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The Character of Legal Reasoning

Brett G. Scharffs

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The Character of Legal Reasoning

Brett G. Scharffs*

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University; B.S.B.A., M.A., Georgetown University, B. Phil., Oxford University, J.D., Yale Law School. I wish to express heartfelt thanks to participants at a seminar at the Rand South Africa University; the Utah Appellate Judges Conference; a delegation of higher appellate judges from the Peoples Republic of China who visited BYU; the Joint Canadian-U.S. Appellate Judges Seminar in Victoria, British Columbia, law students at the Nanjing Agricultural University in Nanjing, China; and several generations of law students in a variety of seminars for wide ranging and very helpful comments and criticism on various aspects of this Article. I owe a large debt of gratitude to my excellent research assistants, Marjorie Fennesbeck and P. Scott Smith, for their help with the manuscript and footnotes. I have benefited especially from conversations with my former teachers, Anthony Kronman and Joseph Raz, and critical comments from Brian Leiter. I would also like to thank Michael Walker, Brian Hager, and Heather Skeeles of the Washington and Lee Law Review for their excellent editorial assistance. This Article is the fourth in a series of six Articles about practical wisdom, craft, and rhetoric, and is intended to provide a framework for the overall project. The first three Articles are Brett G. Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998); Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367 (2001); and Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001). Two additional Articles are planned, one tentatively titled, *Law and Logical Error*, which will explore in greater detail the role of informal logical fallacies in legal reasoning, which I discuss briefly in Part IV.A of this Article, and *The Competing Claims of Rules and Balancing*, which will discuss the respective merits of approaches to legal decisionmaking that favor rules and approaches that favor balancing. This Article is dedicated to dean, teacher, mentor, judge, Guido Calabresi.

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I. Introduction

A. The Distinctive Character of Legal Reasoning

During the past one hundred years the autonomy of the law has come under assault from almost every imaginable direction.¹ At the beginning of the twenty-first century there is considerable doubt about whether there is anything unique or distinctive about legal reasoning.² The law has traveled a long

1. See Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 758–62 (1998) (discussing the various debates about the autonomy of legal reasoning); Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 27 (1993) (acknowledging that the current movements in legal thought have "stimulated heated debate about the relationship among law, culture, politics, economics, and morality"); David M. Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 578 (1984) (rejecting the idea that "there is an autonomous and neutral mode of 'legal' reasoning and rationality"). The approaches that look to disciplines outside the law for insights into the limitations and biases of conventional approaches to adjudication include movements such as law and economics, critical race theory, critical legal studies, legal realism, and law and feminism. See, e.g., Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) (defending critical race theory); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987) (defending law and feminism); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (defending critical legal studies); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (defending law and economics); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (defending legal realism).

2. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 428 (1990) (proclaiming that "supports for the faith in law's autonomy have now been kicked away"). As Steven Burton asserts:

The intellectual climate in the American legal academy has changed drastically in the last quarter of a century. Among the most salient changes are those marked by the advent of extensive interdisciplinary studies. Courses and scholarship in law and economics, law and social science, law and literature, law and philosophy, and law and psychology now are common, even old hat. The bipolarity of "law and . . ." is giving way, at the cutting edge of academic fashion, to a criss-crossing

distance in the almost 250 years since Blackstone spoke of the garden of the common law, bounded by a protective hedge and characterized by gradual growth and change.³ This assault has come from both ends of the political spectrum.⁴ Some have argued that legal reasoning is essentially political,⁵ and that judges do, or should, decide cases based on their vision of what is politically correct.⁶ Such a judge may serve the master of her own ideas of

interdisciplinarianism that draws on many sources in a sort of postmodern pastiche.

Steven J. Burton, *Foreword: Rhetoric and Skepticism*, 74 IOWA L. REV. 755, 755 (1989); see also KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 15 (1960) (addressing the problem and the worry that people have lost confidence in the steadiness of the law and its ability to answer questions); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984) (contending that "[b]y its own criteria, legal reasoning cannot resolve legal questions in an 'objective' manner; nor can it explain how the legal system works or how judges decide cases").

3. William Blackstone asserted that "it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 WILLIAM BLACKSTONE, *COMMENTARIES* *69 (1765). The judge:

is only to *declare* or *pronounce*, not to *make* or *new-model*, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees . . .

Id. at *327; see also Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON 569, 583 (1976) ("Legal institutions in Blackstone's view change and evolve, but the evolution is toward a set of ideal concepts that, in keeping with the spirit of his time, Blackstone locates in a remote and no doubt largely imaginary past state of grace.").

4. In my judgment, the most influential attack from the right has come from law and economics, and the most influential attacks from the left have come from legal realism, critical legal studies, and critical feminist and race theories. See, e.g., Minda, *supra* note 1, at 36-40 (identifying the law and economics movement as a "conservative reaction to the liberal, rights-based brand of judicial activism" and critical legal studies as "self-consciously associated with the sixties counterculture of the New Left"); see generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (defending critical race theory); POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992) (defending law and economics); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983) (defending critical legal studies); JEROME FRANK, *LAW AND THE MODERN MIND* (1949) (defending legal realism); Richard Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (defending law and feminism).

5. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 621 (1989) ("A popular CLS slogan is that 'law is politics.'"); John Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984) ("LAW IS POLITICS, pure and simple . . ."); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984) ("Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.").

