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WEDNESBURY UNREASONABLENESS

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ABSTRACT. *Administrative decisions are unlawful if they are unreasonable, in the sense that* Corporation *Provincial Picture Houses Ltd. v Wednesbury Corporation made famous. What is* Wednesbury *unreasonableness, precisely? Courts have not clearly said, and existing academic answers are flawed. Here I propose a new answer. My claim, roughly, is that a* Wednesbury *unreasonable decision is one that a court is entitled, given the evidence before it, to conclude was wrong, given the evidence before the authority when it made the decision. In a slogan: Wednesbury unreasonableness is demonstrable wrongness.*

KEYWORDS: *unreasonableness*, Wednesbury, *judicial review*, *administrative law*

I. WHAT IS UNREASONABLENESS?

In 1995, members of the Orange Lodge, a Northern Irish unionist group, assembled at Drumcree parish church. From there they planned to parade to the centre of Portadown, a route that would take them along Garvaghy Road, a nationalist area. Before the parade could begin, nationalist protesters arrived. A standoff ensued and the police intervened. The conflict grew and spread; before long, there was disorder and rioting across Northern Ireland.

In the aftermath, Parliament enacted the Public Processions (Northern Ireland) Act 1998. The Act established a Parades Commission to mediate parade-related disputes and set conditions for parades, including in respect of routes. From its outset, the commission was opposed by unionist groups. That opposition became entrenched when, year after year, the commission prohibited unionists from parading down Garvaghy Road. By the early 2000s, the Government felt it had to do something to gain the cooperation of unionists.

In 2005, several vacancies on the commission came open. In addition to advertising these positions publicly, the Secretary of State for Northern Ireland wrote to leaders of unionist groups asking them to encourage

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their members to apply. Among those who applied were Mr. Burrows and Mr. Mackay. Both men were active members of the Portadown Orange Lodge. Both insisted in their applications that they could decide on parade issues impartially. On the recommendation of the selection panel, the Secretary of State appointed Burrows and Mackay as commissioners.

These appointments were challenged by way of judicial review by Mr. Duffy, a member of the Garvaghy Road Residents' Association. *In re Duffy*[1] was eventually heard by the House of Lords. Before their lordships was a single issue: were the appointments unreasonable, in the sense made famous by *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*?[2] Lord Bingham (with whom the other Lords agreed) said that for the commission to fulfil its functions its members must both be impartial and appear to be impartial. Burrows and Mackay could be neither: "No reasonable person, knowing of the two appointees' backgrounds and activities, could have supposed that either would bring an objective or impartial judgment to bear on problems raised by the parade in Portadown and similar parades elsewhere."[3] Appointing representatives of unionist groups was one thing. Appointing "hardline members of the very lodges whose activities had been a focus … of the serious problems which had caused widespread disorder"[4] was quite another. The appointments were, His Lordship held, *Wednesbury* unreasonable ("unreasonable" hereafter).

I have no doubt that Lord Bingham's conclusion was correct. The Northern Ireland Secretary's decision to appoint immoderates as moderators was clearly unreasonable. It is far less clear, at least to me, *why* Lord Bingham was correct and *why* the appointments were unreasonable. It is all well and fine to be able to recognise decisions as unreasonable; but, at some point, one wants to be able to say what one is recognising. What is unreasonableness, precisely?

If one look to the case law for the answer, I am afraid one will be disappointed. *Wednesbury* told us that an unreasonable decision is one

[1] *In re Duffy* [2008] UKHL 4, [2008] N.I. 152.

[2] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223. Lord Greene M.R. said that administrators act unlawfully if they (1) "have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account"; or (2) have "come to a conclusion so unreasonable that no reasonable authority could ever have come to it" (233–34). On the distinction between (1) and (2), see e.g. *R. (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 W.L.R. 1649, at [98] (Leggatt L.J. and Carr J.); *Braganza v BP Shipping Ltd.* [2015] UKSC 17, [2015] W.L.R. 1661, at [24] (Lady Hale). I am concerned only with (2) or with what is sometimes called *Wednesbury* in the "narrow sense".

[3] *In re Duffy* [2008] UKHL 4, at [27] (Lord Bingham).

[4] Ibid.

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that "no reasonable body could have come to".[5] The "overstated and under-explained"[6] character of this pronouncement is typical of administrative cases influenced by wartime considerations. While one might hope that the law would have been clarified in the 75 years since, especially given the "countless"[7] invocations of *Wednesbury*, the formulations in later cases are not much better. A decision is said to be unreasonable if it is "beyond the range of reasonable decisions",[8] "beyond rational justification"[9] or beyond what a "sensible person"[10] would do, phrases that are hardly self-explanatory. An unreasonable decision is supposed to be one that "lacks logic",[11] lacks rationality[12] or "lacks … justification",[13] as if logic, rationality, and justification are the same thing. It is also said – and for sheer opacity this is my favourite – that an unreasonable decision is whatever causes a judge to think "my goodness, that is certainly wrong".[14]

I must believe that judges know how little help these brief, cryptic, and divergent remarks provide.[15] And I must believe that judges would offer something more helpful if they could. The implication is not reassuring. Judges, it would seem, do not know what unreasonableness is, or at least not in a way they can articulate clearly.

So I have tried to work out for myself what unreasonableness is. I think I have succeeded; at the least, I cannot tell where I have failed. Although my analysis will make more sense with the background in place, my basic idea is that unreasonableness is a function of two bodies of material or evidence. The first is the material available to a court when it reviews the decision. The second is the material available to the authority when it made its decision. An unreasonable decision is one that a court is entitled, given the former body of evidence, to consider wrong, given the latter body of evidence.

[5] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 K.B. 223, 230 (Lord Greene M.R.).

[6] J.W.F. Allison, "The Spirits of the Constitution" in N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (Oxford 2013), ch. 2, 55. As Allison explains (at 53), the "main authority" on which Lord Greene relies is *Harman v Butt* [1944] K.B. 491, a decision regarding the opening of a cinema for the benefit of the armed forces.

[7] G. Hall, "Unreasonableness" in H. Fenwick (ed.), *Supperstone, Goudie & Walker: Judicial Review*, 6th ed. (London 2017), 212.

[8] *R. (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778, [2020] P.T.S.R. 1872, at [48] (Rose L.J.); see also *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 W.L.R. 4193, at [21] (Lord Kerr).

[9] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] 1 A.C. 455, at [132] (Lord Toulson).

[10] *HMB Holdings Ltd. v Antigua and Barbuda* [2007] UKPC 37, at [31] (Lord Hope). See also *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1064 (Lord Diplock).

[11] *R. (A) v Liverpool City Council* [2007] EWHC 1477 (Admin), at [39] (Walker J.).

[12] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374, 410 (H.L.) (Lord Diplock).

[13] *R. (Mackay) v Parole Board* [2019] EWHC 1178 (Admin), at [38] (Kramer J.).

[14] *R. v Devon County Council, ex parte George* [1989] A.C. 573, 583 (Lord Donaldson M.R.).

[15] Cf. *Dudley Metropolitan Borough Council v Dudley Muslim Association* [2014] EWCA Civ 911, [2014] 5 W.L.U.K. 1099, at [11] (Sir Stephen Sedley, remarking on the "impoverished" state of the "*Wednesbury* jurisprudence").

In a slogan: unreasonable decisions are demonstrably wrong decisions. I hope to persuade you to think of unreasonableness this way, too.

Here is how I proceed. Section II explains how we will recognise a good analysis of unreasonableness when we see one. Section III sets out my analysis in detail. In Section IV I show that my analysis meets the criteria for a good analysis. I show that no existing academic analysis does as well in Section V. Section VI concludes.

