliance decision is that moral intuitions can vary. These variations in moral intuition can occur for a myriad of different reasons, including genetic predisposition; the physical attributes of the brain; errors in perception; and differences in educational background, religious background, and other sorts of social experience. As a result, a very real concern is created regarding the accuracy and usefulness of intuition in making legal compliance decisions.

Concerns regarding errors in intuition based in large part upon variations in intuition among and within groups of individuals provide the strongest reason for the primacy of extensive and exhaustive legal research when making legal compliance decisions for business entities. This Article has consistently and unwaveringly stated that legal research must be at the heart of making any legal compliance decision. Although legal research and the analytic reason associated with it are potentially fallible, legal research is likely to yield better predictions about the state of the law than ethical intuitions alone because of how widely intuitions can vary.

Nonetheless, intuition remains a useful tool in making legal compliance decisions for a variety of reasons. First, certain aspects of the law are often determined at least in part based upon intuition. Most of the legal compliance issues facing businesses relate to the prevention of some form of misrepresentations against the government, equity holders, creditors, employees, or the public.²²⁰ Whether a particular statement crosses the line and becomes a misrepresentation is often determined based upon a mix of intuition and the available facts. Even if intuitions may at times be inaccu-

220. *See supra* note 6–7 and accompanying text (arguing that most legal compliance issues for business entities relate to the prevention of some form of fraud or misrepresentation).

rate or vary, intuition still may be the best tool available to answer certain legal compliance questions, especially if these questions are ultimately handed to a jury, which is unlikely to adhere to whatever instructions it is given and to resort to intuition itself.²²¹ Second, this Article is limited to a relatively narrow range of legal issues, i.e., it focuses on the use of intuition in legal compliance decisions for business entities. As mentioned in the introduction to this Article, human intuition tends to vary widely on many social issues, including, abortion, the use of military force, and gun control. With that said, intuitions of justice do coalesce on certain topics, which include the notion that misrepresentations are wrong.²²² As a result, intuition can be a valuable tool in making legal compliance decisions because less variation is likely to exist in terms of intuitions regarding legal compliance issues, which tend to focus on avoiding misrepresentations.²²³ Third, although legal research and the analytic reasoning associated with it may in some cases yield better predictions regarding the state of the law, extra-legal punishments, such as consumer backlash, the inability to form business alliances, and the inability to obtain credit, are inflicted by the masses who tend to resort to practical reason, i.e., intuition, when inflicting these punishments. Intuition is likely the best tool for determining what sort of extra-legal punishments will be incurred because one would have a difficult time arguing that analytic reasoning is the best means of predicting intuition-fueled behavior that often defies reason. Fourth, despite concerns regarding intuitions varying among and within groups of individuals, intuition may be the best and only tool available to deal with the limitations in time, information, and resources that occur commonly in practice. The practice of law does not occur in a controlled environment in which time for research is limitless, the facts surrounding a legal matter are crystal clear, and the resources to find the answer to a legal solution are endless. As a result, intuition may be a necessary evil in making legal compliance decisions for business entities. Finally, even if intuitions do vary, they still offer an additional data source that may be useful.

V. METHODS OF EMPLOYING ETHICAL INTUITIONISM IN LEGAL COMPLIANCE DECISIONMAKING

Despite the fact that the use of intuition in making legal compliance decisions for business entities raises a variety of valid concerns, intuition is

221. *See supra* note 168 and accompanying text (noting that juries often ignore whatever instructions are given to them by judges and resort to their moral intuitions about the matter before them).

222. *See supra* note 8 (providing various citations for the proposition that most people agree that fraud is wrong).

223. *See supra* note 9 and accompanying text (arguing that intuition is one of the best tools for detecting misrepresentations and fraud).

still a valuable tool for finding the law when legal research is exhausted. Intuition is also a useful tool for determining what sorts of legal and extra-legal punishments may result from a business entity's actions and a useful tool for coping with the pressures created by limited information, time, and resources. Once the value of intuition in legal compliance decisionmaking has been acknowledged, however, the issue becomes when and how intuition can be meaningfully incorporated into the legal compliance decisionmaking process.

