

After Theory: An Aristotelean Conception of Legal Judgment

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Investiture Lecture: Rex E. Lee Chair and Professor of Law, J. Reuben Clark Law School,
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Gratitude

Thank you, Dean Smith, and thank you, Cole, for that lovely introduction.

No one gets to a day like today without having a long list of people to thank. At the top of my list are my parents, Gilbert and Virginia Scharffs, who each passed away during my time teaching at BYU Law School. One of my early memories is of wearing my father's graduation mortarboard when I was six years old, on the day my dad received his PhD and my mother her Master's degree from BYU. They were pleased when I came to teach at BYU Law School, and I know they would be proud of me on this day.

I'm also deeply grateful to my family, Deirdre, for being a wonderful partner and friend, and for her unstinting support. And I'm grateful to my children, Elliot, a BYU Senior, Sophie, who just returned from a mission to Taiwan and soon to be a BYU Sophomore, and Ella, a senior at Timpview, and soon hopefully to be a BYU Freshman. Add to that Deirdre's teaching in the BYU Art History Department, and it is fair to say that this boy, who grew up cheering for the Utes, and his family, are firmly a BYU family now.

I'm grateful to be a part of the BYU Law School enterprise – the grand experiment of striving to become a world class Latter-day Saint law school, with world class people, world class teaching, world class events, and world class scholarship, all done while studying the laws of men in the light of the laws of God.

I'm grateful to the Deans with whom I've served here at BYU – beginning with Reese Hansen, followed by Kevin Worthen, Jim Gordon, Jim Rasband and Gordon Smith, and to my faculty colleagues. Thanks to our administrative assistant, Anne Apuakehau for the beautiful lei.

I express appreciation to the committee that selected these chairs, and pledge to strive to become worthy of this recognition.

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I also honor Cliff Fleming and Fred Gedicks, longtime holders of BYU Law School Chairs, as well as Kif Augustine-Adams and Christine Hurt whose chairs we have celebrated already this fall.

I'm grateful to my former colleague, Thomas Morgan, who was the first occupant of the Rex E. Lee Chair. As a new faculty member, he gave me some of the best advice I ever received about trying to become a successful scholar: "Find an interesting argument," he said, "and insert yourself into the middle of it."

I'm also grateful to my colleague David Thomas, who next held this chair. He taught me you don't have to be rude to be rigorous, a lesson I suspect my students wish I'd learned better than I have.¹

I believe I'm the first professor hired at the Law School who never met Rex E. Lee, but his son Tom and I began our teaching careers together at BYU on the same day twenty years ago. I love the legend and lore of Rex E. Lee and am deeply honored to sit in a chair that bears his name.

He was not only the founding Dean of this Law School and a beloved president of this University, he was also widely regarded as the premier Supreme Court advocate of his generation, who argued 59 cases before the Supreme Court. The term "10th Justice" was often applied to him, in recognition of his stature at the Supreme Court, and I love the tribute paid to him at a conference held here at BYU focusing on the office of Solicitor General. In discussing the secret to his success as an advocate, one person observed, Rex E. Lee did not view his job as primarily being one of persuading the Court to his position, but rather as one of helping them solve a difficult problem with which they were faced.

The Character of Legal Reasoning

Most of my work at the Law School these days focuses on freedom of religion (and I am deeply grateful to my senior partner, Cole Durham, and all of my colleagues at the Center), but my early articles as a law professor were about the character of legal reasoning. My first article was about humility, and I argued, citing the Old Testament prophet Micah that in addition to being just and merciful, humility was the most important virtue of a good lawyer.² I also wrote articles about the incommensurability of values and the implications of this plurality for legal judgment.³ Next, I wrote an article, *Law as Craft*, which Cliff Fleming in his role as Associate Dean used to call my "law as knitting" article.⁴ There I argued that lawyers should adopt the attitudes towards our craft that master craftsmen such as carpenters, potters—and yes, quilt makers and knitters—bring to theirs.

This series culminated in an article called, *The Character of Legal Reasoning*, in which I argued that legal reasoning and judgment is best conceptualized as lying at the intersection of three ideas that were at the heart of Aristotle’s practical philosophy: craft, rhetoric, and practical wisdom.⁵

Today, I’d like to return to the themes of that article and try to rearticulate and develop further a pair of propositions—that good judgment lies at the heart of being a good lawyer or judge, and that the path to fostering good judgment lies in traveling the roads that will help us develop the virtues of being a responsible rhetorician, a master craftsman, and a person of practical wisdom.

I will argue that the cardinal virtue of rhetoric is *honesty*, the cardinal virtue of craft is *integrity*, and the cardinal virtue of practical wisdom is trust or *being trustworthy*. Thus, it is in cultivating these virtues—honesty, integrity, and trustworthiness—that lawyers (or any of us, really) have the best chance of developing the character of having good judgment.

Monism, skepticism, pluralism

I’LL BEGIN with a brief detour (so please bear with me) into philosophy.

How we carve up the world tells us at least as much about us as it does the world. With that caveat, from a certain perspective the history of legal theory can be viewed as a struggle for pre-eminence among three broad approaches, which we might label *monism*, *skepticism*, and *pluralism*.⁶

Monism aspires to a strong type of theory that provides a determinate methodology to guide reason and deliberation in a systematic way towards finding or achieving “right” answers to legal questions.

Skepticism is usually a response to strong theory, and questions the ability of reason to generate right answers to difficult legal questions. Skepticism often manifests itself in various forms of romanticism that despair at the possibility of being right when it comes to questions of legal interpretation, and advocates substitute values to reason such as politics, identity, authenticity, or status.

In response to the contest between strong and weak theory, pluralism emerges as a pragmatic alternative, which usually focuses on consequences of legal decisions and interpretations; for the pragmatist the goal is to predict and control legal outcomes, and it is often drawn to various forms of utilitarian empiricism.

Imperial theory

MONISTIC THEORIES have strong views about the correct method or approach to be utilized in legal and judicial reasoning. Such imperial theories travel under labels such as originalism (focusing on speaker's or speakers' intent),⁷ formalism (focusing on the original or ordinary meaning of legal texts),⁸ and positivism (focusing on conventional meaning of authoritatively enacted law).⁹ But imperial theories, as I'm using the term, also include theories such as law and economics (focusing on utility or efficiency)¹⁰ and many philosophical approaches to legal interpretation, including natural law (focusing on right reason)¹¹ and constructivist theories such as Ronald Dworkin's view of law as developed in *Law's Empire* (focusing on fit and philosophical justification).¹²

Many of these schools of thought define and explain themselves in opposition to each other. But for all their differences, what these approaches have in common are well defined methodologies for interpreting legal texts and deciding cases, and strong claims about there being verifiably correct answers to most, if not all, interpretive questions. To be sure, these approaches give very different "right answers" to questions of legal interpretation and analysis, but they aspire to give and claim to provide *right* answers with a high degree of certainty.

In the imaginative terminology adopted by St. John's law professor Marc DeGirolami, this style of theory is "comic," in the sense that there are "happy endings" that emerge out of even the most tangled and difficult interpretive scenarios. As Professor De Girolami explains,

A comedy moves from sorrow to joy. Its aim is to take an existing chaos and to order it through and through – to give it a satisfying and intimately worked-out architecture. In a comedy, everything falls into its proper, collision-less place – a place in which a problem that at first seemed intractable has been fully worked out, completely resolved, with the result that the human condition has progressed and been improved.¹³

Imperial theories seek such satisfying conclusions. As DeGirolami notes, "The avatar of comic legal theory is the famous legal and political philosopher Ronald Dworkin," who explains its core creed as follows:

It is in the nature of legal interpretation – not just but particularly constitutional interpretation – to aim at happy endings. There is no alternative, except aiming at unhappy ones. . . . Telling how it is means, up to a point, telling it how it should be. . . . That is a noble faith, and only optimism can redeem it.¹⁴

Imperial theories, in their quest for rationality and order, are deeply committed to the search for correct answers.

Romantic anti-theory

IN STARK CONTRAST with imperial theories, romantic approaches to legal interpretation are in a sense deeply anti-theoretical—they are suspicious and distrustful of robust claims about “objective” or “correct” legal interpretations. Such outlooks are not romantic in the sense that they are about love, but rather in the classical sense that the judge or interpreter of legal texts is like a romantic hero who faces an impossible task against impossible odds. Uncertainty swamps certainty. Romantic approaches reject enlightenment values such as systematic rationality and the desire to turn law into a science; they emphasize instead ideas like emotion, status, identity, imagination, and creativity.