II. Commonplaces

What is the test of a good analysis of unreasonableness? We start with what nearly everyone familiar with unreasonableness would acknowledge as true about it – that is, with truisms about unreasonableness. We identify a candidate analysis. Then we check if it accounts for what we know about unreasonableness. If it does, then the analysis is successful and our work is done. Otherwise we must start again, for an analysis that "flouts too many of [the truisms]" is an analysis not "of the intended entity but of something else entirely".[16] While there is no canonical list of truisms about unreasonableness, any list would include at least the ones below.

First, unreasonableness *concerns the balance of reasons for and against a decision*.[17] In *Tesco Stores v Environment Secretary*,[18] Lord Keith said that "it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense".[19] The implication of the last clause is that unreasonableness regulates the weight placed on relevant reasons. Later courts are more explicit. For example, Lord Mance said in *Kennedy v Charity Commission* that "reasonableness review … involve[s] considerations of weight and balance".[20]

Second, unreasonableness is a *high standard*.[21] That means it takes more than the balance of relevant reasons opposing a decision to make it unreasonable. It takes more than wrongness, in other words. Lord Hailsham expressed this thought when he said that "[n]ot every

[16] S.J. Shapiro, *Legality* (Cambridge, MA 2011), 14.

[17] This point has been made persuasively by P. Craig, "The Nature of Reasonableness Review" (2013) 66 Current Legal Problems 131, 135–42.

[18] *Tesco Stores v Secretary of State for the Environment* [1995] 1 W.L.R. 759.

[19] Ibid., at 764 (Lord Keith).

[20] *Kennedy v Charity Commission* [2014] UKSC 20, at [54] (Lord Mance); see also *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 W.L.R. 1591, at [60] (Lord Carnwath). Lords Mance and Carnwath both endorse Craig's analysis.

[21] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 558 (C.A.) (Sir Thomas Bingham M.R.); *R. v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] S.T.C. 681, 692 (C.A.) (Sir Thomas Bingham M.R.); *R. (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] I.N.L.R. 633, at [11]–[12] (Brooke L.J.); *R. (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 W.L.R. 2697, at [66] (Lord Carnwath and Lord Mance).

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reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable".[22] So did Lord Ackner when he said that the Secretary of State's decision to issue certain directives could be reasonable "whether the Secretary of State was right or wrong to issue [them]".[23]

Third, unreasonableness review is *neither an appeal nor a form of merits review*.[24] The nature of the distinction between unreasonableness and merits review is something a good analysis would illuminate. For now, we can say that a decision is not unreasonable just because a court, based on its own assessment of the relevant reasons, considers it wrong. A court must not, in the guise of unreasonableness review, "substitute its, the judicial view, on the merits"[25] for the authority's view.

Fourth, unreasonableness is *context-dependent*: a decision is more or less likely to be unreasonable depending on a range of contextual factors. Two factors are especially important. One is an authority's expertise on the matter decided relative to the court's. The greater the authority's relative expertise, the less likely its decision is unreasonable, other things being equal.[26] For instance, the British Union for the Abolition of Vivisection claimed that an investigator's findings as to the suffering caused by certain animal experiments were unreasonable.[27] In rejecting that claim, the reviewing court said that it should be careful not to "substitute its own inexpert view of the science"[28] for that of an "expert and experienced"[29] scientist.

The other main contextual factor is the impact of the decision. A decision that impacts a fundamental right or interest is subject to "anxious scrutiny",[30] meaning that a court is "entitled to start from the premise" that the decision "requires to be justified"[31] and that only an important justification will do. Thus, it was unreasonable for the Bloody Sunday inquiry to publish the full names of soldiers who had fired live rounds during the massacre given that (1) the decision risked "the most

[22] *Re W (An Infant)* [1971] A.C. 682, 700E (H.L.) (Lord Hailsham). See also *Secretary of State v Tameside* [1977] A.C. 1014, 1074–75 (H.L.) (Lord Russell).

[23] *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696, 757 (Lord Ackner).

[24] *R. (Khatun) v London Borough of Newham* [2004] EWCA Civ 55, [2005] Q.B. 37, at [40] (Laws L.J.); *R. v Ministry of Defence, ex parte Walker* [2000] 1 W.L.R. 806, 812 (H.L.) (Lord Slynn).

[25] *R. v Secretary of State, ex parte Brind* [1991] 1 A.C. 696, 757 (H.L.) (Lord Ackner).

[26] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 556 (C.A.). See also *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] Q.B. 728 (Laws L.J.); *R. (CENTRO) v Secretary of State for Transport* [2007] EWHC 2729 (Admin), at [36] (Beatson J.).

[27] *R. (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417.

[28] Ibid., at [1] (May L.J.).

[29] Ibid.

[30] *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514, 531 (H.L.) (Lord Bridge). See also *R. (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 A.C. 920, at [9] (Lord Bingham), [58]–[59] (Lord Hope); *R. (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116, [2010] 4 All E.R. 448, at [22]–[24] (Carnwath L.J.).

[31] *R. v Secretary of State, ex parte Brind* [1991] 1 A.C. 696, 748–49 (Lord Bridge). See also *R. v Secretary of State, ex parte Moon* [1997] 1 I.N.L.R. 165, 170 (Q.B.) (Sedley J.).

fundamental of all human rights"[32] – the lives of "the former soldiers and their families"[33]; and (2) there was no "compelling justification"[34] for publishing the names.

Fifth, unreasonableness is *evidence-dependent*. The court's task is to test the authority's "conclusion against the evidence before [the authority]" and "ask whether the conclusion can … be safely justified on the basis of that evidence".[35] One implication is that a decision is unreasonable if there is clearly no support for that decision in the evidence before the authority.[36] Another implication is that a decision is not unreasonable if evidence that would have counted decisively against it becomes available only after the decision has been made.[37] In one recent case, it was reasonable for a parole board panel to direct the release of a prisoner who had been smuggling large amounts of steroids and alcohol into a prison, given that the panel did not learn of the smuggling until after it made its decision.[38]

The sixth truism concerns moral legitimacy or justification. Judges generally believe that unreasonableness review is morally justified. Coke's words still inspire:

> [N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.[39]

It could be that judges are mistaken, and they should not engage in unreasonableness review. Perhaps they should engage in a more or less intrusive form of review instead. Judges are, however, typically intelligent people, knowledgeable in the law, acting in good faith. If they say that unreasonableness review is justified, then *it is at least plausible that it is justified*. So, an analysis of unreasonableness does not need to

[32] *R. v Lord Saville of Newdigate, ex parte A* [2000] 1 W.L.R. 1855, 1877 (C.A.) (Lord Woolf M.R.).
[33] Ibid.
[34] Ibid.
[35] *R. (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [32]. A different approach may be followed when liberty is at stake. See Hall, "Unreasonableness", 216, discussing *R. v Secretary of State for the Home Department, ex parte Launder* [1997] 1 W.L.R. 839, 860–61 (H.L.).
[36] *Champion v Chief Constable of Gwent* [1990] 1 W.L.R. 1, 6–7 (H.L.); *R. v Birmingham City Council, ex parte Sheptonhurst Ltd.* [1990] 1 All E.R. 1026, 1038 (C.A.); *R. v Secretary of State for the Home Department, ex parte Zakrocki* (1998) 1 C.C.L.R. 374 (Q.B.).
[37] *R. (Dickins) v Parole Board for England and Wales* [2021] EWHC 1166 (Admin), [2021] 1 W.L.R. 4126.
[38] Ibid. On the relevance of late evidence, see A. Beetham, "The Parole Board as 'Functus Officio': *R (Dickins) v Parole Board* [2021] EWHC 1166 (Admin)" (2021) 85 Journal of Criminal Law 406, 407.
[39] *Rooke's Case (1598)* 77 E.R. 209, 210 (K.B.). For many other examples, see H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th ed. (Oxford 2014), 293–95.

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explain why it is justified, but it does need to explain why it "might plausibly be thought to be"[40] so.