A. Approaches to Legal Compliance

To begin to answer these issues, one must note that intuition can only be meaningfully incorporated into the legal compliance decisionmaking process when a business entity is attempting to comply with the law. Approaches to legal compliance can be grouped into three broad categories: 1) obliviousness to the law, 2) willful disregard of the law, and 3) attempted compliance with the law.

Although arguing that obliviousness to the law is an approach to legal compliance might seem strange, remarkably, this is the approach to legal compliance used by many business entities, especially small business entities without legal counsel. For example, business entities commonly sell securities without knowledge of federal and state securities laws, engage in consumer transactions without understanding consumer protection law, and deal with employees without knowledge of employment law. When a business entity has adopted an approach to legal compliance founded upon obliviousness to the law, intuition has very little role to play in making actual legal compliance decisions. In the absence of any knowledge of the law, one would have a hard time arguing that any meaningful legal compliance decisions are being made. Some basic intuitions of right and wrong may come into play and help to avoid some legal traps. However, in the absence of informed choice, intuition is not really being incorporated into the legal compliance framework, but intuition simply becomes a substitute for it. As should already be clear, this Article in no way advocates for the replacement of a structured framework for legal compliance decisionmaking with intuition alone.

Willful disregard of the law offers a second possible approach in regard to legal compliance issues facing a business entity. For example, if a business entity is making a decision regarding how to dispose of toxic materials and knows what the law requires in regard to disposal of that waste, a business entity could always consciously decide to dump that waste illegally. When the law is being willfully disregarded, intuition cannot be incorporated into the legal compliance framework because intuitions of right and wrong are likely being ignored. In the alternative, if a business entity is acting upon aberrant, antisocial intuitions of its management, intuition is still

not being incorporated into a legal compliance decisionmaking framework because a conscious decision is being made to violate the law and not to attempt to comply with it. In terms of both obliviousness to the law and willful disregard of the law, the law is being disrespected. As a result, intuition has very little role, if any, to play in making decisions regarding how to comply with the law.

A third approach to legal compliance for business entities is attempted compliance with the law. Only under this approach can intuition be meaningfully incorporated into the legal compliance decisionmaking process. Unlike an approach founded upon obliviousness to the law in which intuition is at best being used as a substitute for the legal compliance decisionmaking process and unlike an approach founded upon willful disregard of the law in which the legal compliance decisionmaking process is being corrupted and ignored, attempted compliance with the law focuses on making real decisions about legal compliance. As a result, intuition can actually be employed in this process.

B. Incorporating Intuition into Legal Compliance Decisionmaking

If legal compliance is being attempted, the next issue is when intuition should come into play during the legal compliance decisionmaking process. Consistently, this Article has emphasized the primacy of legal research. This, however, does not mean that legal research should be the beginning of the legal compliance decisionmaking process. As previously explained, intuition can potentially limit information gathering costs.²²⁴ This, however, can only occur if intuition is employed prior to undertaking exhaustive legal research. For example, if a particular act seems intuitively repugnant, a business entity may not want to waste the time, energy, and resources investigating if it is legally permissible because even if it is, the particular act may yield significant social punishments that will outweigh any benefit. In addition, resorting to intuition when first faced with a legal compliance issue can also be beneficial because it prevents the type of rationalization that can occur when business managers desperately want a particular act to be legally permissible.²²⁵ For example, in the Ford Pinto case discussed above, a great deal of rationalization likely occurred during the process of determining whether to recall the automobiles, which likely clouded the intuitions of those individuals ultimately making the decision whether to issue

224. See *supra* Part III.B (explaining that intuition can assist in discovering the law).

225. See Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 1020 (2006) (discussing the dangers of rationalization in making legal compliance decisions in a business setting because “[w]hether in our own minds, or in a group of like-minded executives, we are wholly capable of mistaking what makes us happy or fulfilled for what is right”).

the recall.²²⁶ In fact, intuition should be referenced throughout the legal compliance decisionmaking process. Before acting, however, all intuitions should be backed up and validated as much as possible by exhaustive legal research.