6. Accounts of this nature might be categorized as "Skeptical Accounts" of adjudication and legal reasoning. According to the Skeptical Account, adjudication and legal reasoning differ from ordinary practical reasoning about what ought to be done only in rhetoric, not in

what is good or right, or may serve political masters and their view of what is good and right. Others maintain that legal reasoning is essentially moral.⁷ Some schools of thought assert that good legal reasoning is like other types of reasoning, disciplined by the same rules of logic and threatened by the same types of logical error.⁸ Those who believe that the law holds something unique

substance. On the Skeptical Account, the only difference between a judge's decision, "How ought this dispute be resolved?" and a layman's decision about the same matter, is that the judge has at his disposal a rhetorical armory of substantive-law and procedural categories unfamiliar to the layman. In other words, the Skeptical Account views judicial reasoning as nothing other than ordinary practical reasoning dressed up with obfuscating terminology. This Skeptical Account of legal reasoning can also be expanded to a more generalized skeptical account of practical reasoning, according to which there is no such thing, beyond perhaps instrumental reasoning. Such a skeptical account of practical reasoning conjoined with the Skeptical Account of adjudication and legal reasoning would lead to theses like "law is politics." I am indebted to Brian Leiter for his suggestion that my account of legal reasoning occupies a conceptual space between such Skeptical Accounts of legal reasoning and what might be called "Mechanical Accounts," which understand judicial reasoning as the instantiation of precise rules of decision, rules of decision which, given the facts of a case, even a suitably programmed machine could apply.

7. Natural lawyers maintain that law is inseparable from normative concerns of moral philosophy. See generally LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969) (expounding the thesis that the formal administration of the rule of law is governed by principles of legal morality, affirming the connection between law and morality set forth by the classical and medieval philosophers of natural law); Robert P. George, *Natural Law and Positive Law, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW* 151 (Edward B. McLean ed., 2000) (asserting that legal choices are governed by "basic principles of morality"). Ronald Dworkin advocates a theory of adjudication, "law as integrity," which specifically requires judges to decide cases by reference to moral principles that fit and justify the settled law. RONALD DWORIN, *LAW'S EMPIRE* 94, 225-75 (1986). Some have argued that Dworkin's project is closely related to natural law reasoning. See CHARLES COVELL, *THE DEFENCE OF NATURAL LAW: A STUDY OF THE IDEAS OF LAW AND JUSTICE IN THE WRITINGS OF LON L. FULLER, MICHAEL OAKESHOT, F.A. HAYEK, RONALD DWORIN AND JOHN FINNIS* 145 (1992) (asserting that even though "Dworkin did not adopt the theoretical standpoint afforded by the great classical and medieval traditions of natural law philosophy. . . . Dworkin challenged the analytical model of law constructed by the mainstream theorists of legal positivism"); Kornhauser, *supra* note 1, at 759 (grouping natural lawyers and Dworkin together as opponents of legal positivists).

8. This is the primary thrust of formalism and "plain meaning" jurisprudence. See generally Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (comparing practical reason and formalism); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending formalism); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (defending formalism, or the "concept of decisionmaking according to rule"). It is also illustrated in much of the work of those who have written about the relationship between law and logic. See RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 16 (3d ed. 1998) (stressing the necessity of logical form). Judge Aldisert wrote:

[T]he common law tradition demands, indeed requires, respect for logical form in our reasoning. Without it we are denied justification for our court decisions. Adhering to logical form and avoiding fallacies . . . is only a means to the ends of justice, but logical form and avoiding fallacies are nonetheless critical tools of

or distinctive often emphasize the ways in which it employs analogy and precedent.⁹

A question of almost limitless significance lies beneath the surface of these debates: Is it possible to distinguish a good legal argument from a bad one? This question is important because if we cannot distinguish between good and bad legal reasons, then we are ultimately in a world of total subjectivity. Power is the only thing that will matter. Our reasons will be nothing more than decorations. Thus, the answer—we hope—must be yes; after all, lawyers, and especially judges, distinguish good and bad legal arguments every day. But describing with any precision what makes one legal argument stronger than another is surprisingly difficult.¹⁰ Perhaps we are mistaken if we think that we can ascertain with confidence that one legal argument is better than another. Maybe it is finally a matter of opinion, and perhaps our certainty reflects only conviction.

argument. They are the implements of persuasion. They form the imprimatur that gives legitimacy and respect to judicial decisions. They are the acid that washes away obfuscation and obscurity.

Id. Pamela Gray asserts that because legal concepts and rules of inference could be represented in symbolic form, she envisions a future, all-encompassing system of computer-aided legal reasoning. See generally PAMELA N. GRAY, *ARTIFICIAL LEGAL INTELLIGENCE* (1997).

9. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 216 n.32 (1991) (expressing the idea that "there is a distinct method which is the legal method, [that] can be deployed more or less well, and [that] yields a distinct set of answers more or less out of itself"); Kornhauser, *supra* note 1, at 747 ("[A]n assertion that the law is autonomous claims that law develops wholly from internal, rather than external, forces."); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988) (linking law's autonomy with methods of investigation and of persuasion, such as "anecdote, introspection, imagination, common sense, intuition . . . , empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'induction' (the expectation of regularities, related both to intuition and to analogy), [and] 'experience'").