Finally, there are *indicia of unreasonableness*, that is, features of decisions reliably associated with unreasonableness.[41] There are at least four indicia:

(1) *Oppressiveness*. The fact that a decision imposes costs on an individual disproportionate to its benefits suggests unreasonableness.[42] For example, Ms. F had been raped by three soldiers while living in Kosovo. She suffered lasting psychiatric injury as a result. When F applied for asylum in the UK, she was refused. F appealed. A psychiatrist would be able to submit a report on F's injuries, but not until a few days after the appeal hearing was scheduled. The special adjudicator refused to adjourn the hearing. In *R. (F) v A Special Adjudicator*,[43] the refusal was quashed as unreasonable. On the one hand, the psychiatrist's report would have assisted F's asylum application. On the other, the delay to the hearing was minor. Overall, it was clear that the costs of the refusal far exceeded its benefits.

(2) *Incoherence.* That an authority adopted an end but not the necessary means to that end indicates unreasonableness.[44] In *R. (Cawser) v Secretary of State for the Home Department*,[45] for example, the Secretary of State conceded "that it would be irrational to have a policy of making release [from prison] dependent upon the prisoner undergoing a [sex offender rehabilitation] treatment course without making … provision for such courses".[46]

(3) *Inconsistency.* That a present decision is inconsistent with a prior decision also suggests that the present decision is unreasonable.[47]

[40] S.A. Smith, *Contract Theory* (Oxford 2004), 20. This is Smith's "moderate" version of his morality criterion for interpretive theories or rational reconstructions.

[41] For similar lists, see P. Daly, "*Wednesbury*'s Reason and Structure" [2011] P.L. 238, 242–47. H. Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84 M.L.R. 265, 293–94.

[42] *Kruse v Johnson* [1898] 2 Q.B. 91, 99–100 (D.C.) (Lord Russell C.J.); *R. v Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 W.L.R. 1052 (C.A.); *R. (Khatun) v London Borough of Newham* [2004] EWCA Civ 55, [2005] Q.B. 37, at [41] (Laws L.J.).

[43] *R. (F) v Special Adjudicator* [2002] EWHC 777 (Admin), [2002] Imm. A.R. 407.

[44] *R. (Association of British Civilian Internees: Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397, at [40] (Dyson L.J.); *R. (Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin), [2011] A.C.D. 16. For a helpful discussion, see R. Williams, "Structuring Substantive Review" [2017] P.L. 99, 107–08.

[45] *R. (Cawser) v Secretary of State for the Home Department* [2003] EWCA Civ 1522, [2004] U.K.H.R.R. 101.

[46] Ibid., at [30] (Simon Brown L.J.). The concession was accepted as appropriate in *R. (James) v Secretary of State for Justice* [2009] UKHL 22, [2010] 1 A.C. 553, at [44] (Lord Carswell).

[47] *R. (Middlebrook Mushrooms Ltd.) v Agricultural Wages Board* [2004] EWHC 1447 (Admin), at [74] (Stanley Burton J.); *R. (Gallaher Group Ltd.) v Competition and Markets Authority* [2018] UKSC 25, [2019] A.C. 96, at [26] (Lord Carnwath). See also J. Randhawa and M. Smyth, "Equal Treatment and Consistency Before and After *Gallaher*" (2018) 23 Judicial Review 159.

For instance, in 2005 the Home Office adopted a scheme for highly skilled migrants under which they would be eligible to obtain indefinite leave to remain (ILR) after four years' residence. The Home Secretary later changed the rules of the scheme, making it more difficult to obtain ILR. Some migrants left the UK as a result. Others who happened to be abroad when the changes were announced chose not to return. The rule changes were then declared unlawful. The question thus arose: should a migrant's absences due to the unlawful rule changes be counted against them when they applied for ILR? In *Patel v Secretary of State for the Home Department*,[48] it was held unreasonable for the Home Secretary to count the absences of those who had stayed abroad against them. An important reason was that (i) the Home Secretary had earlier decided *not* to count the absences of those who left the UK against them and (ii) the two groups were very similar.

(4) *Lack of stated reasons*. Lord Pearce said in *Padfield v Minister of Agriculture, Fisheries, and Food*[49] that if "all of the prima facie reasons seem to point in favour"[50] of a decision, and if the authority "gives no reason whatever for taking a contrary course, the court may infer that he has no good reason".[51] The use of the power is unreasonable, as a result.

I do not claim that a decision is reasonable unless it displays one of these markers. The decision in *Duffy* does not exhibit any of them but was still unreasonable, for example. All I claim is that a good analysis will explain why, despite their diversity, all of these factors indicate the same thing, namely, unreasonableness.

None of these truisms is optional. None is less vital than any of the others. What we need is an analysis that tells us what unreasonableness is such that *all* of these things are true of it.

III. Demonstrable Wrongness

In the course of writing this article, I have embraced and abandoned a number of analyses of unreasonableness. Among my many mistakes, the most time-consuming, was to assume that a confusing ground of review needs a complicated analysis. It does not, of course. The analysis I want to persuade you of is simple. It says: *a decision is unreasonable if and*

[48] *Patel v Secretary of State for Home Department* [2012] EWHC 2100 (Admin).
[49] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (H.L.).
[50] Ibid., at 1053 (Lord Pearce).
[51] Ibid., at 1053–54 (Lord Pearce). See also *R. v Secretary of State for Trade and Industry, ex parte Lonrho Plc* [1989] 1 W.L.R. 525, 539–40 (H.L.) (Lord Keith).

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only if it is demonstrably wrong. I explain the analysis in this section. I argue for it in the next two sections.

Let me start with what makes a decision "wrong". There are reasons for and against decisions. These reasons compete by strength or weight, with the weightier reasons prevailing over the less weighty ones. If the reasons against a decision are collectively weightier than the reasons for it, then there is *most reason* or *decisive reason* against that decision.[52] We can also say that the decision is contrary to the *balance of reasons*. If a decision is contrary to the balance of reasons, one *ought not to* take that decision. Not taking it is *right*; taking it is *wrong*.

These claims are commonplace. Things get more controversial when it comes to the relationship between reasons and evidence. According to some philosophers, one can have a reason that is not part of one's evidence. If late last night someone snuck into your garage and secretly disabled the brakes on your car, then you have a reason not to drive your car this morning. It does not matter that the fact the brakes were disabled is not part of your evidence. Other philosophers think that a fact can be a reason for one only if it is part of one's evidence. Since the fact that your brakes were disabled was not part of your evidence when you decided to drive, that fact was no reason for you at that time. Since there were – we can assume – no other reasons not to drive, it was not wrong to drive. Following Benjamin Kiesewetter, let us call these views *objectivism* and *perspectivism*, respectively.[53]

I prefer perspectivism, for two reasons. One is that it yields more intuitive consequences in a range of cases. Consider an example of Frank Jackson's:

> Jill is a physician who has to decide on the correct treatment for her patient, John, who has a minor but not trivial skin complaint. She has three drugs to choose from: drug A, drug B, and drug C. Careful consideration of the literature has led her to the following opinions. Drug A is very likely to relieve the condition but will not completely cure it. One of drugs B and C will completely cure the skin condition; the other though will kill the patient, and there is no way that she can tell which of the two is the perfect cure and which the killer drug. What should Jill do?[54]

Obviously the answer is: Jill ought to prescribe drug A. That is the answer perspectivism gives, too. Let us say that a reason is *available* to one at some time just if it is part of one's evidence at that time.[55] The reasons that are available to Jill are (1) that drug A is very likely to relieve the condition; (2) that drug B has a 50–50 chance of killing or curing the patient; and

[52] D. Parfit, *On What Matters* (Oxford 2011), 32.
[53] B. Kiesewetter, *The Normativity of Rationality* (Oxford 2017), 195. The formulations of these views are also based on Kiesewetter.
[54] F. Jackson, "Decision-Theoretic Consequentialism and the Nearest and Dearest Objection" (1991) 101 Ethics 461, 462–63.
[55] Kiesewetter, *Normativity of Rationality*, 199.