A number of different approaches to thinking critically about the law are romantic in this sense, including legal realism (which focuses on facts in concrete cases, the ubiquity of judicial choice, and on understanding law principally in terms of predicting adjudicative outcomes),¹⁵ critical legal studies (which focuses on the political priors and social biases of judges),¹⁶ and related theories such as critical race theory¹⁷ and feminist theories of law.¹⁸ Such systems of thinking sometimes travel under labels such as deconstructionism,¹⁹ post-structuralism,²⁰ and post-modernism.²¹

Romantic theories are deeply suspicious of grand theoretical claims (although they sometimes make such claims themselves). Romantic theories question the ability of reason to generate “right” answers to difficult legal questions. Indeed, romanticism often despairs at the possibility of being right when it comes to questions of legal interpretation. Advocates of romantic views substitute values to reason such as politics, race, gender, identity, authenticity, and status.

In DeGirolami’s taxonomy, romantic approaches are “tragic,” as opposed to “comic,” because legal interpretation inevitably follows a never-ending cycle of uncertainty and struggle; happy resolutions are destined to be only mirages or deeply flawed temporary solutions that will reveal their defects in time.

Professor DeGirolami explains, “A tragedy, by contrast, proceeds not from joy to sorrow, but from struggle to unresolved struggle.” While comic theory “brings the intellectual and psychological comforts of clarity, elegance, and system where an intolerable confusion is felt to reign,” it does so at considerable cost—irreconcilable clashing values are flattened out “until they are coherent but often unrecognizable.” Tragic theory, in contrast envisions plural and incommensurable values that struggle “in perpetuity to avoid absorption and subordination by others.” This means that decision-making cannot be “fully systematized” and that we will always

experience “tragic outcomes, results that sacrifice important values whose loss cannot be compensated by the triumph of others.” Clashes of important values are not “merely an impediment to be pointed out and bypassed,” but rather a “permanent fixture of the human condition.” For those with a tragic outlook, the best we can hope for, perhaps, is catharsis, a heightened sense of ethical choice, and a deepened understanding of our mortal plight.

Logical fallacies and cognitive biases will be embraced by romantics, perhaps not by name, but indirectly—fallacies will be re-characterized as tropes, motifs, or rhetorical flourishes, and cognitive biases will be repurposed as heuristics, rules of thumb, and common sense. Experts will exercise judgment in a blink of an eye, rather than by rationally applying rules, explicitly considering evidence and reasons, or engaging in calculations.

Beyond pragmatism

PLURALIST THEORIES SEEK a middle ground between the grand pretensions of comic monistic imperial theories and the pessimistic despair of romantic and tragic theories. Plural approaches take two primary forms.

The first is pragmatism, which responds to the legalistic and rationalistic impulses of imperial theory by focusing on the importance of context, the instrumental character of law, the absence of foundations for formulating law as an exercise in sound logical reasoning, and the ubiquity of alternative perspectives.²²

Pragmatism became an influential philosophical movement in the late nineteenth century, led by philosophers such as William James, C.S. Peirce, and John Dewey. Pragmatism draws inspiration from figures such as Justice Oliver Wendell Holmes, Jr., and has found a powerful contemporary advocate in the judicial-era Richard Posner. Posner defends legal pragmatism as “the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role.”²³

The second variety of pluralism reaches back to an ancient concept, Aristotle’s idea of practical wisdom. Its lineage runs through the eighteenth century Irish philosopher and statesman Edmund Burke, the later work of early twentieth-century law professor Karl Llewellyn, Judge Learned Hand and, more recently, Yale law professor Anthony Kronman.²⁴

Professor Kronman begins his book, *The Lost Lawyer*, by lamenting what he sees as a crisis of morale in the legal profession:

This crisis has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer – the one who serves as a model for the rest – is not simply an accomplished technician but a person of prudence or practical wisdom as well. . . . Earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique – a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. . . . But in the last generation this ideal has collapsed, and with it the professional self-confidence it once sustained.²⁵

Practical wisdom insists that there are standards for what constitutes “good judgment,” although defenders of practical wisdom struggle to articulate clearly what those standards might be. Whereas pragmatism focuses largely on the predictive and consequential aspects of legal judgments (replacing the question “Is it true?” with the question “Does it work satisfactorily?”), practical wisdom focuses more on identifying the standards and components of good judgment. Practical wisdom is the art, or perhaps craft, but in any event definitely not the science,²⁶ of exercising judgment well—a capacity that rests upon not just intellect, but moral character as well.²⁷

My goal is to offer a defense of this second more ancient branch of pluralism.

Philosophical counterparts

AS A SIDE NOTE, it is interesting to observe that there are philosophical counterparts, often taproots, to these jurisprudential approaches. Legal monism follows enlightenment moral philosophies that emphasize reason, objectivity and intelligence, such as Emanuel Kant’s deontology and Jeremy Bentham and John Stuart Mill’s utilitarianism.²⁸ Philosophical romanticism rejects enlightenment rationality and scientific theories of morality, and focuses instead on concepts such as freedom, creativity, imagination, empathy, and authenticity or being true to one’s real self.²⁹ Such theories often give priority to emotion over reason, the self over science, and imagination and creativity over method and theory. Similarly, philosophical pragmatism is a counterpart and source of legal pragmatism.³⁰

Two of the primary nemeses of practical wisdom are rules and incentives, which are the building blocks of imperial deontology (in its quest for a set of binding rules to govern morality) and utilitarianism (in its quest for creating incentives that will coax good behavior out of utility maximizing individuals). The other nemesis of practical wisdom is thoroughgoing subjectivism, the calling card of romantic theories (with their goal of achieving authenticity).

Aristotelian approaches to understanding legal reasoning and judgment are based upon much broader Aristotelian conceptions of morality and ethics. Aristotle's conception of practical wisdom is deeply anti-imperial, rejecting monism in favor of the plurality of values, and placing rules and incentives in a subservient posture to judgment. Exercising judgment for Aristotle is a matter of virtue, of both character and intellect, rather than a matter of following rules or having the right theory or set of incentives. But Aristotelian practical wisdom also rejects romanticism, in believing that there are objective standards of success in matters of practical judgment, in a strong commitment to reason as well as emotion, and by giving pride of place to the trustworthiness of the person exercising judgment. Practical wisdom, unlike its more contemporary counterpart, pragmatism, is not focused so much on the consequences of decisions (although they are important) as on the characteristics of sound and wise judgment.

Components of intelligence

AS ANOTHER SIDE note, it is interesting that current social science understandings of intelligence follow a similar pattern. For example, the prominent psychologist Robert Sternberg has identified three different modes or components of intelligence.³¹ The first is what psychologists commonly refer to as *intelligence*, as measured by IQ. The second is *creativity*. And the third is *wisdom*, which Sternberg says is comprised of reason (analytical and logical problem solving skill, recognizing similarities and differences, making connections and distinctions), emotional intelligence (having sagacity, empathy, a concern for others, a willingness to listen and learn from others, and being thoughtful and fair), and perspicacity (having the ability to see through things, to read between the lines, and possessing intuition, as well as the ability to understand and interpret information).³²

Intelligence, as defined by Sternberg, is characterized by logic and rules and seems closely related to imperial philosophical and jurisprudential theories.³³ Creativity is closely related to romantic philosophical and legal theories that emphasize emotion, imagination, and authenticity.³⁴ And wisdom, as described by Sternberg, is closely related to Aristotle's conception of practical wisdom.³⁵

Upon reflection, it is not surprising that similar patterns are found in psychological, philosophical, and legal thinking. One of the purposes of this article is to draw connections between parallel lines of thinking in each of these fields of thought.

Institutional dimension

As my student Jordan Brimley (BYU JD candidate, 2020) observed, there is an important institutional dimension to the "trifecta" of practical wisdom, craft, and rhetoric built into our judicial system as well. We expect a judge to be trustworthy in his or her use of practical wisdom

in adjudicating a dispute, a jury to have integrity in its craft of determining the facts of the dispute, and the attorneys to be honest in their rhetoric while arguing the merits of either side of the dispute. Each role can have a tempering effect on the others. The attorney is tempered by the judge's authority to limit his or her arguments and by the jury's ability to discern any fallacies or falsehoods in them. The jury is tempered by the attorney's ability to persuade using effective appeals to logic, emotion, and character. The jury is also tempered by the judge's power to direct a verdict or to rule notwithstanding the verdict. The judge is tempered by an attorney who can demonstrate the judge's bias to the jury or who can appeal the judge's potentially faulty ruling. The judge is tempered by the jury's role in applying the law to the facts and the power of delivering a verdict. This power includes determining the law for the purpose of the dispute when the jury senses a bias in the court.³⁶

Theological dimension

My colleague Jack Welch also suggested to me that there is an important sense in which the Mormon doctrine of the Godhead is also reflected in the grouping of practical wisdom, craft, and rhetoric. God the Father, Elohim, is associated with *phronesis*, or wisdom, and merits our trust. Jesus Christ, his son, is a craftsman, not just a carpenter during his mortal life, but also as creator of the world, who lived a life of perfect integrity. And the Holy Ghost is the persuader, the member of the Godhead who testifies honestly of truth. There is a remarkable reciprocity and reinforcement that takes place among the three. These individuals each testify and bear record of each other. As Jesus Christ put it in his visit to the Nephites recorded in 3 Nephi 11,

And this is my doctrine, and it is the doctrine which the Father hath given unto me; and I bear record of the Father, and the Father beareth record of me, and the Holy Ghost beareth record of the Father and me; and I bear record that the Father commandeth all men, everywhere, to repent and believe in me.³⁷

The institutional and theological dimensions of these concepts are quite profound and worthy of further contemplation, and suggest there are deep structural connections between practical wisdom, craft and rhetoric.