10. See Richard Warner, Note, *Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523, 1523 (1989) (discussing the appearance of arbitrariness in many legal decisions). Warner noted:

Legal decisions often appear arbitrary. Such decisions . . . typically contain reasoning that is to justify the decision; yet even a cursory examination reveals that reasoning about seemingly identical fact situations often leads to inconsistent, or at least apparently inconsistent, results. Moreover, legal reasoning is frequently incomplete; crucial assumptions are not made explicit, and often it is not clear what the unstated assumptions are.

Id.; see also ARISTOTLE, *NICOMACHEAN ETHICS* VI.9.1142b13, VI.9.1142b35–37, in *A NEW ARISTOTLE READER* 363, 425–26 (J.L. Ackrill ed., 1987) [hereinafter ARISTOTLE, *NICOMACHEAN ETHICS*] (asserting that "excellence in deliberation involves reasoning" and "correctness with regard to what conduces to the end of which practical wisdom is the true apprehension"); Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287, 1321 (1998) (noting difficulty of producing relevant comparison of reasons to justify choice).

A well-known cartoon about judicial reasoning is illustrative. Nine distinguished judges in robes sit in a row behind a high rostrum. Solemn expressions grace their faces, and one judge is reading from a piece of paper. "My dissenting opinion will be brief," he says. "You're all full of crap."¹¹



"MY DISSENTING OPINION WILL BE BRIEF:
"YOU'RE ALL FULL OF CRAP!" "

It is hard not to chuckle at this cartoon. We can easily imagine that this cartoon embodies a sentiment that every appellate judge has felt from time to time.¹² One thing that makes the cartoon funny is its juxtaposition of the very

11. This cartoon is used with permission from the artist, Sidney Harris. For similar legal cartoons by the same artist, see SIDNEY HARRIS, *SO SUE ME!: CARTOONS ON THE LAW* (1993).

12. Usually judges manage to bite their tongues. *But see Webster v. Reproductive Health Services*, 492 U.S. 490, 532-37 (1989) (Scalia, J., dissenting) (criticizing Justice O'Connor's concurring opinion as one that suggests "irrational" concepts and can therefore not be taken

formal and proper with the very informal and inappropriate.¹³ One thing, however, is clear: The judge is not engaged in an acceptable mode of legal reasoning. Some types of argument, such as the blatant *ad hominem*, are simply out of bounds.¹⁴

My goal in this essay is to articulate what I believe to be the components of good legal reasoning, and especially of good judicial reasoning.¹⁵ At bottom,

seriously).

13. Known as "register humor," this type of juxtaposition is humorous because of the "incongruity originating in the clash between two registers." SALVATORE ATTARDO, *LINGUISTIC THEORIES OF HUMOR* 230 (Victor Raskin & Mahadev Apte eds., 1994). A register is defined as "the configuration of semantic resources that the member of a culture typically associates with a situation type." *Id.* at 237.

14. The *ad hominem* argument is a logical fallacy described by Judge Aldisert as follows: "Instead of addressing the issue presented by an opponent, [the *ad hominem*] argument makes the opponent the issue. It shifts attention from the argument to the arguer; instead of disproving the substance of what is asserted, the argument attacks the person who made the assertion." ALDISERT, *supra* note 8, at 182. The *ad hominem* argument is also known as the *fallacy of personal attack*, the *appeal to personal ridicule*, and the *argumentum ad hominem*. See *id.* at 182–85 (discussing the *ad hominem* argument and giving examples); IRVING M. COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 122–23 (9th ed. 1994) (defining and discussing the "argument *ad hominem*"); WAYNE A. DAVIS, *AN INTRODUCTION TO LOGIC* 60, 61, 63, 72 (1986) (detailing the difference between an *ad hominem* attack and refuting an argument from authority); S. MORRIS ENGEL, *WITH GOOD REASON: AN INTRODUCTION TO INFORMAL FALLACIES* 192, 195–96 (3d ed. 1986) (discussing the *ad hominem* attack).

15. Several interlocutors have questioned whether the account of legal reasoning I propose is applicable only in common law but not civil law systems. On its face, the account of legal reasoning I am describing here would appear to be a more accurate description of common law reasoning than civil law reasoning. *Black's Law Dictionary* defines the common law as comprising:

the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.

BLACK'S LAW DICTIONARY 250–51 (5th ed. 1979). More generally, the common law understood as judge-made law is often contrasted with positive law, legislation, or legal codes, enacted by legislatures or other authoritative bodies. Practical wisdom, craft, and rhetoric would seem to be more evident in common law decisionmaking than in civil-law decisionmaking, where the judge's role is often characterized as much more passively "applying" or "interpreting" the law as opposed to "making" or "developing" the law. I would suggest, however, that the distinction between common law and civil law systems is not as clear and categorical as might first appear. When I have asked civil law judges whether they have experienced cases in which the code does not seem to dictate a clear answer to a case, or situations in which they can see persuasive arguments on both sides of a case, they quickly acknowledge not only that they have experienced such situations but that they are quite common. Judges in "common law" jurisdictions such as the United States also frequently encounter such cases, both when they are interpreting a statute and when they are interpreting a body of case law. This is not to say that the process of civil law interpretation and common law decisionmaking are identical, but there

I aim to describe the traits or habits of character that will distinguish the best lawyers and the best judges, and how these traits or habits relate to each other. My ambition is not primarily to create a set of criteria to evaluate and critique others. Rather, my main purpose is to provide a framework for self-assessment to help lawyers and judges reflect upon what each of us may do to improve in our professional capacity and competence.