(3) that drug C has a 50–50 chance of killing or curing the patient[56] The balance of the available reasons clearly favours giving John drug A.

By contrast, the objectivist must say that the fact that drug B (or drug C, as the case may be) will cure John is a reason for Jill to prescribe drug B, even though it is not part of Jill's evidence. That reason will be decisive. So, according to the objectivist, Jill ought to prescribe drug B and not drug A. But that is very counterintuitive: Jill ought *not* to give John a drug that, as far as her evidence indicates, has a 50 per cent chance of killing him just to treat a minor skin condition. So, in this case and others like it, perspectivism is more intuitive than objectivism.

The second argument for perspectivism is that reasons and oughts are supposed to help guide our deliberation and decision-making, but we cannot be guided by what is not accessible to us. One of the motivations for the principle that "ought" implies "can" is that practical requirements must not be, as Jonathan Dancy puts it, mere "shouting in the dark".[57] Likewise, the facts that constitute our reasons "must lie within our capacities for recognition, if they are to be capable of being practically relevant for us".[58] In Jill's case, the fact of the matter as to whether drug B or drug C will cure the patient cannot guide Jill's deliberation or decision-making, since it is not accessible to her. It cannot play the role that reasons are supposed to play, which suggests it is not a reason at all.

I do not claim that these arguments show that perspectivism is correct. There are counters to these arguments, counters to those counters, and so on.[59] All I claim is that these arguments show that perspectivism is a plausible way to think about reasons, oughts and wrongness. Given that this article is not a contribution to the philosophy of normativity, I hope that entitles me to treat perspectivism as true in what follows. Assuming perspectivism is correct, when I say that an unreasonable decision is demonstrably "wrong", I mean that it is demonstrably contrary to the balance of reasons available to the authority when it made its decision.

I turn now to what makes a decision "demonstrably" wrong. The wrongness of a decision is demonstrable, in the relevant sense, when a reviewing court would be entitled to believe (conclude, consider etc.) that it is wrong, based on all the evidence before it. Although the idea is simple enough, I need to explain what "all of the evidence" includes.

Let us say that an authority is a court's *epistemic superior* on an issue just if the authority's conclusion on that issue is more reliable – more likely

[56] Ibid., at 202.
[57] J. Dancy, *Practical Reality* (Oxford 2002), 59. Dancy is here discussing moral requirements and moral reasons. Similar points are made by J. Oberdiek, *Imposing Risk: A Normative Framework* (Oxford 2017), 50–52.
[58] Dancy, *Practical Reality*, 59.
[59] See P.A. Graham, *Subjective versus Objective Moral Wrongness* (Cambridge 2021) for an overview.

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true – than the court's.[60] Epistemic superiority can be indicated by, for example, paper qualifications, experience and reasons provided for a decision.[61] If the court has reason to believe that an authority is its epistemic superior on an issue, then it should treat the authority's conclusion on that issue as evidence of what it concluded. It should attach weight to the authority's conclusion. It should, in other words, defer to the authority.[62] The stronger the reason to believe that the authority is the court's superior, the more weight the court should attach to the authority's conclusion, and the more it should defer to the authority.[63]

Authorities often have greater "knowledge and experience"[64] of policy issues than courts. In other words, courts are often relatively "ill-equipped to take decisions in place of the … authority".[65] It is plausible that the Secretary of State for Northern Ireland, for example, knows more about Northern Irish political dynamics than the judges of the House of Lords. So, there is typically at least *some* reason for a court to believe that an authority is its epistemic superior.[66] If an authority took a decision, it will have thought that decision was right. So, a court should typically treat an authority's decision on a policy issue as evidence of at least some weight that its decision is right.

There will be other evidence available to the court, in addition to the authority's decision (e.g. testimony, affidavits, documents). Some of that other evidence may give the court reason to believe that the authority's decision was wrong. In that case the court will need to take into account the total evidence – the authority's view plus the other evidence – to work out what to believe. Perhaps it should overall agree with the authority; perhaps not. It all depends on how much deference the authority is owed and the strength of the other evidence.[67] When I say that an unreasonable decision is "demonstrably" wrong I mean that a court ought to consider it wrong based on *all* of its evidence – including the fact that the authority believed that the decision was right.

[60] A. Elga, "Reflection and Disagreement" (2007) 41 Nous 478, 484.
[61] A. Perry and F. Ahmed, "Expertise, Deference and Giving Reasons" [2012] P.L. 221.
[62] For weight-based understandings of deference, see e.g. *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167, at [16] (Lord Bingham) (the court should give "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice"); A. Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge 2008), ch. 8.
[63] S.E. Bokros, "A Deference Model of Epistemic Authority" (2021) 198 Synthese 12041, 12064–65.
[64] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 K.B. 223, 230 (Lord Greene M.R.). See also *R. v Lord Saville of Newdigate, ex parte A* [2000] 1 W.L.R. 1855, 1866 (Lord Woolfe M.R.).
[65] Lord Irvine, "Judges and Decision Makers: The Theory and Practice of *Wednesbury* Review" [1996] P.L. 59, 61.
[66] I do not claim that this reason is typically decisive, or that the overall balance of reasons typically favours the court's believing that the authority is its epistemic superior.
[67] A. Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 L.Q.R. 222, 225; A. Young, "Deference, Dialogue and the Search for Legitimacy" (2010) 30 O.J.L.S. 815, 818.

Putting these points together, the idea is that unreasonableness is a function of two bodies of evidence: (1) the evidence that could be considered by a reviewing court; and (2) the evidence before the authority when it made its decision. A decision is unreasonable if and only if a court would be entitled, relative to the former body of evidence, to find the decision wrong, relative to the latter body of evidence. More concisely, an unreasonable decision is one that from a court's perspective is wrong from the authority's perspective.

To illustrate, in *Duffy* the Secretary of State believed that Burrows and Mackay could be impartial and be perceived as impartial. He might have been correct: it is possible that Burrows and Mackay would have been exemplary members of the Parades Commission. But the evidence before the Secretary of State was very much to the contrary. Both men had been "very prominent and committed proponents of the loyalist parade from Drumcree along the Garvaghy Road".[68] Neither had resigned from the loyalist bodies to which they belong or given "any recorded indication that he had changed his allegiance".[69] Mackay even planned to march in the parade from Drumcree along Garvaghy Road.[70] The case against the appointments was so overwhelming that the House of Lords was entitled to consider the appointments wrong, notwithstanding the deference due to the Secretary of State. That is the same as saying that the appointments were demonstrably wrong.

IV. Unreasonableness Is Demonstrable Wrongness

My analysis is simple, and so is the reason to accept it. The reason is that the analysis accounts for the self-evident truths about unreasonableness described in Section II.

First, why is unreasonableness concerned with the weight and balance of the relevant reasons? Because – says my analysis – unreasonableness is concerned with whether a decision is wrong, and wrongness is understood in terms of the balance of reasons. Other grounds of review (e.g. proper purposes, relevancy) are concerned with the reasons for which the authority acted and the reasons it included in its deliberations. Unreasonableness, by contrast, is not about motivation or deliberation. It is only about whether a decision can be considered contrary to the balance of reasons.

Second, why is unreasonableness a high standard? That is, why does wrongness not suffice for unreasonableness? Because unreasonableness is a matter of demonstrable wrongness, and not every wrong decision is demonstrably wrong. Demonstrable wrongness is a function of the evidence before the court. Wrongness is a function of the evidence

[68] *In re Duffy* [2008] UKHL 4, at [27] (Lord Bingham).
[69] Ibid., at [27] (Lord Bingham).
[70] Ibid., at [44] (Lord Carswell).