Living in the law

My hope is to provide an account of the key components of legal reasoning and rhetoric in an effort to reduce the distance between reason and rhetoric, and between theory and practice.

This lecture's title, *After Theory*, is an oblique reference to Alasdair MacIntyre's plea a generation ago in his book, *After Virtue*, to return to an Aristotelian understanding of morality.³⁸ As MacIntyre explains:

The rejection of the Aristotelian tradition was a rejection of a quite distinctive kind of morality in which rules, so predominant in modern conceptions of morality, find their place in a larger scheme in which the virtues have the central place.³⁹

While I am skeptical of grand theories and modern romantic anti-theories, I too, write from a posture of concern about a social practice that in many ways has gone awry and is in a state of disrepair. Whereas MacIntyre was concerned about moral philosophy, my concern is rather more terrestrial: The everyday work of lawyers and judges.

I share Professor Kronman's concern for the crisis facing the legal profession from the collapse of our collective interest in and commitment to the ideals found in Aristotle's idea of practical wisdom, although I may not share the depths of Professor Kronman's pessimism about the future of the profession.

The cover of *The Lost Lawyer* captures this gloomy view. It is an 1838 painting, *Portico of the Temple Edfou*, by David Roberts. A once-great temple is being buried by encroaching dunes of sand. The fate of the edifice appears inevitable. The picture does not depict an effort of excavation or an attempt to hold the sand at bay. Rather, there are a few lonely survivors who erect small, flimsy tents upon the remaining visible wreckage of that edifice, and they huddle around barely-visible fires for warmth. For Kronman, the lawyers committed to the ideals of practical wisdom are in the same position of those remaining few refugees.

The original painting that appears on the cover of *The Lost Lawyer* hung on a wall in Professor Kronman's house—or at least it did when I was working as Professor Kronman's research assistant on the book twenty-five years ago. When I saw it, I was overcome with a wave of sadness, which I quickly brushed off as a reasonably optimistic young law student on the threshold of beginning my life's work as a lawyer. Now, twenty-five years later, I am closer to Professor Kronman's soulful despair. But I do hope to engage, as I believe he was actually engaged, in a project of excavation and preservation, not of an ancient temple that we can appreciate as a museum or artifact of an earlier age, but of a place of habitation that we can renovate and in which we can work and dwell again.

My hope is to move beyond theory and to engage with the ordinary work of lawyers and judges in a way that helps find a way forward for a profession in crisis by looking backwards to the ideas and ideals that have animated it from the beginning. Academic accounts of legal reason and persuasion have been dominated by monistic theories, which emphasize reason, and skeptical theories, which emphasize persuasion, and the primary pluralistic alternative, pragmatism, all but gives up on the possibility that there might be definable and explicable standards beyond

workability for assessing legal arguments and judgments. I believe that in looking back to Aristotle's conceptions of practical wisdom, as well as the related components of practical rationality, rhetoric and craft, we can revive a more integrated conception of living in the law.

In looking backwards to these three Aristotelian concepts, I am reminded of what Michael Oakeshott said in warning against being overly impressed with shiny modern fashions. As Oakeshott puts it,

There is nothing to encourage us to believe that what has captured current fancy is the most valuable part of our inheritance, or that the better survives more readily than the worse. And nothing survives in this world which is not cared for by human beings.⁴⁰

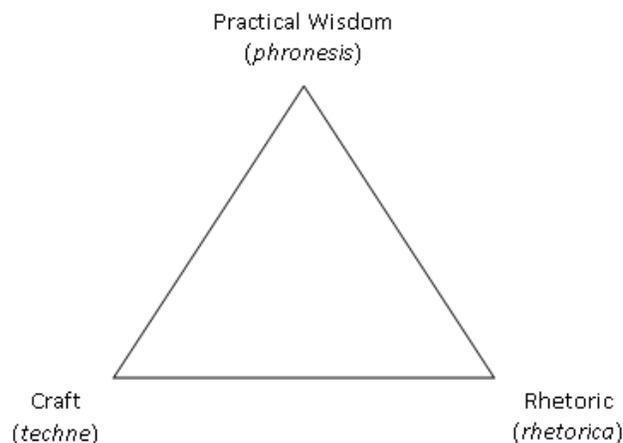
*An Aristotelean Conception of Legal Reasoning:
The relationship between craft, rhetoric, and practical wisdom*

SO WHAT might an Aristotelian conception of legal reasoning look like?

(I believe there are) three skills or capacities that lie at the heart of legal reasoning – practical wisdom, craft, and rhetoric.⁴¹ Each of these ideas is central to Aristotle's practical philosophy.

Equally important, and less well understood, is the relationship between these concepts, which is illustrated in this triangle, where good legal reasoning and judgment is bounded by practical wisdom, craft and rhetoric.

Three Components of Legal Reasoning



Before I sketch this approach to thinking about legal reasoning and rhetoric, an important caveat is needed. In calling this an Aristotelean conception of legal reasoning, I do not mean to argue that this account summarizes or precisely reflects Aristotle's views, but rather that it draws upon and seeks to integrate basic concepts from Aristotle's account of practical philosophy in a way that is true to Aristotle's approach to thinking about legal reasoning. I will try to be clear about when I am describing Aristotle's ideas, and when I am creating a framework that is based upon those ideas.

Practical wisdom

The first component of legal reasoning and judgment is practical wisdom. The distinctive character of practical reason is that it is concerned with deliberation, choice, and action, about what should be done in particular situations involving decision. Excellence in practical reason Aristotle calls practical wisdom.

As the philosopher Bryan Garsten explains:

“Unlike philosophers who approach ethics through rules or principles, Aristotle insisted that no general codes could fully capture what made human choices good. While he acknowledged that rules of thumb could be helpful, he assumed that the final determination of what was appropriate at any time fell into the domain of judgment, a human capacity that drew upon perception, emotion, and reason to respond to each situation in all of its particularity. In making practical judgment so central to his ethics, Aristotle found a way to recognize the importance of sensitivity, nuance, and insight – aspects of moral life that rule-based systems of ethics tend to ignore.”¹

The person of practical wisdom is adept at reasoning about complex, competing, incompatible, and even incommensurable values. The key to understanding Aristotle's concept of practical wisdom is that it is composed of both virtue of intellect and virtue of character. As a result, excellence in practical rationality is not primarily a matter of following rules or creating an optimal set of incentives, nor is it embodied in a theory. It is embodied, however – embodied in the individual person of practical wisdom. When faced with a difficult practical choice, Aristotle advises, we should try to find a person of practical wisdom, or better yet several of them, and ask them to reason together about what should be done.

Craft

The second component of legal reasoning and judgment is craftsmanship. Aristotle defines craft as the “reasoned state of capacity to make.”⁴² Craft is primarily concerned with how something should be done. In Aristotle's typology, it is a virtue of intellect only, combined with the right

sort of passion or love for the craft tradition.

Craft is characterized by its emphasis on making objects one at a time, rather than en masse, and in its emphasis on the skillful use of materials and tools. Craft is also distinctive for the way it is learned and transmitted – through apprenticeship – by experts leading and guiding novices. Success is measured by the synthesis of form and function. For example, a good chair, will not only look beautiful, it will be sturdy, bear weight, and not give you a backache from sitting on it.

Rhetoric

The third component of legal reasoning and judgment is rhetoric. Rhetoric is concerned with persuasion. As Aristotle explains it – and as rhetoricians have taught for millennia – there are three means of persuasion.

