



AFTER THEORY

AN ARISTOTELIAN CONCEPTION OF LEGAL JUDGMENT

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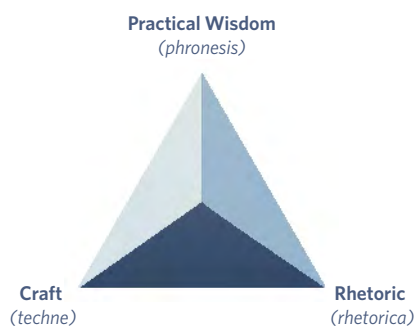
Most of my current work at the Law School focuses on freedom of religion, but my early articles as a law professor were about the nature of legal reasoning. That work culminated in an article called “The Character of Legal Reasoning,” in which I argued that legal reasoning and judgment are best conceptualized as lying at the intersection of three ideas that were at the heart of Aristotle’s practical philosophy: practical wisdom, craft, and rhetoric.²

I would like to return to the themes of that article and develop further a pair of propositions: (1) that good judgment lies at the heart of being a good lawyer or judge and (2) that the path to fostering good judgment lies in traveling the roads that will help us develop the virtues of being a person of practical wisdom, a master craftsman, and a responsible rhetorician.

This lecture’s title is an oblique reference to Alasdair MacIntyre’s plea a generation ago in his book *After Virtue* to return to an Aristotelian understanding of ethics.³ However, whereas MacIntyre was concerned with moral philosophy, my concern is rather more terrestrial: the everyday work of lawyers and judges.

So what might an Aristotelian conception of legal reasoning look like? Practical wisdom, craft, and rhetoric⁴ are each central to Aristotle’s practical philosophy. Equally important, and less understood, is the relationship between these concepts, which is illustrated by a triangle in which good legal reasoning and judgment are bounded by practical wisdom, craft, and rhetoric.

The Three Components of Legal Reasoning



PRACTICAL WISDOM

The distinctive character of practical reason is that it is concerned with deliberation, choice, and action and with what should be done in particular situations involving decision. Aristotle calls excellence in practical reason practical wisdom.

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 that we find a person of practical wisdom, or, better yet, several of them, and ask them to reason together about what should be done.

CRAFT

Aristotle defines craft as the “reasoned state of capacity to make.”⁵ 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 in craft is measured by the synthesis of form and function. For example, a good chair will not only look beautiful, but it will be sturdy, bear weight, and not give you a backache.

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 is by appeals to emotion, or *pathos*. Aristotle criticized 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 is through one's character, or *ethos*. The key idea is that we are most inclined to believe those whom we can trust, not only 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. On the other hand, there is an internal measure of success, which is to make 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, 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; a judge must make a choice and act. The judicial opinion is a craft artifact that serves a useful purpose not unlike other craft objects. It 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 they 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

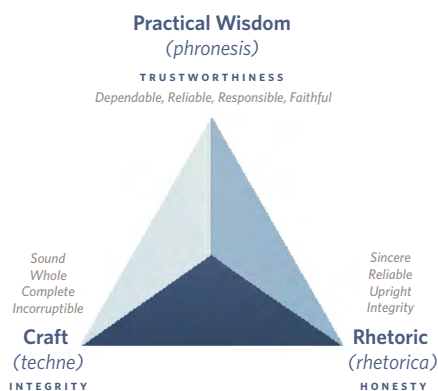
As different as these three practical activities are, they share an important quality: all depend upon the human capacity for exercising practical judgment—for responding to particular situations in ways that are appropriate and make sense. Rules are important to each of these three activities, especially for novices and 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. The concepts of practical wisdom, craft, and rhetoric are each components of legal reasoning that carry attendant primary or cardinal virtues

that are subject to standards of reason. They each also carry risks, or a darker side. Ultimately, each of these concepts has an ameliorative or healing effect on both of the other two ideas. I use these ideas as something of a roadmap for thinking about legal reasoning and judgment.

THE CARDINAL VIRTUES OF PRACTICAL WISDOM, CRAFT, AND RHETORIC

I suggest that each of these three components of legal reasoning has a corresponding cardinal virtue.

The Cardinal Virtues of Practical Wisdom, Craft, and Rhetoric



Practical Wisdom and Trustworthiness

The cardinal virtue of practical wisdom is trustworthiness. The person of practical wisdom will be dependable, reliable, responsible, and faithful.