B. Thesis

My thesis is that legal reasoning is unique and distinctive. I will argue that legal reasoning is composed of three ideas or concepts, each of which lies at the heart of Aristotle's practical philosophy.¹⁶ The first is *phronesis*, or practical wisdom.¹⁷ The second is *techne*, or craft.¹⁸ The third is *retorica*, or rhetoric.¹⁹

is much more overlap and commonality than appears at first sight. Of course, if a legal system does not require judges to give reasons in justification for their decisions, then rhetoric and craft will be a much smaller role in legal reasoning.

16. For an introduction to the broad range of Aristotle's philosophical works, see J.L. ACKRILL, *ARISTOTLE THE PHILOSOPHER* 1-9 (1981) (calling itself "a guide book to Aristotle's philosophy" and discussing Aristotle's philosophy on several topics). Aristotle's works include logical treatises, a long series of works on nature, the metaphysical books, and "works on 'practical subjects'—ethics, politics, rhetoric, aesthetics." *Id.* at 3. Aristotle distinguishes his practical philosophy from other areas of philosophical study by emphasizing that "the end of practical theory is not to study and know each thing, but rather to act on that knowledge. Hence it is not enough to know about virtue, but we must also try to possess and exercise it . . ." ARISTOTLE, *NICOMACHEAN ETHICS* X.9.1179b1-4, in NANCY SHERMAN, *THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE* 8 (1989). Central to Aristotle's practical philosophy, and in contrast to his other areas of thought, such as his writings on nature and formal logic, is the practical concern "not to increase our knowledge, but to achieve a better life." SARAH BROADIE, *ETHICS WITH ARISTOTLE* 58 (1991).

17. See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 118 (1994) (calling for return to judicial virtues of "impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole . . . and above all, self-restraint"); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11-52 (1993) (describing genesis, development, criticism, and near demise of practical wisdom ideal); see also Brett G. Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998) [hereinafter Scharffs, *The Role of Humility*] (writing at greater length about practical wisdom). In response to Aristotle's assertion that practical wisdom is a virtue of both intellect and a virtue of character, I argue that the three most important virtues of character for practical wisdom are justice, mercy, and humility. *Id.*

18. See KRONMAN, *supra* note 17, at 295 (defending the once widely held, now largely forgotten "idea that the law is a craft demanding a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill, and which therefore justifies the special sort of pride that the possession of such a trait affords"); LEWELLYN, *supra* note 2, at 213-35 (describing appellate judging as a craft of law); see also Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2247-49 (2001) [hereinafter Scharffs,

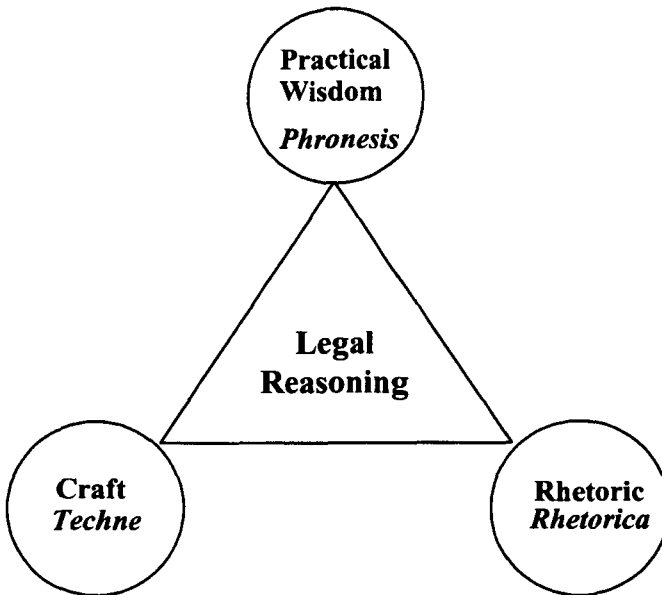
Good legal reasoning is a combination of practical wisdom, craft, and rhetoric. The good lawyer is someone who combines the skills or character traits of practical wisdom, craft, and rhetoric. Each of these three concepts is an essential component of legal reasoning. Equally important, and less well understood, is the relationship between these concepts, which is illustrated in Figure 1.²⁰

Law as Craft] (engaging in a detailed comparison of the legal profession with other craft traditions such as carpentry, pottery, and quilting).

19. See Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 687 (1999) ("[R]hetoric is a discipline for mobilizing the social passions for the sake of belief in a contestable truth whose validity can never be demonstrated with mathematical finality."); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (defending rhetoric as "the central art by which community and culture are established, maintained, and transformed"); see generally EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (1994) (expounding on Aristotle's *Rhetoric* as a piece of philosophic inquiry). I will address the topic of rhetoric in greater detail in my forthcoming Article entitled *Law and Logical Error* (draft on file with author).