The first is reason, or *logos*, and it takes the form of syllogisms (arguments based upon deduction and proof) and enthymemes (arguments based upon induction and probabilities). The second way of persuading is by appeals to emotion, or *pathos*. Aristotle criticizes professional teachers of rhetoric of his day for focusing unduly upon emotional appeals, but his own account of rhetoric is filled with advice about how to elicit the desired emotional response from one's audience. The third way of persuading is through one's character, or *ethos*. Here the key idea is trust. We will be most inclined to believe those whom we can trust, not just because of their reputation, or skill, but because of their character. Aristotle also makes a very important point about what counts as success in rhetoric. On the one hand there is the external measure of success, winning; but on the other hand, there is an internal measure of success, making the best possible argument under the circumstances, an argument that is cogent, coherent and honest.

The ends of practical wisdom, craft, and rhetoric are each evident in the law, and, in particular, in the work of judges. The judicial decision or holding corresponds to the action required of *practical wisdom*. A judge does not have the luxury of endless deliberation; the judge must make a choice and act. The judicial opinion is a *craft artifact* that serves a useful purpose not unlike other craft objects. The judicial opinion is also something that can be criticized and praised as good (or not), sound (or not), and useful (or not) in much the same way that other craft objects are evaluated and assessed. Judges also *engage in rhetoric*, providing arguments designed to persuade the parties and other concerned readers that the judge decided the case correctly. Rhetoric is also involved in judges' efforts to persuade each other—in the first instance, to create a majority in favor of a particular outcome among judges hearing the same case, and secondarily to influence other judges who will read the opinion and decide whether and how to apply the law articulated in the opinion.

Rules and practical judgment

AS DIFFERENT as these three practical activities are, they share something very important. They all depend upon the human capacity for exercising practical judgment, for responding to particular situations in ways that are appropriate and make sense.

Rules are important to each of these three activities, especially for novices or apprentices, but none of these activities can be reduced to a set of rules, and they cannot be evaluated based upon a set of rules. As Bryan Garsten explains with respect to rhetoric, by judgment we mean “the mental activity of responding to particular situations in a way that draws upon our sensations, beliefs, and emotions without being dictated by them in any way reducible to a simple rule.”⁴³ A similar sort of judgment is involved in craft and practical wisdom, although the facets of what makes up good judgment will be somewhat different in each context. In each, Aristotle walks a fine line, arguing that the activity is subject to standards of reason, but that they cannot be reduced to a set of rules or evaluated based upon a scientific rationality.

I have much more I’d like to say about craft, rhetoric, and practical wisdom. For now, I want to emphasize three key features of these concepts. The first is that each of these components of legal reasoning carries an attendant primary or cardinal virtue. The second is what I describe as the risks, or dark side, accompanying each. And the third is the ways in which each of these concepts has an ameliorative or healing effect on both of the other two ideas. Here I will provide a quick sketch of these ideas, which will serve as something of a roadmap for thinking about legal reasoning and judgment.

The cardinal virtues of craft, rhetoric, and practical wisdom

EACH OF THE THREE components of legal reasoning, I suggest, has a corresponding cardinal virtue, as illustrated in this diagram.

The cardinal virtue associated with craft is integrity. The idea here is that the craftsman should strive to create work that is sound, whole, complete, and incorruptible. Unlike a work of art, a craft object must match form to function; a chair, no matter how beautiful, is defective if it cannot bear weight, or if it is too uncomfortable to sit upon.

The cardinal virtue of rhetoric is honesty. This means that praiseworthy rhetoric will be sincere, reliable, and upright. To be sure, my claim that honesty is the cardinal virtue of rhetoric flies in the face of much of what we think about rhetoric and rhetoricians.

Consider the relationship between the three means of persuasion and honesty. *Logos* must be honest to be persuasive—arguments must be clear, candid, lucid, cogent, valid and sound.

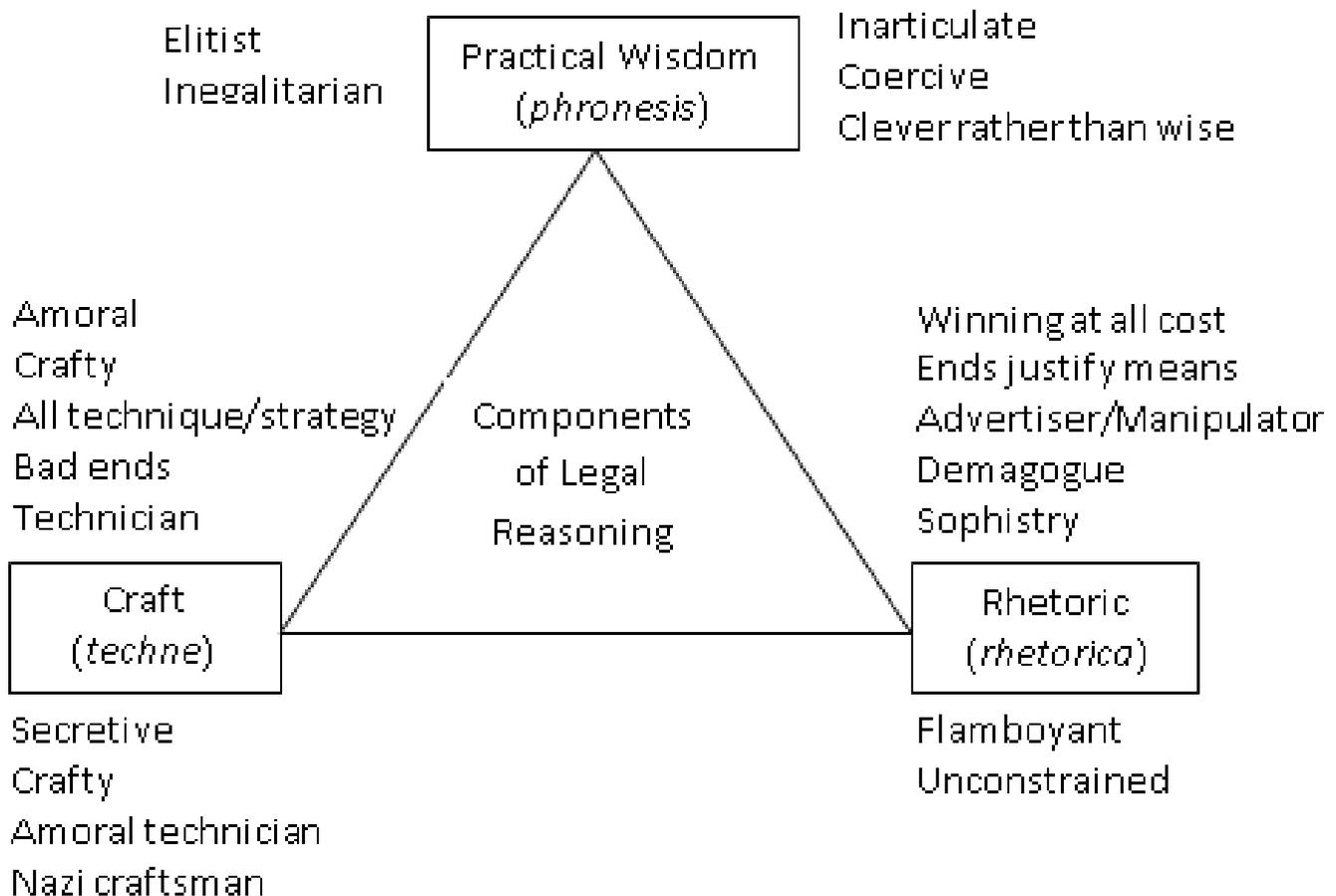
Pathos, too, must be honest. It will not be persuasive if passions are overwrought over-the-top. Emotional appeals must strike the right chord or register, appropriate to the particular situation. And *ethos*, character, or being worthy of trust, is closely related to honesty as well. If a speaker is upright, reliable, and dependable, the audience is much more likely to trust her.

The cardinal virtue of practical wisdom is trust. The person of practical wisdom will be trustworthy, in other words, dependable, reliable, responsible, and faithful.

The risks or dark side of craft, rhetoric, and practical wisdom

PRACTICAL WISDOM, craft, and rhetoric, I believe, are each important but incomplete components of legal reasoning.

Each one of these concepts has significant weaknesses, an accompanying set of risks—a dark side, as illustrated in this figure.



Thus, one or even two of these concepts alone is not only incomplete as an account of legal reasoning, by themselves or in pairs, these concepts provide a potentially faulty roadmap for engaging in legal reasoning.

Practical wisdom. The greatest risk associated with practical wisdom is its latent elitism. Some people are more practically wise than others. Virtues of intellect and character are not distributed equitably among all people, lawyers, or judges. And although we are rightly cautious about whom we hire to serve as advocates or appoint to serve as judges, we still have reason to be suspicious of practical wisdom. This is in part because we live in a society that highly values equality, and it is thus difficult to be comfortable with a concept that is so deeply inegalitarian.