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before the authority. The two sets of evidence are different; only the former includes the authority's judgment that its decision was right. That additional piece of evidence can make a difference to the conclusion the court should reach. When it does, a decision is wrong but reasonable. Suppose that the evidence before the Secretary of State gave him a reason to appoint Burrows with a weight of 7. The evidence also gave him a reason not to appoint Burrows with a weight of 10. If his view that it was right to appoint Burrows carries a weight of 4, then the appointment is wrong ($7 < 10$), but the court should not consider it wrong ($11 > 10$). The appointment would be wrong but reasonable.

For similar reasons, unreasonableness review is not a form of merits review. By "merits review" I mean a form of review in which a court forms a judgment as to whether a decision is wrong without attaching any significance to the authority's judgment.[71] Unreasonableness review also requires a court to form a judgment as to a decision's merits, but that judgment is based on all available evidence, including the fact of the authority's judgment. Essentially, merits review is non-deferential, whereas unreasonableness review is inherently deferential.

Fourth, why is unreasonableness context-dependent? Some contextual factors indicate how much weight the court should give to certain evidence. For example, the greater an authority's expertise, the greater the weight a court should attach to the authority's view. At the extreme, so much weight is given to the authority's view that it is hard to imagine what contrary evidence could entitle the court to adopt a different view. In the vivisection case, for example, an investigator's scientific expertise was so great that a challenge to his findings was at the "further boundary of that which is suitable for judicial review".[72] Other contextual factors are evidence that an authority's decision was wrong. If a claimant can show that a decision (e.g. to publish the names of the soldiers who fired live rounds at the Bloody Sunday massacre) impacted on a fundamental right or interest (e.g. a right to life), they are halfway home. They have already shown to the court that there is a weighty reason against the decision. The decision is unreasonable unless the court should find an even weightier reason – a "compelling justification"[73] – *for* the decision.

Although my analysis favours expertise-based deference, it does not favour deference on democratic grounds. While "deference" is used in many ways, as I use the term it concerns treating others' beliefs as evidence of what they believe when one forms one's own view on the

[71] It is admittedly somewhat inaccurate to think of appeals as a form of "merits review", given that appellate courts do defer to lower courts on some issues (e.g. factual issues). See M. Fordham, *Judicial Review Handbook*, 7th ed. (Oxford 2021), §15.2.

[72] *R. (British Union for the Abolition of Vivisection) v Secretary of State* [2008] EWCA Civ 417, at [81] (May L.J.).

[73] *R. v Lord Saville of Newdigate, ex parte A* [2000] 1 W.L.R. 1855, 1877 (C.A.) (Lord Woolfe M.R.).

matter.[74] Deference, in this sense, is justified by the reliability of others' judgments. That a body is democratically constituted does not, in itself, warrant deference to its views because it is not, in itself, evidence of the truth of the body's views. Of course, a large and representative body may be well suited to arriving at the truth of, for example, highly polycentric matters. If so, its democratic character favours deference – but indirectly, through its relevance for reliability.

Admittedly, there are cases like *Nottinghamshire County Council v Secretary of State for the Environment*,[75] in which the House of Lords was reluctant to find that a decision was unreasonable, partly because the decision was subject to a House of Commons affirmative resolution procedure. Such cases are sometimes thought to favour deference on democratic grounds. But the better reading, accepted by later courts, is that deference was warranted in these cases because the matters decided in them were political or economic, and therefore lay within the expertise of ministers and Parliament.[76]

To be clear, I do not deny that there are other senses of "deference", or that deference in some other sense might be justified by democratic considerations.[77] For instance, the democratic character of a decision may favour treating it as correct or proceeding on the basis that it is correct (as opposed to believing it is correct).[78] The point is that an analysis of unreasonableness need not accommodate deference in this sense, or on that basis, to account for our commonplaces about the concept.

Fifth, why does unreasonableness depend on the evidence available to an authority? Because a decision is unreasonable only if a court ought to consider it wrong, and a decision is wrong only if the authority's evidence gave it most reason not to take the decision. Earlier I gave an example of a parole board panel releasing a prisoner who had been

[74] I take this understanding to be consistent with *Huang v Secretary* [2007] UKHL 11, at [16] (the court should give "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice"). For a similar view, see Kavanagh, "Deference or Defiance?", 185 ("deference is a matter of assigning weight to the judgment of another"). These statements suggest, though do not make explicit, that weight is attached to a person's judgment *for the purpose of forming a judgment on the same issue*.

[75] *Nottinghamshire County Council v Secretary of State for the Environment* [1986] A.C. 240 (H.L.); see also *R. v Secretary of State for the Environment, ex parte. Hammersmith and Fulham London Borough Council* [1991] 1 A.C. 521 (H.L.).

[76] This reading is accepted in *R. (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] Q.B. 129, at [49] (Lord Phillips M.R.); *R. (CENTRO) v Secretary of State for Transport* [2007] EWHC 2729 (Admin), at [36] (Beatson J.). But cf. *R. (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] P.T.S.R. 322, at [23] (Lord Sumption).

[77] For discussion of the nature and justification of deference generally, see D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart (ed.), *The Province of Administrative Law* (Oxford 1997), ch. 13; M. Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of Due Deference" in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003), ch. 13.

[78] I discuss the difference between treating a proposition as true and believing a proposition in A. Perry, "The Internal Aspect of Social Rules" (2015) 35 O.J.L.S. 283.

smuggling contraband into the prison.[79] The decision was reasonable because the panel had not been informed of the smuggling. That makes sense, on my analysis, because the prisoner's smuggling was not part of the panel's evidence. It was therefore not a reason for the panel to refuse his release. Since the reasons that were part of the panel's evidence overall favoured the prisoner's release, the panel's decision was not wrong, and was therefore not unreasonable.

Conversely, a fact does not support an authority's conclusion unless it was part of its evidence. In *R. (Hollings) v Bath and North East Somerset Council*,[80] for example, a care home sought planning permission to extend its premises to include 52 more beds. The council granted permission, despite local opposition and the premises' Grade I listed status. The council did so because it believed that only larger care homes were financially viable. The court, "having carefully considered all of the information available to the councillors", found it "impossible to identify the provenance or foundation"[81] of this belief. There was simply "no evidence"[82] in support of it. This consideration had to be "stripped away".[83] It "could not legitimately be placed in what was overall clearly a relatively fine balance".[84] And it was "very difficult indeed to see how the balancing exercise leading to the decision does not inevitably fall as a result".[85] In my terminology, a consideration cannot "legitimately be placed" in the balance of reasons unless it is part of the authority's evidence, that is, unless it is an available reason. Since all the reasons that were available to the council were reasons *not* to grant permission (e.g. listed status), the decision was contrary to the balance of available reasons.

Sixth, what makes it plausible that unreasonableness review is justified? We all want authorities to decide rightly. We do not want them to decide wrongly. Everyone will agree on that. Of course, authorities *do* sometimes decide wrongly. But they will do so less often if courts review decisions for unreasonableness, understood as demonstrable wrongness. Since courts have reason to do what will reduce the likelihood of wrong decisions, they have reason to review decisions for unreasonableness. That is the rough argument. Here it is more precisely:

> P1. If there is a reason for one to X, and one's Ying brings it about that one Xs, then one has a reason to Y.[86]

[79] *R. (Dickins) v Parole Board* [2021] EWHC 1166 (Admin).
[80] *R. (Hollings) v Bath and North East Somerset Council* [2018] 5 W.L.U.K. 375 (Q.B.).
[81] Ibid., at [40] (Cotter J.).
[82] Ibid., at [44] (Cotter J.).
[83] Ibid., at [79] (Cotter J.).
[84] Ibid., at [44] (Cotter J.).
[85] Ibid., at [79] (Cotter J.).
[86] This is a simplified version of an account of instrumental reasons in N. Kolodny, "Instrumental Reasons" in D. Star (ed.), *The Oxford Handbook of Reasons and Normativity* (Oxford 2018), ch. 31.