20. One might wonder if it would be easier and more accurate to conceptualize legal reasoning as an example of practical reasoning or as a type of practical wisdom, one which includes the components of craft and rhetoric. On one level such an approach might be seen as being only semantically different from the account I propose because I advocate the view that legal reasoning, and especially judicial reasoning, is comprised of these three concepts. Nevertheless, I believe efforts simply to expand practical wisdom to include craft and rhetoric should be resisted for several reasons. First, as I discuss in detail in Part II of this essay, the concern and ends, the components, the distinctive characteristics, and the measure of success for practical wisdom, craft, and rhetoric are each different. We would be more likely to fail to recognize the distinctive characteristics of these concepts and their relationship to legal reasoning if craft and rhetoric are simply subsumed into practical wisdom. Second, the problematical features of practical wisdom, craft, and rhetoric are more easily recognized if these concepts are kept analytically distinct. If the weaknesses of practical reason as an account of legal reasoning are addressed by expanding practical reason to include craft and rhetoric, it is easy to overlook the fact that the concepts craft and rhetoric themselves have problematical features. Third, Aristotle distinguished practical wisdom, craft, and rhetoric and treated them as separate categories of practical rationality. While it does not make sense to follow his use of these concepts out of blind homage, to the extent that we are looking to Aristotle for insights to help us understand practical wisdom, craft, and rhetoric, it is useful to be attentive to the implications of the differences as well as the similarities he identifies in these concepts. Finally, treating practical reason as an imperial concept that simply appropriates helpful concepts in the same neighborhood does not make practical reason a more accurate or complete account of legal reasoning. Indeed, I would argue to the contrary, that to the extent practical reason must incorporate other concepts in order to create a robust or persuasive account of legal reasoning, that is evidence that practical reason by itself is an incomplete account of legal reasoning. It is easier to develop a sense of and appreciation for the richness and multidimensionality of the complex social practice of legal reasoning if we resist efforts to reduce it to a single analytical concept. Nevertheless, to the extent an account of practical wisdom incorporates elements of rhetoric and craft, those accounts of practical reason will have much in common with the account of legal reasoning that I defend here.

Figure 1: The Relationship Between Practical Wisdom, Craft, and Rhetoric



In Part II of this Essay, I will briefly describe practical wisdom, craft, and rhetoric.²¹ I will discuss the character and relationship of these three concepts, focusing upon four questions about each. First, what is the concern or end related to each of these concepts?²² Second, what are the components or constituent parts of each?²³ Third, what are the distinctive characteristics of practical wisdom, craft and rhetoric?²⁴ And fourth, how is success measured with respect to each of these concepts?²⁵ The distinct answers to each of these questions are shown in Figure 2. In Part III, I will discuss what I call the "dark side" of each of these concepts.²⁶ While I come to praise practical wisdom,

21. See *infra* Part II (discussing practical wisdom, craft, and rhetoric in legal reasoning).

22. See *infra* Part II.A (noting the different goals of practical wisdom, craft, and rhetoric).

23. See *infra* Part II.B (discussing the constituent parts of practical wisdom, craft, and rhetoric).

24. See *infra* Part II.C (detailing distinctions between practical wisdom, craft, and rhetoric).

25. See *infra* Part II.D (analyzing practical wisdom, craft, and rhetoric and how they measure success).

26. See *infra* Part III (detailing the risks of practical wisdom, craft, and rhetoric as models

craft, and rhetoric, each of these concepts is an incomplete account of legal or judicial reasoning. I will explain the dangers of practical wisdom, craftsmanship, and rhetorical skill. Not only is it useful to recognize what we should fear or mistrust in each of these ideals, more importantly, we should be aware of the pitfalls that threaten our effectiveness as lawyers and judges if we fancy ourselves to be particularly adept at any one of these three skills or characteristics. In Part IV, I will explore in greater depth the interrelationships of these three concepts.²⁷ In particular, I will try to explain how each of these aspects or elements of legal reasoning tempers or ameliorates the negative tendencies and effects of the others. My hope is to convince the reader not only of the centrality of practical wisdom, craft, and rhetoric in legal reasoning, but also that any one or two of these concepts taken alone is dangerous. Finally, I want to show that when composed harmoniously, these concepts constitute the bedrock characteristics of the good lawyer and judge.

I do not mean to suggest that the framework I propose is the only useful way of thinking about or analyzing legal reasoning. I will be discussing legal reasoning at a relatively high level of abstraction. What I have to say may not be directly helpful to the lawyer trying to articulate the best possible legal argument on behalf of his client's position with respect to a particular case, and it may not offer straightforward assistance to the judge trying to decide a difficult case. But as a framework for thinking about our work as lawyers and judges, I hope this analysis will be helpful. In particular, I hope that it will help lawyers and judges reflect critically upon what traits or habits of character we should be cultivating in ourselves.

II. The Character and Relationship of Practical Wisdom, Craft, and Rhetoric

A. The Concerns or Ends

Practical wisdom, craft, and rhetoric each has a distinctive concern or end. The goal or purpose, the *telos*, of each is different. Practical wisdom's concern is what should be done at some particular time in some particular situation. It is about deliberation (*bouleusis*), choice (*proairesis*) and, ultimately, action (*praxis*). Aristotle contrasts *phronesis*, or practical wisdom, with concepts such as theory (*teoria*), knowledge (*episteme*), and theoretical wisdom or truth

of legal reasoning).

27. See *infra* Part IV (discussing how practical wisdom, craft, and rhetoric work together to form a more complete account of legal reasoning).