Another reason to be suspicious of this elitism is that the person of practical wisdom may be unable to explain, at least fully, the reasons and grounds for her judgments. This inarticulateness may leave us wondering whether a judgment reflects wisdom, mere cleverness, or simple raw power. Practical wisdom poses the risk that the public reasons given in favor of a course of action are incomplete or even pretextual. Just because someone is powerful does not mean they are right. This brings to mind the old saw that the United States Supreme Court is not final because they are infallible, but rather they are infallible because they are final.⁴⁴

Practical wisdom's elitism and inarticulateness may combine to lead to even more insidious dangers: Private truths. Someone may be so convinced that he understands what is good and right that he is willing to impose that view on others even at tremendous costs, and this conviction may lead to totalitarianism, or in any event, judicial imperialism. Isaiah Berlin provides a powerful critique of the dangers of those who are possessed of an all-embracing vision of the good and right. "To make such an omelet," he warns of utopian visions, "there is surely no limit to the number of eggs that should be broken – that was the faith of Lenin, of Trotsky, of Mao, for all I know of Pol Pot."⁴⁵

Lawyers and especially judges might be particularly susceptible to these risks and dangers, given their access to the levers of influence and power. Judges are used to being obeyed, of being treated deferentially, and even of having people reliably laugh at their jokes. They can easily mistake their power for wisdom. Practical wisdom is predicated on virtue of both intellect and character, and a lawyer or judge that possesses one of these types of virtue but not the other may be a particular peril. Intelligence without virtue, Aristotle warns, is mere cleverness, and clever judges in the grip of their own views of the good are dangerous (indeed perhaps more dangerous than a thoroughgoing mediocrity). And the judge who is virtuous but not intelligent will be a bundle of good intentions that will not be particularly adept at anticipating unintended consequences, or of matching means to ends.

Craft. The dark side of craft is that it is largely an amoral ideal. One can bring the skills of the craftsman to the service of questionable or even horrific ends. For example, there is nothing oxymoronic about speaking of the “Nazi craftsman.” Some Nazi functionaries during the Holocaust even described themselves with chilling pride as craftsmen in their methods of mass execution.⁴⁶

Consider, too, the number of negative connotations associated with the word “craft”—crafty, secretive, misleading—connotations that illustrate its possibly crooked character. In short, the craftsman may be an amoral technician. Calling a lawyer or judge a craftsman is a great compliment, but being described as crafty is dubious praise at best. The line between craft and crafty, however, is often difficult to draw. For example, renowned courtroom lawyer Clarence Darrow famously used a “trick of the trade” when he reportedly stuck a straight pin in his cigar to distract the jury during his opponent’s closing arguments. *Red herring*, or just really clever?

Rhetoric. What makes rhetoric problematic is its win-at-any-costs mentality that a desired end justifies any means. With victory as its received definitive measure of success, rhetoric has developed a dubious reputation: Not only the art of persuasion, but the art of manipulation. Immanuel Kant famously dismissed rhetoric as the disreputable business of using others’ weaknesses for one’s own personal gain.⁴⁷ The rhetorician may become a demagogue, someone who endeavors to convince others that his ends are theirs.

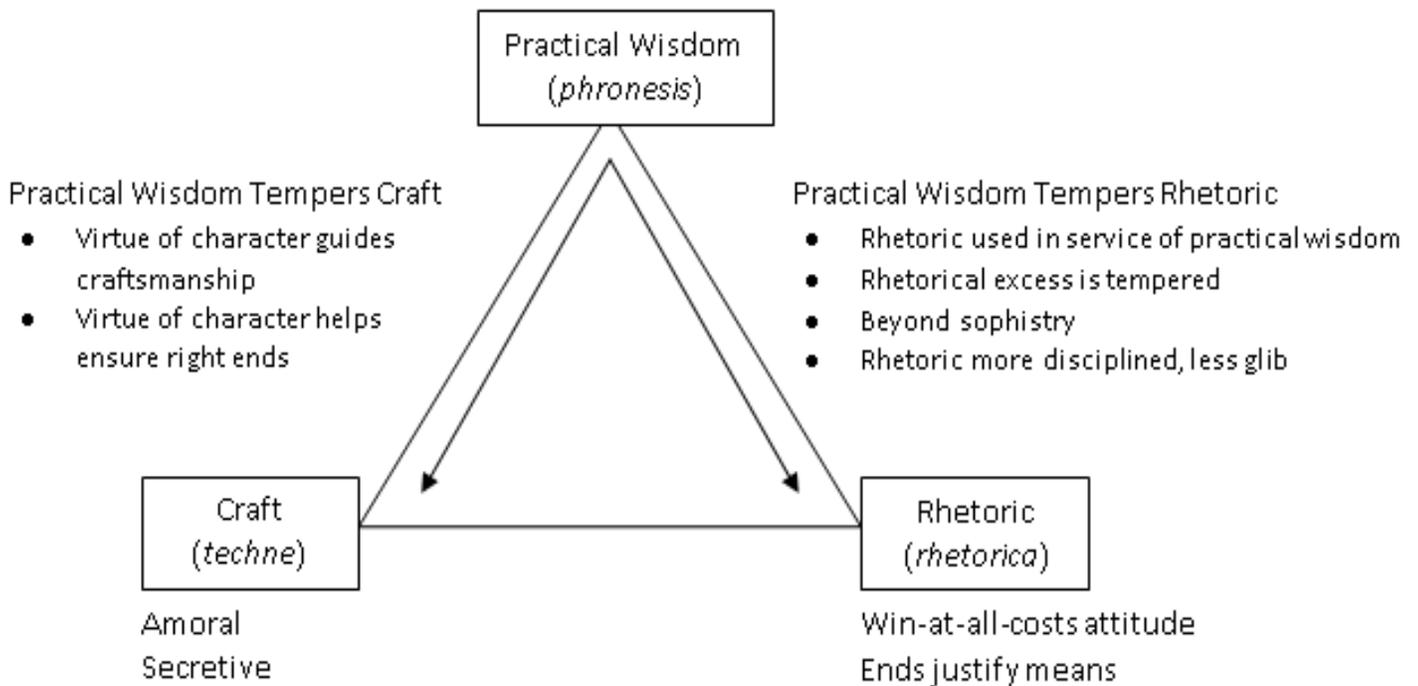
Plato was especially critical of rhetoric, contrasting sophists who specialize in persuasion with philosophers, who search for wisdom and truth. In Plato’s *Gorgias*, Socrates interrogates Gorgias, a famous sophist of the time period, about rhetoric. Using Socrates as his mouthpiece, Plato establishes his view of rhetoric as a knack for persuasion and a form of flattery. Plato also addresses the topic of rhetoric in the *Phaedrus*, and concedes the possibility of a true art of rhetoric. However, Plato asserts that rhetoric can only be a true art if the speaker makes an effort to gain knowledge and learn the truth about his subject, makes the speech follow a logical structure by properly defining the subject and dividing it in a systematic way, and tries to fashion his speech to suit the nature of his audience. Plato did not trust the rhetoricians of his day to adapt their methods of persuasion to pursue rhetoric as philosophic art.

The ameliorative effects of each component of legal reasoning upon the others

THE NEGATIVE SIDE-EFFECTS of practical wisdom, rhetoric and craft are widely recognized. Much less well understood is how each of these concepts places restraining effects on the worst excesses of the other two. Each of these components of legal reasoning—practical wisdom, craft, and rhetoric—plays an important role in tempering the negative tendencies of the other two components of legal reasoning.

Practical wisdom tempers the worst tendencies of craft and rhetoric. Practical wisdom tempers the worst excesses of craft (that it may be amoral and secretive) and the worst excesses of rhetoric (its win-at-all-costs attitude).