Craft and Integrity

The cardinal virtue associated with craft is integrity. 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 is too uncomfortable to sit upon.

Rhetoric and Honesty

The cardinal virtue of rhetoric is honesty. 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. But 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 will not be persuasive if passions are overwrought; emotional appeals must strike the right chord or register appropriate to the particular situation. And with ethos, if a speaker is upright, reliable, and dependable, the audience is much more likely to trust her.

THE DARK SIDES OF PRACTICAL WISDOM, CRAFT, AND RHETORIC

Each one of these concepts has significant weaknesses, an accompanying set of risks—a dark side.

The Dark Sides of Practical Wisdom, Craft, and Rhetoric



Practical Wisdom and Latent Elitism

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'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.

Practical wisdom is predicated on virtue of both intellect and character, and a lawyer or judge who 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 good are dangerous (indeed perhaps more dangerous than a thoroughgoing mediocre judge). And the judge who is virtuous but not intelligent will be a bundle of good intentions but will not be particularly adept at anticipating unintended consequences or matching means to ends.

Craft and Amoral Ideals

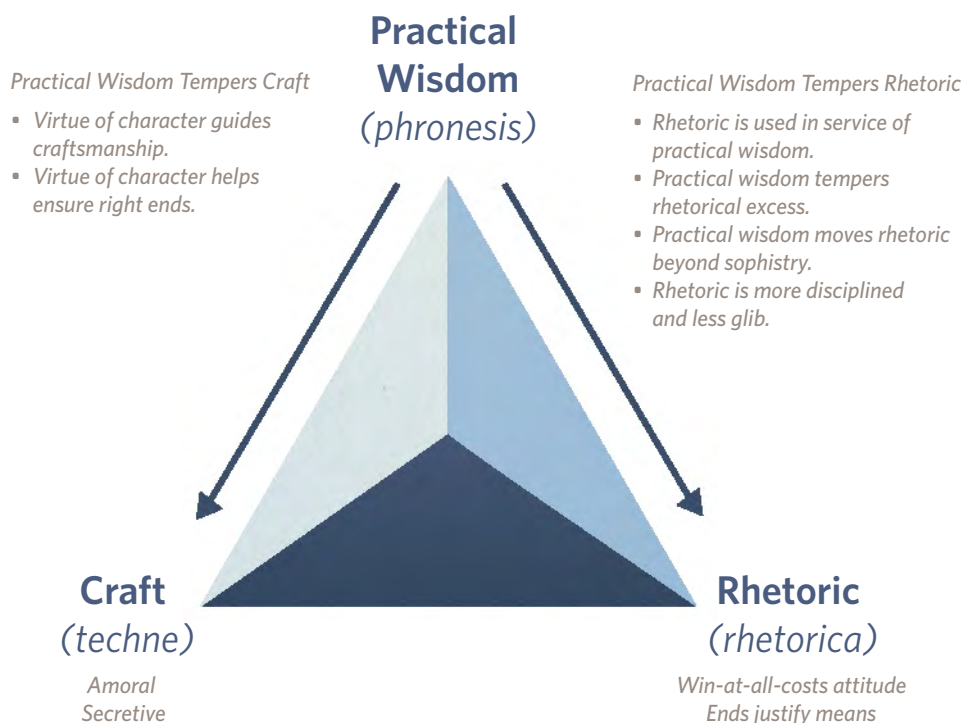
The dark side of craft is that it is largely an amoral ideal. One can bring the skills of the craftsman to the service of questionable or even horrific ends. For example, there is nothing oxymoronic about speaking of the “Nazi craftsman.” Some Nazi functionaries during the Holocaust described themselves with chilling pride as craftsmen in their methods of mass execution.⁶

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.

Rhetoric and Justification

What makes rhetoric problematic is its win-at-all-costs mentality, suggesting that a desired end justifies any means. With victory as the definitive measure of success, rhetoric has developed a suspect reputation as 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.⁷ The rhetorician may become a demagogue—someone who endeavors to convince others that his ends are theirs.

How Practical Wisdom Tempers Craft and Rhetoric



Plato was especially critical of rhetoric, asserting 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.