(*sophia*). The *phronimos*, or person of practical wisdom, is uniquely adept at reasoning about complex, competing, incompatible, and even incommensurable values.²⁸ Practical wisdom is not primarily concerned with applying and following rules, and so in a real sense it is antifoundational and antitheoretical.²⁹ Practical wisdom is also not primarily about knowing what is true or false; rather, its primary concern is action, what should be done.

28. For an evaluation of the sources and nature of the limits on our ability to reason decisively and find uniquely correct outcomes or decisions in the face of incommensurability, see generally INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998). On the resources that practical wisdom brings to reasoning about incommensurable values, see Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1410–35 (2001) (arguing that practical wisdom and practical reasoning provide valuable tools for reasoning about incommensurable values).

29. See Farber, *supra* note 8, at 539 (contrasting practical wisdom and values-based foundationalism). Farber argues:

[P]ractical reason means a rejection of foundationalism, the view that normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a pre-existing set of rules.

Id. Nancy Sherman asserts that, even though it is important for a practically wise person to have the skills of a theoretician, practical wisdom as theory "remains inexact, awaiting the more determinate operations of practical reason in its perceptual and decision-making roles." SHERMAN, *supra* note 16, at 11. For a discussion of the antitheoretical nature of practical reason and practical wisdom "theories," see generally Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253 (1996). Leiter defines "[a] theoretical understanding of any domain of human activity [as] one that provides an explicit articulation or reconstruction of the rules that govern and explain activity in the domain," and argues that a theory of adjudication is an impossibility. *Id.* at 258. Leiter recommends that proponents of practical reason or practical wisdom should really adopt what we might call the "no-theory" theory of adjudication. According to the no-theory theory, judicial decision is not something about which one should expect to have a theory because one can never produce the needed theoretical reduction of adjudication to explicit rules of decision. *Id.* at 280; see also William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345 (1990) (noting that foundationalism is flawed and recommending a practical reasoning approach); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1588 (1985) (citing Alexander Bickel's assertion that the Supreme Court should not rely on fixed standards or principles when deciding to render a judgment or abstain); David Wiggins, *Deliberation and Practical Reason*, in NEEDS, VALUES, TRUTH: ESSAYS IN THE PHILOSOPHY OF VALUE 215, 234–36 (1987) (paraphrasing Aristotle in asserting that practical wisdom "does not reside in a set of maxims or precepts").

Aristotle defines craft as the "reasoned state of capacity to make."³⁰ In contrast with practical wisdom, which is concerned with action, craft has making or production (*poiesis*) as its end. You may be a carpenter constructing a chair, a potter forming a bowl, or a quilter sewing a blanket, but in each of these cases you create an artifact, something that is useful. The efficient cause of a craft object is the craftsman or maker. The material cause is the stone or wood, or other material, from which the craft is wrought. The formal cause is the idea or plan that directs the craftsman in his or her efforts.

The aim or end of rhetoric is persuasion. Aristotle defines rhetoric as "an ability, in each [particular] case, to see the available means of persuasion."³¹ This definition is interesting because it highlights Aristotle's distinction between the external end of rhetoric and the internal end of rhetoric. The external end is winning, or successfully persuading one's audience; success is measured by the outcome of the argument.³² The internal end, in contrast, involves making the best possible argument under the circumstances and in light of the available means of persuasion.³³ Because rhetoric has an internal as well as external end, it is possible that the person who is victorious in an argument is not necessarily the best or most skilled rhetorician.

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

30. Aristotle states that *techne*, or craft, is "essentially a reasoned state of capacity to make." ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at VI.4.1140a7. Joseph Dunne notes that *techne* "is thus quite straightforwardly linked to making (*poiesis*), i.e., the generation of 'things whose source (*arche*) is in the producer and not in the product.'" JOSEPH DUNNE, BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND ARISTOTLE 249 (1993). Thus objects produced by craftsmen are distinguished from natural things (*phusika*), which have the source of their generation in themselves, and from necessary things, the objects of *sophia*, which are ungenerated. *Id.*

31. ARISTOTLE, ON RHETORIC, in ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE I.2.1355b26–28 (George A. Kennedy ed. & trans., Oxford Univ. Press 1991) [hereinafter ARISTOTLE, RHETORIC] (alteration in original).

32. See, e.g., GARVER, *supra* note 19, at 25, 30 ("In each art, one can distinguish between successfully achieving some external goal—persuading, arguing, or healing—and doing everything in one's power to accomplish that end When I hire a lawyer, I want success as the external end of rhetoric. I want victory.").