How Practical Wisdom Tempers Craft and Rhetoric



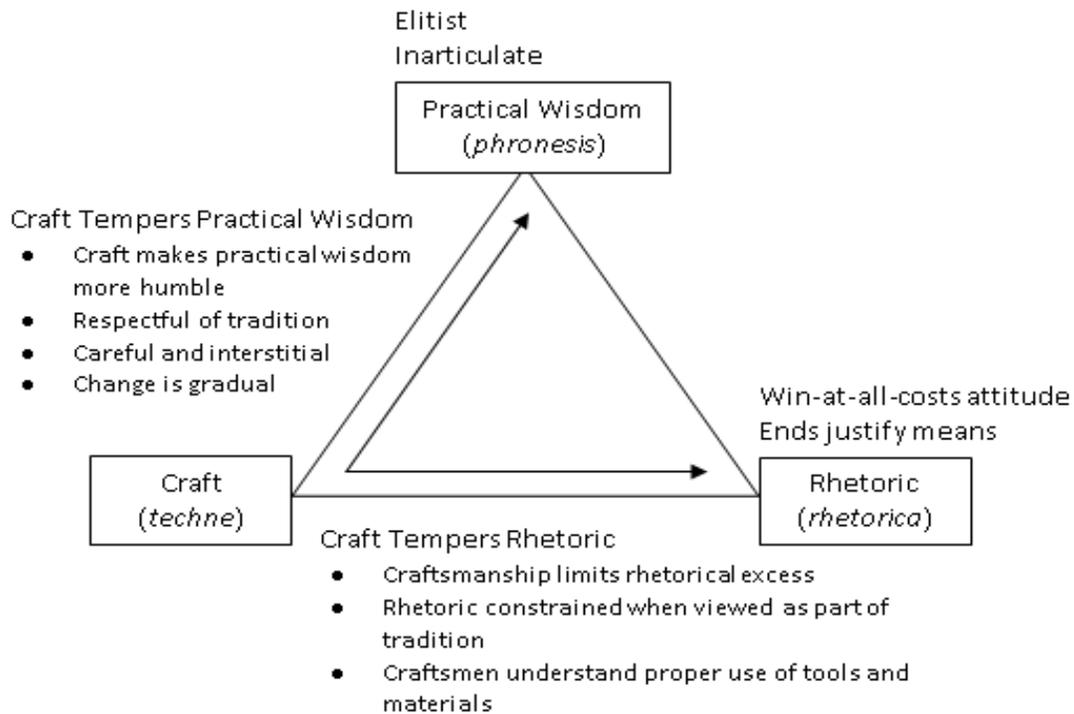
Unlike craft, which is a virtue of intellect only, practical wisdom is a virtue of both intellect and character. Thus when craft is coupled with practical wisdom, craft is imbued with a moral dimension and direction that it otherwise lacks: The ends pursued in a craftsmanlike way are more likely to be correct or appropriate. When craft is divorced from practical wisdom, there is no reason to have confidence in the ends pursued by the craftsman, even one who is highly skilled.

Practical wisdom also tempers the worst tendencies of rhetoric. When rhetoric is practiced by a person of practical wisdom, the rhetorician becomes something more than a mere sophist, gladiator, or hired gun. There are some arguments and appeals that a salesperson or mercenary will be able and willing to make that the person of practical wisdom will not be able and willing to make. Rhetoric tempered by practical wisdom is less glib, more disciplined, and has an element of gravitas that is lacking when it is untethered to practical wisdom.

Rhetoric, of course, with its appeals to emotion, fear and bias, is the main culprit behind the informal logical fallacies that distract from logic and reason. The best lawyers will not only be skilled rhetoricians, but also people of practical wisdom, and their good sense and judgment will help them differentiate between appropriate and inappropriate rhetorical appeals. The worst lawyers, on the other hand, some of whom may fancy themselves to be skillful rhetoricians, will not possess the disciplining and tempering trait of good practical judgment, and they will frequently overdo emotional appeals and their use of other fallacies.

Craft tempers the worst tendencies of practical wisdom and rhetoric. In a similar way, craft tempers the worst excesses of practical wisdom (its elitism and inarticulateness) and the worst excesses of rhetoric (believing that the ends justify whatever means are necessary to win). This tempering effect is illustrated in figure 5.

How Craft Tempers Practical Wisdom and Rhetoric



Craft makes practical wisdom more humble. Unlike practical wisdom, which is at the pinnacle of Aristotle's practical philosophy, the status of the craftsman is much less exalted. In Aristotle's world, craftspeople are near the lower end of the social spectrum—the cobbler making shoes, the potter spinning clay—people who are typically not prideful or powerful.

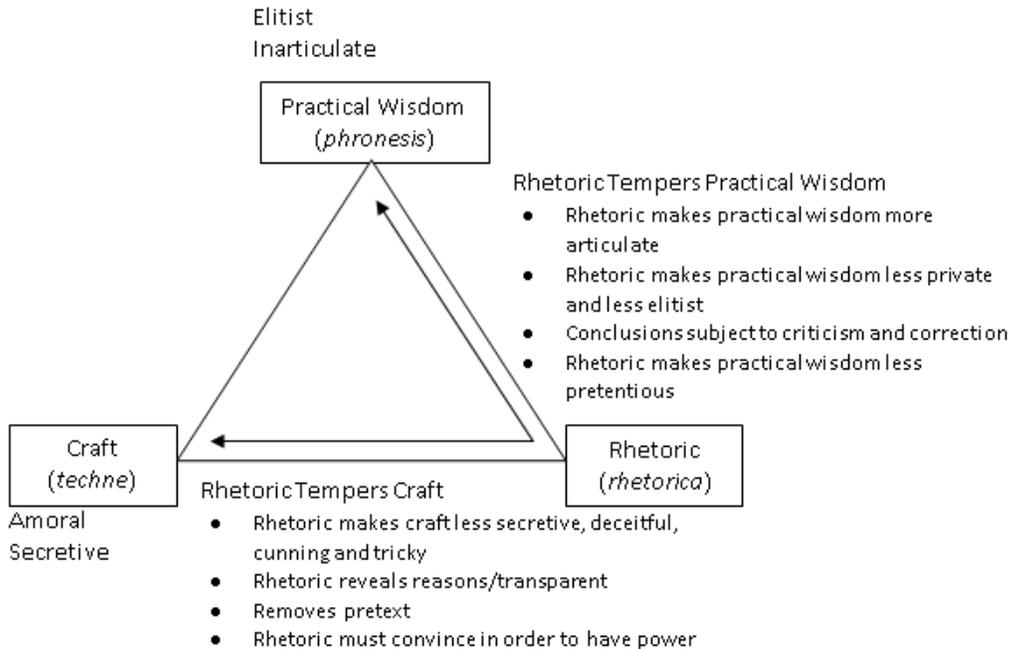
Craft also has an attitude and posture toward the past that counteracts arrogance and elitism. Craft is respectful of tradition and precedent. In craft traditions, change tends to be gradual and interstitial, rather than revolutionary or sudden. Creativity is welcome, but it is bounded by tradition. And craftsmen are unlikely to be impressed with grand theories and claimed universal truths. Rather, craftspeople rely upon know-how and experience, operating with a deep familiarity with what does and does not work. Departures from or refinements of tradition will be of a careful and considered character.

Lawyers and judges who are guided by the ideals of craft, in addition to the ideals of practical wisdom, will be somewhat more careful and circumspect. They will tend to view the role of judges with a large measure of humility, and may be viewed as being somewhat minimalist in their method. Judicial craftspersons will be modest in their approach to adjudication and will be reluctant to make magnificent pronouncements or create dramatic inventions, even those that are strikingly beautiful. They will value what Alexander Bickel called the passive virtues, deciding cases narrowly rather than sweepingly, having a reluctance to overturn statutes that represent majority preferences, and eschewing grand theories. They will care about separation of powers. They will more likely view themselves as part of a tradition that is to be respected and treated with care. They will be attracted to the old and not very fashionable ideal of prudence. A legal craftsperson will care deeply about professional ideals and aspirations as well as concrete norms such as the rules of professional responsibility.

A craftsmanlike attitude also limits rhetorical excess. Rhetoric is more constrained when it is viewed as part of a tradition, when the speaker has a sense of respect for the norms and examples of successful and appropriate advocacy that have come before. An attitude of the craftsman helps us focus not just on the external end of winning, but on the internal end of making the best possible argument. The craftsman has a deep understanding that tools can be misused as well as used correctly, and a subtle appreciation of which tool will be appropriate in different situations. This sense of what is appropriate, suitable or proper, as well as a sense of what works, will provide a restraining effect on rhetoric. In the law, we encourage lawyers to study the work of great lawyers before them. For example, if someone wishes to be a successful Supreme Court advocate, one of the most important things she can do is to study the oral arguments and written briefs of her predecessors who are considered to be the most skillful at their craft and then to try to imitate them.

Rhetoric tempers the worst tendencies of practical wisdom and craft. As illustrated in this figure, rhetoric exercises a similar restraining effect on the worst tendencies of craft and practical wisdom.

How Rhetoric Tempers Practical Wisdom and Craft



Rhetoric makes practical wisdom more articulate, as well as less private and pretentious. It is committed to reason-giving, and in its desire to persuade it is deeply democratic. Indeed, one reason we tend to distrust rhetoric is that it can be used to stir up and embolden the masses. But, on the other hand, rhetoric is committed to justification and explanation in a way that practical wisdom is not. With rhetoric, for instance, the premises, arguments, and conclusions are subject to scrutiny, criticism, and correction, and when the rhetorician commits a logical error, with practice we can recognize it and call her out. Logical fallacies lose a good deal of their persuasive effect if they are identified and called by name. If a judgment, even a seemingly good judgment, is not supported by good reasons, we will be more likely to question it.