If ubiquitous use of intuition is supposed to occur in the legal compliance decisionmaking process, the issue that remains as to how this incorporation into the process is supposed to occur. This is an exceedingly difficult issue to address because businesses vary in size, sophistication, purpose, and structure, and as a result, a “one size fits all” answer does not exist as to how intuition should be incorporated into legal compliance decisions. For example, the methods of incorporating intuition into the legal compliance decisionmaking process of a large, multinational corporation are going to be dramatically different than the methods of incorporating intuition into a small limited liability company that has been formed for a very narrow purpose. Some general themes, however, can be offered, including that counsel and managers must be empowered to make decisions at least in part based upon their intuition, that business entities should consider incorporating independent committees and outside consultants to review business decisions that may create backlash for the companies, and that focus groups should be convened for especially important business decisions that have a legal compliance component.

As a starting point, counsel and managers must be empowered to make decisions at least in part based upon their intuition. Although for-profit entities must labor to make a profit,²²⁷ the ethical implications of business decisions must also be considered because they ultimately are related to the profitability of a business.²²⁸ If a business behaves in an unethical manner, it risks legal penalties and extra-legal punishments. As previously explained, because most individuals make moral decisions based upon practical reason, i.e., intuition,²²⁹ counsel and business managers must be em-

226. See *supra* notes 186–191 (discussing the events that led to the Ford Motor Company failing to issue a recall of its Ford Pinto automobiles).

227. *Dodge v. Ford Motor Co.* is the classic case for the proposition that a for-profit entity must be run for purposes of making a profit. 170 N.W. 668 (Mich. 1919). In that case, which is found in many business law textbooks, the Supreme Court of Michigan held, “A business corporation is organized and carried on primarily for the profit of the stockholders.” *Id.* at 684; see also Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365 (1932) (“Historically, and as a matter of law, corporate managements have been required to run their affairs in the interests of their security holders.”).

228. See S. Scott Massin, *Corporate Social Responsibility: A Review of the Past—A Proposal for the Future*, 10 Midwest L. Rev. 115, 130 (“While early business leaders focused upon profit making, without regard to ethical behavior, contemporary society has required more. Consumer advocacy, environmental awareness, and a better educated populous now demand that corporations become morally responsible.”).

229. See *supra* Part II.D (noting that most individuals approach moral issues using practical reason, i.e., intuition).

powered to consider their own intuition in making legal compliance decisions.

Obviously, the use of intuition by counsel and business managers will be far from perfect. Lawyers receive extensive training that tends to make them risk adverse,²³⁰ and this training tends to skew their moral compasses toward providing advice founded upon excessive risk aversion.²³¹ In addition, both lawyers and business managers can also find their moral compasses altered in the opposite direction because of the pressures created by attempting to make the business that they represent as profitable as possible.²³² The danger of over rationalization is a constant concern in any business setting. This is especially true for lawyers because law schools often train lawyers to ignore their moral intuitions.²³³ Still, lawyers and business managers should consider their intuitions whenever possible when making legal compliance decisions, and then, those intuitions should be backed up and validated as much as possible with thorough legal research.

In addition, business entities should consider incorporating independent committees and outside consultants to review business decisions that may create backlash from regulators and the public. For large corporations that regularly engage in ethically questionable behavior that may create legal scrutiny and extra-legal backlash, adding a committee to the board that operates independently of the rest of the board is one way that a business entity may be able to obtain a better sense of how individuals outside of the company may perceive a legal compliance decision. A board assembling such a committee will likely want to choose people without legal training to get a better sense of how the public might react to particular legal compliance decisions because the company's counsel will likely already serve as a good proxy for how regulators and other attorneys might react to the legal compliance decision. For small business entities, convening an independent committee may not be possible. For such business entities, outside consultants should be retained from time to time to explore the legal implications

230. See Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 500 (2009) ("Law schools teach risk aversion to a population inclined in that direction to a degree that goes beyond student temperaments."); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 541 (1994) (noting lawyers "are viewed—perhaps by ourselves as well as by others—as conservative, risk-averse, precedent-bound, and wedded to a narrow, legalistic range of problem solving strategies").

231. See Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 455 ("Lawyers, by training, tend to be fairly conservative and notoriously risk adverse.").