33. See *id.* at 25 ("[T]he rhetorician might not persuade his audience, but he will exercise his rhetorical power and fulfill his rhetorical function if he discovers the possible means of persuasion in a given case."). Garver asserts that "the definition of rhetoric, with its comparisons to dialectic and medicine, highlights the distinction of ends. . . . Rhetoric begins with the given end of persuasion, but the *art* of rhetoric has its own internal, guiding or constitutive end, finding in each case the available means of persuasion." *Id.* at 28. He adds that "[t]he essence of the rhetorical art is not winning, but arguing." *Id.* at 32.

the luxury of endless deliberation; the judge must make a choice and act. This feature and requirement of the judge's function largely accounts for the importance and seriousness of what the judge does. As Robert Cover memorably put it, "Legal interpretation takes place in a field of pain and death A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."³⁴ 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, sound, and useful in much the same way as other craft objects are evaluated and assessed.³⁵ Judges engage in rhetoric, providing arguments designed to persuade the parties and other concerned readers that the judge decided the case correctly.³⁶ 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,³⁷ and secondarily to

34. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

35. Crafts are often evaluated on the basis of their function and usefulness. See PAUL J. SMITH, CRAFT TODAY: POETRY OF THE PHYSICAL 11 (1986) ("Historically craft was identified with producing objects that were necessary for life."); Bruce Metcalf, *Replacing the Myth of Modernism*, AM. CRAFT., Feb.–Mar. 1993, at 40, 40 ("Craft is defined by use."). Similarly, judicial opinions are evaluated on their utility as future precedent for interpreting and understanding the law. See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 662 (1992) ("In most cases, the likelihood of precedential value will depend less on who wins than on how the opinion is written.").

36. Aristotle compares the judge to an "assayer of silver in that he distinguishes counterfeit and true justice." ARISTOTLE, RHETORIC, *supra* note 31, at I.15.1375b6–7. In order to persuade others that the judgment is correct, the judge must tie his or her argument "to the values and beliefs of the various audiences" by understanding their "concerns and work[ing] to meet or at least address their disparate interests." Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEGAL WRITING 61, 62 (2002). Those with formal legal powers do "not obtain results by giving orders—or not, at any rate, merely by giving orders. [Their] power is the power to persuade." RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 10 (1980) (arguing that legal power is moot without the ability to persuade people to follow your lead).

37. In the United States Supreme Court, the Chief Justice plays a key role in creating a majority opinion. "[A] chief is performing reasonably well if he can persuade a majority to join him most of the time and particularly in those cases which have strong implications for national public policies." ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP IN THE SUPREME COURT 24 (1986). "Often to obtain unanimity or even near unanimity the chief must spend much precious time and energy in cajoling his colleagues as some chiefs have or . . . join the majority even when in disagreement with it." *Id.* at 25. Some examples of "brilliant successes were the unanimous decisions in the desegregation cases under Warren and in the Nixon tapes case under Burger, both of which were politically explosive." *Id.* A judge may have to make compromises in craftsmanship in order to garner majority support. See Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 199 (Peter Brooks & Paul Gewirtz eds., 1996) (relating that Justice Brennan was "willing to subordinate his own 'best view of the law' or most felicitous expression of his point of view to the far more

influence other judges who will read the opinion and decide whether and how to apply the law articulated in the opinion.³⁸ Judges also hope to persuade the parties to the dispute, although this goal will often prove difficult because someone usually loses. For a judge, a dramatic measure of accomplishment lies in persuading the losing party that the judgment is correct. Even when this proves to be impossible, a losing party may nevertheless be persuaded that it has received due process and a fair hearing.

B. Components

Practical wisdom, craft, and rhetoric are each composed of different constituent parts. Practical wisdom is distinctive, Aristotle suggests, in that it is composed of both virtue of intellect and virtue of character.³⁹ The person

important task of gaining a fifth vote").

38. Levinson, *supra* note 37, at 199 (noting that not only must a judge convince his immediate colleagues, but also other public officials who will consider the value of the logic behind the opinion). Levinson notes:

[G]etting the agreement of five people is only the very first stage in an extraordinarily complex process of bringing about changes in behavior in the world beyond the courthouse. The same costs . . . that must be paid to gain the fifth . . . vote may be paid even more often to gain the assent of the so-called inferior judges and the even more remote public officials and bureaucratic underlings whose behavior must ultimately be affected if desired changes are to occur.

Id. Judges are often faced with the choice to either follow a rule or precedent or to find some basis for distinguishing that rule or precedent. "The rule follows where its reason leads; where the reason stops, there stops the rule." KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 157–58 (1951) (emphasis omitted); see also Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by the United States Courts of Appeal*, 51 *FORDHAM L. REV.* 53 (1982) (discussing the trends and problems arising from the practice of anticipatory overruling as well as the reasons why courts of appeal overrule precedent of the United States Supreme Court). Judge Wheeler characterized the role of the courts in shaping the common law as follows:

That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature.

Dwy v. Conn. Co., 92 A. 883, 891 (Conn. 1915) (Wheeler, J., concurring).

39. ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 10, at VI.2.1139a31–35. Aristotle states:

The origin of action—its efficient, not its final cause—is choice, and that of choice is desire and reasoning with a view to an end. This is why choice cannot exist either without thought and intellect or without a moral state; for good action and its

of practical wisdom is adept at deliberating well, both in figuring out the best means to a given end and in discerning the appropriate end that should be pursued. Aristotle describes a person who is intelligent but does not have good character as clever. A clever person will be skillful at calculating means to ends, but there is no guarantee that the ends pursued will be correct or praiseworthy.⁴⁰ Aristotle is cryptic about what the particular virtues or habits of character are that will qualify a person as a *phronimos*, or person of practical wisdom. Anthony Kronman has argued that the two primary traits of character that facilitate practical wisdom are sympathy and detachment.⁴¹ Building upon Kronman's suggestion, I have argued elsewhere that the primary traits of character that the person of practical wisdom will possess are justice, mercy, and humility.⁴² These characteristics are particularly important in the law, in which matters of justice and mercy, and problems based upon the difficulty of accommodating the claims of each, are commonplace.⁴³

opposite cannot exist without a combination of intellect and character.