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P2. There is a reason for courts to reduce the likelihood of wrong decisions by authorities.
P3. Courts reviewing authorities' decisions for unreasonableness brings it about that they reduce the likelihood of wrong decisions by authorities.
C. So, there is a reason for courts to review authorities' decisions for unreasonableness.

I take it that P1, or a like rule of instrumental reason, is uncontroversial. I also assume that P2 is uncontroversial. It is good, surely, if courts can make it less likely that authorities will decide wrongly. I do, however, want to say a bit more about the final premise, P3.

Assume that most of the decisions that courts find unreasonable are in fact unreasonable. Assume, too, that if a court finds an authority's decision unreasonable, and it is unreasonable, the authority will make a reasonable decision instead.[87] Thus, the House of Lords found Burrows and Mackay's appointments unreasonable. They were in fact unreasonable. The court's intervention led the Secretary of State to make suitable appointments to the Parades Commission. Now, an unreasonable decision is, we are supposing, one that a court ought to believe is wrong. A decision that a court ought to believe is wrong likely *is* wrong, relative to the court's evidence. So, given these two assumptions, findings of unreasonableness mostly lead authorities to make likely right decisions instead of likely wrong decisions. That establishes P3. Are these two assumptions justified? I believe so, at least under ordinary conditions. But I do not need to defend that strong claim here. These assumptions are plausible, and that is enough to make it plausible that unreasonableness review is justified.

Finally, why is unreasonableness indicated by oppressiveness, inconsistency, incoherence and a lack of stated reasons? Let me take these indicia in order, starting with oppressiveness.

Recall that a decision is oppressive if the benefits of a decision are greatly exceeded by the costs it imposes on an individual. These benefits and costs are reasons for and against the decision. Since the costs are excessive, the decision is contrary to the balance of reasons. If all this is demonstrable to the court, then the decision is unreasonable. In *F*, for instance, it was plain to the court that by refusing to give F extra time to submit a psychiatrist's report, the adjudicator had effectively doomed F's asylum application for the sake of avoiding minor administrative inconvenience. Unsurprisingly, the decision was unreasonable.

[87] It is enough that the authority makes a less unreasonable – less likely wrong – decision instead. That would also result in a reduction of the likelihood of error.

Incoherence – a lack of appropriate connection between an authority's chosen means and ends – is the next indicium of unreasonableness. A good illustration is *R. (Johnson) v Secretary of State for Work and Pensions*.[88] The Universal Credit Regulations 2013 awarded benefits based partly on income earned in a monthly assessment period. Some claimants were paid by their job on the last day of the month. When their pay day fell on a bank holiday or weekend, the pay date would be pushed back a day, and they would receive two pay cheques in one month. Their universal credit award would be reduced. In the next month, they would receive no pay cheque. Their universal credit award would be increased, but not by as much as it had been reduced the previous month. So, claimants who were paid on the last day of each month were left worse off than claimants who were not, other things being equal. This problem was called the "non-banking day salary shift".[89]

The Court of Appeal held that it was unreasonable for the Secretary of State to fail to correct the non-banking day salary shift. The "legislative policy behind universal credit in general" and these regulations in particular "is to encourage work by being responsive to changes in earned income".[90] The non-banking day salary shift made it harder for claimants to predict how much income they would receive in any given month. That made budgeting difficult and increased debt. Many claimants would conclude "that it is preferable in many ways not to work".[91] Those claimants who stayed in employment would be encouraged to choose jobs based on salary pay dates, rather than on the potential to make "use of … [their] skills and educational achievements" and "previous work experience".[92] Instead of promoting the aim of the universal credit regime, the non-banking day salary shift frustrated it. For this and other reasons, it was unlawful for the Secretary of State to fail to address the problem.

Here is how my analysis makes sense of cases like *Johnson*. Grant that the Secretary of State ought to "encourage work" by introducing a benefits scheme that does not disadvantage recipients for working and using their skills. Grant that on the evidence before the Secretary of State addressing the non-banking day salary shift was a necessary means of achieving that end. Finally, grant the general principle that if one ought to X, and one ought to believe that one will X only if one Ys, then one ought to Y.[93] It follows that the Secretary of State ought to have addressed the non-

[88] *R. (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778, [2020] P.T.S.R. 1872.
[89] Ibid., at [2] (Rose L.J.).
[90] Ibid., at [100].
[91] Ibid., at [106].
[92] Ibid.
[93] N. Kolodny, "Why Be Disposed to Be Coherent?" (2008) 118 Ethics 437, 452; Kiesewetter, *Normativity of Rationality*, 265.

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banking day salary shift and that failing to do so was wrong. All of this was plainly in evidence before the court; so the failure was unreasonable.[94]

Let me now turn to inconsistency. Why does inconsistency with a prior decision suggest that a present decision is unreasonable? On the one hand, a court should treat an authority's present decision as evidence that it is right. On the other hand, a court should treat an authority's prior and inconsistent decision as evidence that *it* was right and thus as evidence that the present decision is wrong.[95] And evidence that the present decision is wrong tends to establish its unreasonableness.

In *Patel*, for example, there were reasons in favour of counting absences from the UK due to unlawful rule changes against migrants applying for ILR. There were also reasons against doing so. The Home Secretary's choice to place more weight on the former reasons in Patel's case deserved deference. However, the Home Secretary's choice in other cases to place more weight on the latter reasons also deserved deference. The deference paid to one decision is offset, to at least some degree, by the deference paid to another decision. The decision is more likely unreasonable than if deference were due only to the present decision.

My claim is not that inconsistency is conclusive of wrongness. It is merely only one piece of evidence among others. Suppose that the total evidence (including the Home Secretary's judgments) gives the court most reason to believe that Patel's absences should have been counted against him. The decision in *Patel* would be reasonable, despite its inconsistency with the previous decisions. This accords with how courts think about inconsistency. They, too, stress that inconsistency with a prior decision does not, on its own, make a decision unlawful.[96]

The final indicium of unreasonableness is lack of stated reasons. If all the evidence before a court is of reasons against a decision, and the authority has not stated any reasons for the decision, then the court says that the decision is unreasonable. That makes sense, on my analysis, if we assume that there would be evidence before the court of reasons for a decision were such reasons to exist.

Consider *R. v Penwith District Council, ex parte May*.[97] The Campaign for Nuclear Disarmament (CND) had for many years sold literature, badges and other material along a street in Penzance. In 1984, the District Council decided to require consent for trading activities on that street. The CND duly

[94] If the Secretary of State ought *not* to pursue the end he did, then his decision is likely unlawful under the improper purposes doctrine. If it is neither the case that the Secretary of State ought or ought not to pursue this end, then matters are much more complicated. For philosophical discussion, see e.g. Kiesewetter, *Normativity of Rationality*, 267–94.

[95] This assumes for simplicity that both decisions cannot be right.

[96] *O'Brien v Independent Assessor* [2007] UKHL 10, [2007] 2 A.C. 312, at [30] (Lord Bingham); *R. (Gallaher) v Competition and Markets Authority* [2018] UKSC 25, [2019] A.C. 96, at [24] (Lord Carnwath).

[97] *R. v Penwith District Council, ex parte May*, unreported, 22 November 1985.

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applied for consent. On the evidence before the court, every reason counted in favour of granting its application: there were no complaints about the CND's activities, they were not disruptive, they did not compete with those of other businesses, etc. Indeed, the Council's own Environment Committee had recommended granting the application. And yet the Council had refused the application without explanation.