232. See also Joan H. Krause, *Ethical Lawyering in the Gray Areas: Health Care Fraud and Abuse*, 34 J.L. MED. & ETHICS 121, 124 (2006) ("Clients . . . naturally gravitate toward attorneys who share their own preferences for risk or risk aversion.").

233. See Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1, 5 (2009) ("The act of being professionalized as a lawyer begins with moral desensitization. We were taught to override our moral intuition in our first year of law school.").

of the companies' activities. Outside ethical consultants may also be useful to a business entity when the business entity is operating in a geographic area that is unfamiliar to its counsel and management. Because ethical intuitions tend to be based at least in part on social norms, having someone experienced in those social norms contribute to legal compliance decisionmaking can be equally as important as having someone who is experienced with the law of that jurisdiction. In fact, this provides another reason why large corporations should retain local counsel when operating in unfamiliar jurisdictions.

Finally, for especially important legal compliance decisions, business entities should consider convening focus groups. Convening such focus groups offers a variety of benefits. First, a focus group composed of random members of the public is unlikely to engage in the rationalizations in which counsel and business managers may engage in the unremitting pursuit of profit. For example, if Ford Motor Company convened a focus group prior to making a final decision about the Pinto recall, the focus group would have likely tried to persuade the company to issue a recall, which would have avoided the legal and extra-legal punishments that resulted from the company's actions. Second, the focus group would also give a better idea of what sorts of extra-legal punishments might result from a particular legal compliance decision. Not everything that is legally permissible is a good business decision. In addition to knowing the legal consequences of a legal compliance decision, knowing the extra-legal consequences, for example, consumer backlash, inability to enter business alliances, and inability to obtain credit, can also be very useful in deciding how to operate a business entity. Although convening focus groups can potentially be costly, when making especially difficult legal compliance decisions, the cost can be worth it to understand what sort of extra-legal punishments might result. Third, focus groups can also be useful in understanding what another sort of focus group, i.e., a jury, might do in the event that a legal compliance decision ends up in litigation. As previously explained, juries tend to ignore jury instructions and use their intuitions of justice in reaching verdicts. Convening a focus group can be a valuable tool in understanding how a jury might react to a particular legal compliance decision before a decision that might lead to litigation is ever made.

VI. CONCLUSION

This Article challenges the view held by many in legal education and in practice that what lawyers should do consists solely of engaging in legal research and analytic reasoning.²³⁴ As discussed in Part II, this challenge is

234. In the 1973 movie adaption of John Jay Osborn Jr.'s novel *The Paper Chase*, Professor Charles W. Kingsfield Jr. informs his contracts class during their first session: "You teach your-

made with good reason, i.e., that academics from numerous disciplines have recognized that individuals use intuition at least in the part in making moral decisions. In addition, neuroscience is producing more and more scientific evidence to validate the intuition-based decisionmaking models of philosophers, psychologists, and economists. Moreover, the reality is that most individuals resort to practical reason, i.e., intuition, when making moral decisions. This is not to claim that law and morality are coexistent. Still, intuition can provide insights into the foundations of law, assist in the discovery of the law, and help protect business entities because intuition can give insight into the legal and extra-legal punishments that may be visited upon a business entity as a result of its legal compliance decisions.²³⁵

In fact, considering one's ethical intuitions may be as reasonable and as useful as resorting to analytic reason. This is not to claim that legal research and analytic reasoning should play no role in making legal compliance decisions for business entities. Exhaustive legal research should be at the heart of any legal compliance decision. Lessons from philosophy, neuroscience, moral psychology, and behavioral economics, however, demonstrate that a dual process approach that incorporates both intuition and analytic reason is best for considering issues relating to a business entity's compliance with the law.

selves the law. I train your minds. You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer." *THE PAPER CHASE* (Twentieth Century Fox 1973); *see also* JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1970). Professor Kingsfield's statement and his behavior throughout the remainder of *The Paper Chase* demonstrate his view that "thinking like a lawyer" chiefly consists of engaging in analytic reasoning, a view that is held by many in the legal academy and in practice today. This Article suggests that some of the things contained within one's "skull full of mush" may be useful in the practice of law.

235. *See supra* Part III (discussing the importance of the use of ethical intuition in legal compliance decisionmaking).