THE AMELIORATIVE EFFECTS OF EACH COMPONENT OF LEGAL REASONING UPON THE OTHERS

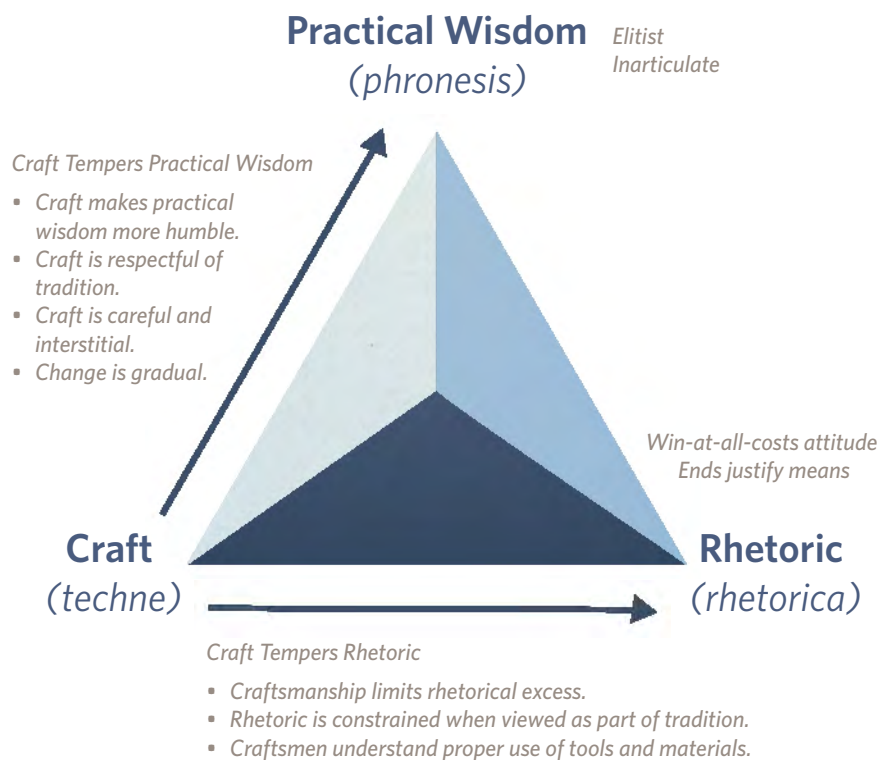
The negative side effects of practical wisdom, craft, and rhetoric are widely recognized. Much less understood is how each of these three components plays an important role in tempering the negative tendencies of the other two components of legal reasoning. One or even two of these concepts alone not only are incomplete as an account of legal reasoning but provide a potentially faulty roadmap for engaging in legal reasoning.

The Effects of Practical Wisdom

Unlike craft, which is a virtue of intellect only, practical wisdom is a virtue of both intellect and character. When coupled with practical wisdom, craft is imbued with a moral dimension and direction that it otherwise lacks, and the ends pursued 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.

When rhetoric is practiced by a person of practical wisdom, the rhetorician becomes 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. 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.

How Craft Tempers Practical Wisdom and Rhetoric



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 use logical fallacies.

The Effects of Craft

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 were near

the lower end of the social spectrum—the cobbler making shoes, the potter spinning clay—and were typically not prideful or powerful.

Craft also has an attitude and posture toward the past that counteracts arrogance and elitism; creativity is welcome but is bounded by tradition. And craftspeople are unlikely to be impressed with grand theories and claimed universal truths. Rather, they rely upon know-how and experience, operating with a deep familiarity of 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 more careful and circumspect. They will tend to view the role of judges with a measure of humility and may be viewed as being somewhat minimalist in their method. Judicial craftspeople

will be modest in their approach to adjudication and will be reluctant to make magnificent pronouncements or create dramatic inventions. They will value what Alexander Bickel called the passive virtues, deciding cases narrowly rather than sweepingly, eschewing grand theories, and having a reluctance to overturn statutes that represent majority preferences. 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 craftsman will care deeply about professional ideals and aspirations as well as concrete norms such as the rules of professional responsibility.

A craftsman-like 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 only on the external end of winning but on the internal end of making the best possible argument.

The Effects of Rhetoric

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, is deeply democratic. Indeed, one reason we tend to distrust rhetoric is that it can be used to stir up and embolden the masses. 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 him out. Logical fallacies lose a good deal of their persuasive effect if they are called by name. And 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 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. In contrast, a judge constrained by the ideal of rhetoric 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.