Most judges have had the experience of believing a certain outcome to be correct in a case, but of being unable to create an argument to justify that outcome. A judge guided only by practical wisdom will be undeterred and will stick with her original judgment. A judge constrained by the ideal of rhetoric, in contrast, will understand that the outcome must be justified in terms of the existing law and precedent and will yield to clear authority. The requirement that judges give public justifications and explanations for their judgments rooted in precedent and tradition places an important constraint upon their exercise of practical wisdom. It is not enough for a judge to be right; she is expected to persuade us that she is right.

Rhetoric also tempers the worst tendencies of craft. Rhetoric renders craft less secretive, deceitful, cunning, and tricky. Rhetoric lays its reasons on the table, where they can be scrutinized, criticized, and evaluated.

Conclusion

In conclusion, as we approach legal reasoning and judgment, we have an alternative to the comic imperial ambitions of strong theory (monism) and the tragic romanticism of skeptical theories (skepticism).

The alternative lies in plural approaches. But pluralism need not devolve into its most common variation, a rudderless and ultimately quite cynical pragmatism.

In the ancient Aristotelean concepts of craft, rhetoric and practical wisdom we find a much more appealing model for legal reasoning and judgment.

Good judgment, I believe, will be inculcated by developing the virtues associated with these concepts:

- Integrity, the cardinal virtue of craftsmanship
- Honesty, the cardinal virtue of rhetoric, and
- Trustworthiness, the cardinal virtue of practical wisdom

Craft, rhetoric and practical wisdom should be developed, employed and valued together, not only because each will have a tempering effect on the others, but because each also helps refine and perfect the others. These concepts, together, provide a conceptual map to help us navigate the treacherous terrain of legal reasoning and argumentation. They also hold out the promise that good judgment is something that can be understood and pursued.

¹ Many thanks as well to Thomas Palmer and Benjamin Thornell for their diligent and thoughtful work in helping to create footnotes for this article.

² Brett G. Scharffs, "The Role of Humility in Exercising Practical Wisdom," 32 U.C. Davis Law Review 127 (1998).

³ Brett G. Scharffs, "Adjudication and the Problems of Incommensurability," 42 William and Mary Law Review 1367 (2001).

⁴ Brett G. Scharffs, "Law as Craft," 54 Vanderbilt Law Review 2244 (2001).

⁵ Brett G. Scharffs, "The Character of Legal Reasoning," 61 Washington & Lee Law Review 733 (2004).

⁶ There are, of course, many other ways to categorize approaches to jurisprudence and legal interpretation. This division focuses on differing attitudes towards certainty and uncertainty in the law.

⁷ Originalism has been conceptualized in a variety of ways. See, e.g., Robert Bork, *The Tempting of America* (New York: Simon & Schuster, 1990) (originalist interpretation saves judges from the temptation to decide cases based on political considerations); Gregory E. Maggs, "Justice Thomas on Originalism," *Justice Clarence Thomas*, December 9, 2016, <http://justicethomas.com/justice-thomas-on-originalism/> ("[Justice] Thomas has developed his own brand of originalist jurisprudence . . . Rather than focusing on whether historic documents might show the original intent of the Framers, the original understanding of the ratifiers, or the original objective meaning, Justice Thomas looks for a

general meaning shown in common by all relevant sources.”); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting) (defending originalist interpretation and rejecting the notion that constitutional interpretation should change “from time to time”); Akhil Amar, *Rethinking Originalism*, Slate, Sept. 21, 2005, http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html (“As I see it, text without context is empty.”).

⁸ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Minnesota: Thomson/West, 2012) (explaining Justice Scalia’s conception of textualism and originalism); Frederick Schauer, “Formalism,” *Yale Law Journal*, Vol. 97, No. 4 (March 1988): 510, <http://fs2.american.edu/dfagel/www/Class%20Readings/Schauer/Formalism.pdf> (defining “formalism” as “decisionmaking according to rule”).

⁹ Leslie Green, “Legal Positivism,” *Stanford Encyclopedia of Philosophy*, January 3, 2003, <https://plato.stanford.edu/entries/legal-positivism> (listing Jeremy Bentham and John Austin among the historical proponents of this view and H.L.A. Hart and Joseph Raz among the modern representatives of this school of thought.)

¹⁰ Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven and London: Yale University Press, 1970) (discussing potential methods to achieve a more efficient distribution of accident costs in tort law); Richard Posner, *Economic Analysis of Law* (Boston: Little, Brown and Company, 1973), 77 (arguing that it is uneconomical for tort defendants’ liability to exceed compensatory costs). However, Both Calabresi and Posner have moved away from economic conceptions of the law towards more cosmopolitan and pragmatic approaches in their later work, and especially after becoming judges. For a discussion about how law and economics principles can affect judicial reasoning, see Frank H. Easterbrook, “Foreword: The Court and the Economic System,” 98 *Harvard Law Review* 4 (1984).

¹¹ Ancient natural law tradition reaches back to Plato and Aristotle, was developed by St. Thomas Aquinas, and continues today through important contemporary legal thinkers such as John Finnis and Robert P. George. See John Finnis, “Natural Law Theories,” *Stanford Encyclopedia of Philosophy*, February 5, 2007, <https://plato.stanford.edu/entries/natural-law-theories/>.

¹² Ronald Dworkin, *Law’s Empire* (Massachusetts: Harvard University Press, 1986). For a related approach, see Richard Fallon, “A Constructivist Coherence Theory of Constitutional Interpretation,” 100 *Harvard Law Review* 1189 (1987).

¹³ Marc O. DeGirolami, *The Tragedy of Religious Freedom*, (Massachusetts, Harvard University Press, 2013), 3-4.

¹⁴ DeGirolami, *The Tragedy of Religious Freedom*, 5 (quoting Ronald M. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Massachusetts, Harvard University Press, 1996), 38).

¹⁵ Legal realism often traces its roots to Justice Oliver Wendell Holmes, Jr. in *The Common Law* (Boston: Little, Brown, and Company, 1881), and found a strong proponent in Jerome Frank: “If the personality of the judge is the pivotal factor in law administration, then law may vary with the personality of the judge who happens to pass upon any given case.” Frank Jerome, *Law and the Modern Mind* (New York: Brentano’s Inc., 1930), 111. Karl Llewellyn and Justice William O. Douglas were also historically significant realists. See e.g., Brian Leiter, “American Legal Realism,” University of Texas School of Law Public Law and Legal Theory Research Paper No. 042 at 3. Some realists focused more on the individual psychology of judges, while others focused more broadly on sociological forces to explain judicial behavior. Realists “famously argued” that the law was both “rationally indeterminate” (“in the sense that the available class of legal reasons did not justify a unique decision”) and “causally or explanatorily indeterminate” (“in the sense that legal reasons did not suffice to explain why judges decided as they did.”) Leiter, “American Legal Realism,” 3. However, Brian Leiter noted that “no Realist ever claimed, as popular legend has it, that ‘what the judge ate for breakfast’ determines her decision!” Leiter, “American Legal Realism,” 9.

¹⁶ See Roberto Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (New York: Verso, 2015) (first published by Harvard University Press in 1983); see also Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 88 *Harvard Law Review* 1685 (1976).

¹⁷ Professor Derrick Bell is considered the founder of Critical Race Theory. André Douglas Pond Cummings, “Derrick Bell: Godfather Provocateur,” 28 *Harvard Journal of Racial & Ethnic Justice* 51 (2012). Patricia Williams, Kimberlé Crenshaw, Mari Matsuda, and Richard Delgado have also made important contributions to critical race theory. See e.g., Richard Delgado, “Liberal McCarthyism and the Origins of Critical Race Theory,” 94 *Iowa Law Review* 1505 (2009) (citing to each of these authors as having made contributions to critical race theory scholarship).

¹⁸ There are many different styles of feminist legal theory. Here I have in mind primarily critical feminist theory, as exemplified by the work of Catharine A. MacKinnon and as canonized by Kimberlé Crenshaw, et al., in *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1995).

¹⁹ Jack M. Balkin, “Deconstruction’s Legal Career,” *Faculty Scholarship Series*. Paper 238 at 719 (describing “some of the changes that deconstruction underwent as it moved from philosophy to literature and then to law.”) See also Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Massachusetts: Harvard University Press, 1980).

²⁰ See John P. McCormick, “Derrida on Law; Or, Poststructuralism Gets Serious,” *Political Theory*, Vol. 29 No. 3, June 2001: 395-423; see also Bernard E. Harcourt, “An Answer to the Question: ‘What is Poststructuralism,’” *University of Chicago Public Law & Legal Theory Working Paper*, No. 156 (2007).