Assuming that the court would have had evidence of reasons to refuse the CND's application were there such reasons, the court was entitled to infer that there were no reasons for the decision. Since there were many reasons against the decision, the court was entitled to conclude that the decision was wrong. The decision was demonstrably wrong, in other words. According to my analysis, that means it was unreasonable – which is the result the court reached, based on the dicta from *Padfield.*

We said that an analysis of unreasonableness should account for everything truistic of it. My analysis explains why unreasonableness is concerned with the balance of reasons and why it is a difficult standard to meet. It accounts for the difference between unreasonableness review and merits review. It explains why unreasonableness depends on evidence and context, why judges might believe that unreasonableness review is justified, and why seemingly heterogenous factors all indicate unreasonableness. In short, my analysis does all we said a good analysis would do.

I commented in the introduction on the unhelpfulness of judicial explanations of unreasonableness. Does this analysis really go beyond saying that an unreasonable decision is one that causes a judge to think "my goodness, that is certainly wrong"? Indeed it does. For one thing, it identifies the relevant sense of wrongness (perspectival versus objective). For another, it clarifies that what matters is not what a judge concludes, but what a judge is entitled to conclude based on all the evidence before the judge, including the authority's view.

V. Other Analyses

In this section I compare my analysis with the three main existing analyses of unreasonableness. All have their virtues; none, however, is adequate.

A. Unreasonableness as Lack of Justification

I start with John Gardner's analysis. According to Gardner, the "word 'reasonable', in legal contexts" means "no more and no less than 'justified'".[98] That, he said, is what it means in tort law and contract law;

[98] J. Gardner, "The Mysterious Case of the Reasonable Person" (2001) 51 University of Toronto Law Journal 273, 273.

it is also what it means in administrative law.[99] What makes a decision "unjustified"? If a reason is weightier than a conflicting reason, we say that the less weighty reason is *defeated.* If a reason is not defeated by any competing reason, then we say the reason is *undefeated*.[100] A decision is "taken for a reason" when, roughly, one believes that there is some reason for some decision, makes that decision, and makes that decision because one believes there is that reason. Putting these points together, a decision is justified just when it is taken for an undefeated reason.[101] A decision that is not justified is unjustified and a decision that is not reasonable is unreasonable. So, the claim is that a decision is unreasonable just if it is unjustified.

Gardner recognises that unreasonableness is "used by the law to allow a measure of latitude"[102] to authorities. How is this compatible with understanding unreasonableness in terms of lack of justification? Gardner's answer is ingenuous. There may be an undefeated reason for more than one decision. Any of these decisions, if taken for the right reason, is justified. Thus, the court can insist that an authority make a justified decision while at the same time affording it substantial latitude, specifically, the latitude to choose any justified alternative.[103]

However, Gardner understates how much latitude unreasonableness grants to authorities. Authorities do not only have latitude to choose from among justified alternatives. They also have latitude, within limits, to choose wrong alternatives. This is the sense in which unreasonableness is a high standard. Gardner's account does not accommodate this latter kind of latitude.[104] Why not? Because if a decision is wrong, then the reasons for it are outweighed by the reasons against. Hence there is *not* an undefeated reason for it. Hence it is unjustified. So, if a decision is wrong, then it is unjustified. The freedom to make any justified decision therefore does not extend to making wrong decisions. Since the freedom granted under the unreasonableness standard *does* extend to making wrong decisions, we cannot (*contra* Gardner) equate that standard with lack of justification.

There is a further problem with Gardner's account, concerning evidence-dependence. Since it arises more squarely with respect to Stephen Perry's analysis, I raise it below.

[99] J. Gardner, *Torts and Other Wrongs* (Oxford 2019), 276–77. Gardner's analysis is meant to apply to unreasonableness generally, and much of his discussion concerns unreasonableness beyond the administrative law context.

[100] Ibid., at 274. If there are exclusionary reasons, then exclusion is an additional way in which a reason may be defeated. See J. Raz, *Practical Reason and Norms*, revised ed. (Princeton 1991), ch. 1.

[101] J. Gardner, "Justifications and Reasons" in A. Simester and A.T.H. Smith (eds.), *Harm and Culpability* (Oxford 1996), ch. 5; Gardner, *Torts and Other Wrongs*, 276–77.

[102] Gardner, *Torts and Other Wrongs*, 276.

[103] Ibid., at 276–77.

[104] This criticism is made effectively and in detail by Dindjer, "What Makes an Administrative Decision Unreasonable?", 275–76.

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B. Unreasonableness and Eligible Views

Dindjer recognises, as Gardner did not, that unreasonableness is not simply lack of justification. He proposes a sophisticated alternative. According to Dindjer, a decision is unreasonable if and only if it is not justified on any "eligible view"[105] of the balance of reasons. An eligible view of the balance of reasons is determined by the "eligible upper and lower bounds [of weight] for each individual reason"[106] bearing on the decision. A "weighting for a reason is eligible if the court cannot, consistent with its epistemic and constitutional position, treat it as mistaken".[107]

How does this analysis work in practice? Suppose that in *Duffy* the reason to appoint Burrows and Mackay is to gain unionist support for the commission. The reason not to appoint them was that it might cause conflict. Given the court's "epistemic and constitutional position" it should defer to the Secretary of State as to the weights of each reasons – up to a point. That point sets the upper and lower bounds of the weightings for each reason. The decision is reasonable if and only if the weight of the reason for the decision, taken at its upper bound, is at least as great as the weight of the reason against the decision, taken at its lowest bound.

We can make this more concrete by attaching numbers to the weights. Suppose that the weights of the reason for and against the decision are as shown in Table 1 below. The weight of the reason for the decision, at its upper bound, is 2. The weight of the reason against the decision, at its lower bound, is 3. Thus, the decision is unreasonable.

Although there is a lot to like about Dindjer's analysis, it suffers from at least two problems. One problem is that it is not clear from Dindjer's discussion how to fix the upper and lower bounds of a reason's weighting. They are supposed to be determined by what a court can, consistent with its epistemic and constitutional position, treat as mistaken. But I do not know exactly how we are supposed to work out what weightings a court is entitled to treat as mistaken. Although there may be ways to fill this gap, the only way I can think of leads to the second problem.

Suppose that a court, based on its independent assessment of the merits, is somewhat confident that the weight of the reason to appoint Burrows and Mackay is 1. It is highly confident, meanwhile, that its weight is between 1 and 2. These beliefs are, let us suppose, rational. The deference due to the Secretary of State ought to be enough to convince the court to accept a view that it is somewhat confident is wrong, but not highly confident is wrong. So, it should be enough to convince the court that the reason's weight is between 1 and 2 – no lower, no higher. Anything outside this range the court is entitled to treat as mistaken. Something similar is true of

[105] Ibid., at 282.
[106] Ibid., at 281.
[107] Ibid.

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Table 1. Duffy

	Lower bound	Upper bound
Unionist support	1	2
Conflict avoidance	3	4

Table 2. Reason to appoint

Weights	Confidence
1	0.4
2	0.4
3	0.05
4	0.05
5	0.1

Table 3. Reason not to appoint

Weights	Confidence
0	0.05
1	0.1
2	0.05
3	0.7
4	0.1

the other reason. The court is somewhat certain that the reason has a weight of 3. It is highly confident it has a weight between 3 and 4. So, it is entitled to treat a weight less than 3 or greater than 4 as mistaken. In essence, a court is entitled to treat a weighting of some reason as mistaken if, based on its own assessment, it is entitled to be highly confident that it is mistaken. (To be clear, I am not attributing this way of thinking to Dindjer. He does not use the language of confidence, probability etc.)

While this way of filling the gap may seem plausible, it creates anomalous results. Suppose – purely for the sake of argument – that the House of Lords' confidence levels for the associated weights of the reasons are as shown in Tables 2 and 3 above.