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

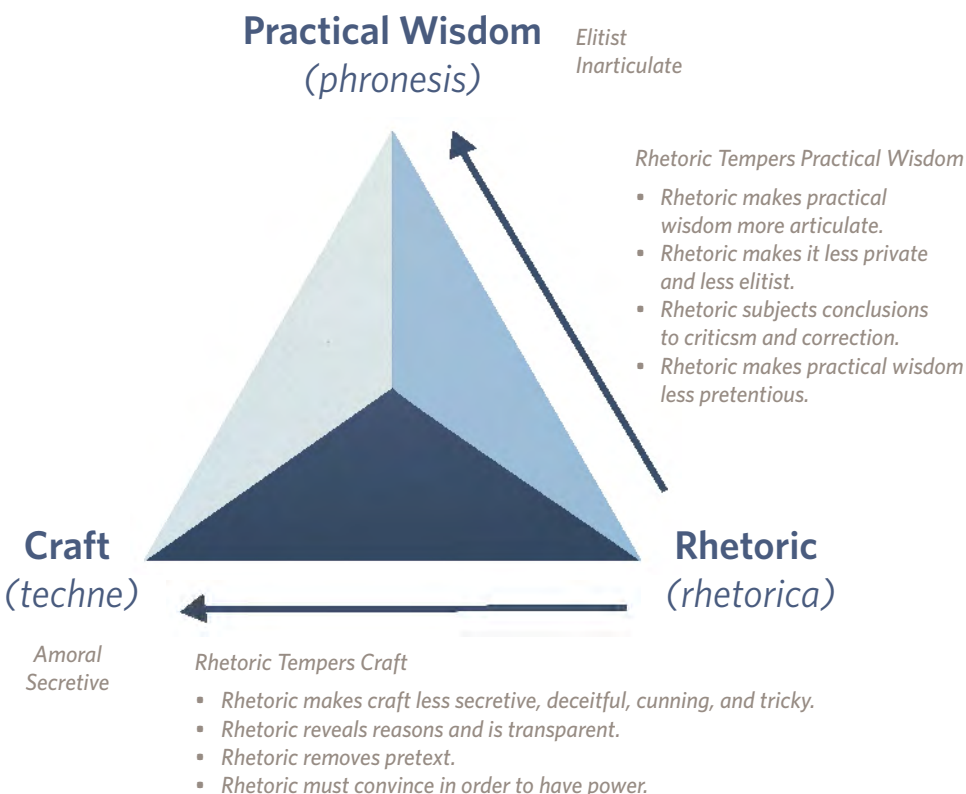
GOOD JUDGMENT

In conclusion, as we approach legal reasoning and judgment, the best choice lies in adopting pluralist approaches. But pluralism need not devolve into its most common variation: a rudderless and ultimately quite cynical pragmatism.

Good judgment, I believe, will be inculcated by developing trustworthiness, the cardinal virtue of practical wisdom; integrity, the cardinal virtue of craftsmanship; and honesty, the cardinal virtue of rhetoric. Practical wisdom, craft, and rhetoric should be developed, employed, and valued together, not only because each will have a tempering effect on the others but because each 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.

Read Professor Scharffs's remarks in their entirety at digitalcommons.law.byu.edu/clarkmemorandum/63.

How Rhetoric Tempers Practical Wisdom and Craft



NOTES

- 1 A special thanks to Thomas Palmer and Benjamin Thornell for their help with references in this article.
- 2 Brett G. Scharffs, "The Character of Legal Reasoning," *Washington and Lee Law Review* 61 (2004): 733–86.
- 3 Twenty-five years after the publication of *After Virtue*, MacIntyre stated in reflection: "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." (MacIntyre Alasdair, *After Virtue: A Study in Moral Theory*, 3d ed. [Indiana: University of Notre Dame Press, 2007], x.)

- 4 This section is an abbreviated adaptation of Scharffs, "Character of Legal Reasoning."
- 5 Aristotle, *Nicomachean Ethics*, VI.4.1140a7.
- 6 See Thomas F. Lambert Jr., "Recalling the War Crimes Trials of World War II," *Military Law Review* 149 (1995): 19.
- 7 Immanuel Kant, *Critique of Judgment*, trans. J. H. Bernard (London: Macmillan and Co., 1892), sec. 53, 198/328 n. 63.