²¹ Gary Aylesworth, “Postmodernism,” *Stanford Encyclopedia of Philosophy*, September 30, 2005, <https://plato.stanford.edu/entries/postmodernism/>.

²² See Brian Edgar Butler, “Legal Pragmatism,” *The Internet Encyclopedia of Philosophy* <http://www.iep.utm.edu/leglprag/>.

²³ Richard A. Posner, *Law, Pragmatism, and Democracy* (Massachusetts: Harvard University Press, 2003), 1. See also Richard A. Posner, *The Problems of Jurisprudence* (Massachusetts: Harvard University Press, 1990); Richard A. Posner, *Cardozo: A Study in Reputation* (Illinois: The University of Chicago Press, 1990); Richard A. Posner, *Overcoming Law* (Massachusetts: Harvard University Press, 1995); Richard A. Posner, *The Problematics of Moral and Legal Theory* (Massachusetts: The Belknap Press of Harvard University Press, 1999), ch. 4; Richard A. Posner, *Frontiers of Legal Theory* (Massachusetts: Harvard University Press, 2001), chs. 2-4; Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (New Jersey: Princeton University Press, 2001), ch. 4.

²⁴ See e.g., Aristotle (J.L. Ackrill, ed.), *Nicomachean Ethics*, in *The New Aristotle Reader*, (Oxford: Clarendon Press 1987); Aristotle (W. Rhys Roberts, trans.), *Rhetoric* (Dover Publications, 2004); Edmund Burke (L.G. Mitchell, ed.), *Reflections on the Revolution in France* (Oxford: Oxford University Press, 1993); Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Company, 1960); Learned Hand, *The Bill of Rights* (Massachusetts, Harvard University Press, 1958); Anthony T. Kronman, *The Lost Lawyer* (Cambridge: Harvard University Press, 1993).

²⁵ Anthony T. Kronman, *The Lost Lawyer* (Cambridge: Harvard University Press, 1993), 2–3.

²⁶ Pragmatism, in contrast, often looks to science for a model and seeks a greater scientific “spirit” in legal reasoning. Richard Posner, for example, maintains “law needs more of the scientific spirit than it has – the spirit of inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of chance.” Posner, *The Problems of Jurisprudence*, 465.

²⁷ See e.g., Aristotle, *Nicomachean Ethics*, in *The New Aristotle Reader*, ed. J.L. Ackrill, (Oxford: Clarendon Press, 1987), VI.1.1139a21-30, VI.2.1139a31–35, VI.13.1144b14-1145a2, X.8.1178a16-19. See also, Brett G. Scharffs, The Role of Humility in Exercising Practical Wisdom, *UC Davis Law Review* 32, no. 1 (Fall 1998), 135–139.

²⁸ For example, in his *Groundwork of the Metaphysics of Morals*, Kant states that the supreme moral principle, which is fundamental and authoritative and based on unconditional truths, must be discovered through reason and philosophy (G 4: 387-92). See also, Lara Denis and Eric Wilson, “Kant and Hume on Morality,” *Stanford Encyclopedia of Philosophy*, Jul. 28, 2016, <https://plato.stanford.edu/entries/kant-hume-morality/>. Bentham and Mill argued that the moral good was determined by what would objectively provide the most pleasure to the most people. They argued that this reasoning should inform laws and social practices. Julia Driver, “The History of Utilitarianism,” *The Stanford Encyclopedia of Philosophy*, Sep. 22, 2014, <https://plato.stanford.edu/entries/utilitarianism-history/#JerBen>. In these kinds of theories, one can find the same basic rational behind legal monism—that there is a right answer and an effective, rational method to discern that answer.

²⁹ Consider this basic explanation of philosophical romanticism: “The Romantic view is that reason, objectivity and analysis radically falsify reality by breaking it up into disconnected lifeless entities, and the best way of perceiving reality is through some subjective feeling or intuition, through which we participate in the subject of our knowledge, instead of viewing it from the outside. Nature is an experience, and not an object for manipulation and study, and, once experienced, the individual becomes in tune with his feelings and this is what helps him to create moral values.” Luke Mastin, “Romanticism,” *Philosophy Basics*, 2008, http://www.philosophybasics.com/movements_romanticism.html. See also the introductory explanation put forth in Roger Jones, “Romanticism,” *Philosopher.org.uk*, 2016, <https://www.philosopher.org.uk/rom.htm>.

³⁰ Christopher Hookway, “Pragmatism,” *Stanford Encyclopedia of Philosophy*, August 16, 2008, <https://plato.stanford.edu/entries/pragmatism/> (“The most important of the ‘classical pragmatists’ were Charles Sanders Peirce (1839–1914), William James (1842–1910) and John Dewey (1859–1952). . . also a number of thinkers, such as Richard Rorty, Hilary Putnam and Robert Brandom develop[ed] philosophical views that represent later stages of the pragmatist tradition.”)

³¹ See Robert J. Sternberg, *Wisdom, Intelligence, and Creativity Synthesized* (Cambridge: Cambridge University Press, 2003).

³² Robert J. Sternberg, "Wisdom: Relations to Intelligence and Creativity" at 145-46, in Robert J. Sternberg, ed., *Wisdom: Its Nature, Origins, and Development* (Cambridge: Cambridge University Press, 1990).

³³ Componential, or analytical, intelligence is the traditional concept of intelligence as measured by IQ tests. It involves skill in abstract thinking, logical conceptualization, and the ability to analyze problems accurately. For further discussion, see Sternberg, *Wisdom, Intelligence, and Creativity Synthesized*, 3-89.

³⁴ Experiential intelligence, also known as creative intelligence, involves the generation of new ideas and the ability to find novel solutions and navigate novel situations. For further discussion, see Sternberg, *Wisdom, Intelligence, and Creativity Synthesized*, 89-147.

³⁵ Contextual, or practical, intelligence involves application of knowledge to real life in order to affect desired changes and achieve goals. This is described as happening through adaptation (changing oneself to fit the environment), shaping (changing the environment to fit oneself), or selection (choosing a different environment altogether). For further discussion, see Sternberg, *Wisdom, Intelligence, and Creativity Synthesized*, 147-177.

³⁶ As Thomas Jefferson explained, "[Juries] are not qualified to *judge* questions of *law*, but they are very capable of judging questions of *fact*. In the form of juries, therefore, they determine all matters of fact, leaving to the permanent judges, to decide the law resulting from those facts. But we all know, that permanent judges acquire an *esprit de corps*; that, being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power; that it is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side; and that the opinion of twelve honest jurymen gives still a better hope of right, than cross and pile does. It is in the power, therefore, of the juries, if they think the permanent judges are under any bias whatever, in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power, they have been the firmest bulwarks of English liberty. Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them. However, it is best to have the people in all the three departments, where that is possible." Thomas Jefferson, "Letter to the Abbe Armond," Paris, July 19th, 1789.

³⁷ 3 Nephi 11:32. Verse 35 explains further: "Verily, verily, I say unto you, that this is my doctrine, and I bear record of it from the Father; and whoso believeth in me believeth in the Father also; and unto him will the Father bear record of me, for he will visit him with fire and with the Holy Ghost.

³⁸ As MacIntyre stated in reflection 25 years after publication of *After Virtue*: "What then was I and am I claiming? That from the standpoint of an ongoing way of life informed by and expressed through Aristotelian concepts it is possible to understand what the predicament of moral modernity is and why the culture of moral modernity lacks the resources to proceed further with its own moral enquiries, so that sterility and frustration are bound to afflict those unable to extricate themselves from those predicaments." Alasdair, MacIntyre, *After Virtue: A Study in Moral Theory, Third Edition* (Indiana: University of Notre Dame Press, 2007), x.

³⁹ MacIntyre, *After Virtue*, 257.

⁴⁰ Michael Oakshott, *The Character of a University Education, in What Is History? And Other Essays* (Virginia: Imprint Academic, 2004), 342 (quoted by Anthony Kronman as the headnote in his book *The Lost Lawyer*).

⁴¹ This section is an abbreviated adaptation of Brett G. Scharffs, "The Character of Legal Reasoning," 61 *Washington and Lee Law Review* 733 (2004).

⁴² Aristotle, *Nicomachean Ethics*, VI.4.1140a7.

⁴³ Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Massachusetts: Harvard University Press, 2006), 7.

⁴⁴ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., dissenting).

⁴⁵ Isaiah Berlin (Henry Hardy, ed.), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (New York: Alfred A. Knopf, 1991), 15.

⁴⁶ See Thomas F. Lambert, Jr., "Recalling the War Crimes Trials of World War II," 149 *Military Law Review* 15 (1995): 19.

⁴⁷ Immanuel Kant (J.H. Bernard, trans.), *Critique of Judgment* (London: Macmillan and Co., 1892), sec. 53, 198/328 n. 63.