Assume that "highly confident" is confidence equal to or greater than 0.8. The court should be highly confident that the reason to appoint's weight is 2 or less ($0.4 + 0.4 = 0.8$). It should be highly confident that the reason not to appoint's weight is 3 or more ($0.7 + 0.1 = 0.8$). It follows that the balance

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of reasons does not favour the appointments unless at least one reason is given a weighting that the court is entitled to treat as mistaken. There is no eligible view of the balance of reasons that favours the appointments. Dindjer's analysis would – on my reading – say that the appointments were unreasonable.

The trouble is that the court should have a confidence level of only 0.67 that the reason to appoint is outweighed by the reason not to appoint.[108] Since $0.67 < 0.8$, the court should *not* be highly confident that the decision was unjustified. We said a court should adopt the authority's view unless it is highly confident, based on its own assessment, that it is mistaken. Thus, the court ought to accept that the Secretary of State's decision is justified. So, this is a decision that (1) Dindjer's analysis says is unreasonable but (2) a court should believe is justified. Now, no good analysis would tell courts to interfere in decisions that they ought to regard as justified. For one thing, it would be a form of review even more intrusive than merits review. On merits review, courts impose the decisions they think are right. On Dindjer's analysis, courts should impose decisions they and the authority agree are wrong. For another, it is not plausible that a court can legitimately set aside decisions that it ought to regard as justified.

Why does Dindjer's analysis produce this odd result? The problem is his focus on the weighting of "each individual reason". His analysis starts by determining the permissible weightings of each reason. Based on those weightings, we construct the eligible views of the balance of reasons. But uncertainty compounds. If one is uncertain that event *A* occurred, and uncertain that *B* occurred, one should be even less certain that both *A* and *B* occurred. A court that is not certain that the reasons for a decision are below a certain weight and not certain that the reasons against that decision are above a certain weight should be even less certain that *both* things are true. It should be even less certain as to the balance of these reasons, in other words.

While it would be possible to avoid this result by stipulating a constraint on the eligible views of the balance of reasons, such that reasonableness is never more demanding than justification, I do not see a principled basis for doing so.[109] In any case, introducing such constraints would complicate an already elaborate account. Since the emphasis on individual reasons does not add significant explanatory power, the better approach is to focus on the overall balance of reasons – as my analysis does.

[108] $0.67 = 1 - [2(0.4*0.1) + 3(0.4*0.05) + 4(0.05*0.05) + 5\ (0.05*0.1) + 2(0.05*0.7) + (0.1*0.1)]$.

[109] Dindjer says that, in some cases, the eligible views of the balance of reasons may depend on considerations other than the upper and lower bounds of each individual reason: Dindjer, "What Makes an Administrative Decision Unreasonable?", 282, n. 101. The examples provided of such considerations are not relevant here.

C. Unreasonableness as Clear Error

Stephen Perry proposed his analysis of unreasonableness almost 35 years ago.[110] It has been almost entirely neglected by administrative law scholars since.[111] That is a shame – it is both the best existing analysis of unreasonableness and nearly correct.

Like Dindjer, and unlike Gardner, Perry knew that unreasonableness is not mere wrongness or lack of justification. There was, he thought, only one other serious possibility: "[W]hat else could it mean that a person regards a decision as wrong but reasonable than that she believes the decision is mistaken but recognises that there is at least a nonnegligible possibility that *she* might be wrong and the tribunal right?"[112] Thus, "an unreasonable decision … is one which she is convinced to some relatively strong degree of certainty could not be right".[113] A decision is "clearly" mistaken or wrong from the court's perspective just when the court is convinced to a high degree or certainty that it is wrong.

For Perry, a decision is mistaken or wrong when it is at odds with the "objective balance of reasons"[114] or "right reason".[115] The objective balance of reasons is the "balance of reasons understood as facts".[116] It "consists of all practical inferences and weighing processes that would be carried out by an agent who, when deciding what ought to be done in a particular situation, possessed true information about all relevant facts"[117] and who "reasoned validly".[118] So, a decision is *Wednesbury* unreasonable – for Perry – just when it is clearly contrary to the objective balance of reasons.

Taken literally, Perry's analysis has some odd consequences. If a decision has not yet been litigated, no court could be convinced – to any degree – that it is contrary to the objective balance of reasons. Any decision that has not yet been litigated would necessarily be *Wednesbury* reasonable. That cannot be right. Moreover, a court might be convinced to a very high degree of certainty that a decision is contrary to the objective balance of reasons on entirely irrational grounds. Such a decision would be unreasonable. Again, that cannot be right. Since these mistakes are easy to see, charity suggests that we do not attribute them to Perry. I shall take him to claim that a clearly wrong decision is one that a court should be highly

[110] S.R. Perry, "Second-Order Reasons, Uncertainty and Legal Theory" (1989) 62 Southern California Law Review 913. Note that Perry's article focuses on unreasonableness in the context of review for error of law.
[111] One exception is J.A. Grant, "Reason and Authority in Administrative Law" [2017] C.L.J. 507, 519.
[112] Perry, "Second-Order Reasons", 938–39.
[113] Ibid., at 939.
[114] Ibid.
[115] Ibid., at 941.
[116] Ibid., at 922.
[117] Ibid.
[118] Ibid.

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confident is wrong, were it to review the decision. And I shall take him to claim that an unreasonable decision is one that is clearly wrong in the sense just defined.

I like Perry's analysis very much and I have learned a lot from it. But I think Perry makes a serious error when he endorses an objective, perspective-independent account of wrongness. It makes it impossible for him to account for the evidence-dependence of unreasonableness. And it leads to two further problems. First, it makes his analysis overinclusive. Remember *Dickins*, where a prisoner was granted parole shortly before his smuggling activities came to light. Had the parole board panel "possessed true information about all relevant facts", including the smuggling, and "reasoned validly", it would likely have decided differently. Perry's analysis would thus say that the panel's decision was unreasonable. And yet the panel's decision was reasonable.

Second, Perry's analysis is underinclusive. In *Hollings*, there was, on the one hand, no evidence in support of the considerations that motivated the council (e.g. that only large care homes were viable). On the other hand, there was no evidence that the concerns were false (e.g. that some small care homes were viable). There was no evidence either way. As a result, the court was in no position to draw any conclusion as to how an authority "possessed [of] true information about all relevant facts" would have decided. The court could not be highly confident that the decision was objectively wrong. Perry's analysis would say that the decision was therefore reasonable. In fact, it was unreasonable.

Like Perry, Gardner's understanding of reasons is objectivist.[119] As a result, Gardner's analysis suffers from the same problems as Perry's. For instance, Gardner would have to say that in *Dickins* the prisoner's smuggling gave the parole board panel a reason not to release the prisoner. That reason is plausibly stronger than the reasons to release him. So, on Gardner's analysis, the decision to release the prisoner was unjustified and unreasonable. As I said, that is not how the law sees things.

VI. Summary

Unreasonableness is a notoriously obscure standard. For decades, courts have struggled to explain it clearly. Progress is possible, however. Drawing on courts' decisions, we can assemble various self-evident truths about unreasonableness. Unreasonableness is (1) concerned with the balance of reasons; (2) a high standard; (3) not a form of merits review; (4) context-dependent; (5) evidence-dependent; (6) prima facie justified; and (7) indicated by various factors including inconsistency,

[119] J. Gardner and T. Macklem, "Reasons" in J.L. Coleman, K.E. Himma and S.J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2004), ch. 11.

oppressiveness, incoherence and the absence of stated reasons. A good analysis of unreasonableness will account for all these truths, but existing analyses fail this test. Gardner's analysis does not explain why unreasonableness is a high standard. Dindjer's does not explain why it is a less demanding form of review that merits review, or why it is prima facie justified. Perry's does not explain why it is evidence-dependent. By contrast, my analysis – that unreasonableness is just demonstrable wrongness – accounts for all we know about the standard.