Id. He also maintains that "[p]ractical wisdom, too, is linked to excellence of character, and this to practical wisdom, since the principles of practical wisdom are in accordance with the moral excellences and rightness in the moral excellences is in accordance with practical wisdom." *Id.* at X.8.1178a15–19.

40. *See id.* at VI.12.1144a23–28 (describing cleverness). Aristotle asserts:

There is a faculty which is called cleverness; and this is such as to be able to do the things that tend towards the mark we have set before ourselves, and to hit it. Now if the mark be noble, the cleverness is laudable, but if the mark be bad, the cleverness is mere villainy; hence we call clever both men of practical wisdom and villains.

Id. The person of practical wisdom will be clever, but not merely clever; in addition, he will have virtue of character, which will make the aim right. *See id.* at VI.12.1144a19–20 (noting that excellence makes the choice right); *cf. id.* at III.5.1114b1–25 (stating that excellence is voluntary, as is vice; the choice belongs to the man).

41. KRONMAN, *supra* note 17, at 70–71. Kronman defines "sympathy" as "compassion, in the literal sense of 'feeling with.'" *Id.* at 70. While sympathy goes beyond mere observation, it also falls short of outright acceptance. "It is possible to entertain a point of view without making it one's own, in the sense of giving the values associated with that point of view one's full endorsement Judgments of this sort demand a detachment" *Id.* at 71.

42. *See generally* Scharffs, *The Role of Humility*, *supra* note 17.

43. Humility helps a judge accommodate the competing claims of justice and mercy. *See id.* at 170–71 ("Not only is humility the key to striking the appropriate balance within the virtues of justice and mercy, it is also the key to synthesizing or mediating between the competing claims of justice and mercy."). Isaiah Berlin asserts that "[j]ustice, rigorous justice, is for some people an absolute value, but it is not compatible with what may be no less ultimate values for them—mercy, compassion—as arises in concrete cases." ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 12 (Henry Hardy ed., 1991). The tension that sometimes arises between duty (the dictates of justice) and conscience (the dictates of mercy) illustrates the conflict between justice and mercy. Scharffs, *The Role of Humility*, *supra*

Craft, in contrast, is a virtue of intellect only.⁴⁴ Crafts are composed by the skillful use of materials and tools.⁴⁵ Crafts are also distinctive because craft objects are made by hand, one at a time, in contrast with mass production, which creates uniform products in a highly efficient and regimented manner.⁴⁶ Unlike art objects, craft objects are defined by their use and usefulness⁴⁷ and are distinctive in that they have a particular type of relation to the past. Craftsmen are rooted in a shared tradition⁴⁸ and are thus

note 17, at 170. Humility helps a judge avoid injustice and show the correct degree of mercy to all the parties before the court because a humble judge will not cling stubbornly to his notions of duty and will view a controversy from the perspective of each of the contending parties, even if the judge is predisposed to favor one party over another. *Id.* at 171.

44. In contrast to practical wisdom's emphasis on acting, for Aristotle, craft (*techne*) is concerned with production (*poiesis*) and involves "making or fabrication; it is activity which is designed to bring about, and which terminates in, a product or outcome that is separable from it and provides it with its end or *telos*." DUNNE, *supra* note 30, at 244. Aristotle states that "making and acting are different . . . so that the reasoned state of capacity to act is different from the reasoned state of capacity to make. Nor are they included one in the other; for neither is acting making nor is making acting." ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at VI.4.1140a2–6. Moral virtue, but not craft, is a state that issues in rational choice (*a hexis prohairetike*). BROADIE, *supra* note 16, at 181. For a further discussion of Aristotle's distinction between the virtues of practical wisdom and craft, see Scharffs, *Law as Craft*, *supra* note 18, at 2263–64 (noting that Aristotle believes practical wisdom is a virtue of intellect and character, whereas craft is a virtue of intellect only).

45. The *Oxford English Dictionary* (OED) defines craft as "[a] branch of skilled work . . . [a]n art, trade or profession requiring special skill and knowledge." 3 THE OXFORD ENGLISH DICTIONARY 1104 (1989). Related definitions include, "[s]kill, skilfulness, art; ability in planning or performing, ingenuity in constructing, dexterity." *Id.*; see also SEONAIID MAIRI ROBERTSON, CRAFT AND CONTEMPORARY CULTURE 36 (1961) ("[I]t is by his attitude to his materials, to his tools, and in his understanding of the needs his products serve that we recognize the essential craftsman."); Scharffs, *Law as Craft*, *supra* note 18, at 2288–94 (noting that crafts are always identified by their materials, hardware, and tools).

46. A craft "must be made substantially by hand. This is the primary root of all craft, the wellspring and reference point for everything else in the field." Metcalf, *supra* note 35, at 40; see also EDWARD LUCIE-SMITH, THE STORY OF CRAFT: THE CRAFTSMAN'S ROLE IN SOCIETY 11 (1981) (maintaining that with the industrialization of Britain came a "separation between a craft object and the thing made by a machine—an industrial product"); Peter Faulkner, *Introduction to ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY* i, v. (William Morris ed., photo. reprint 1996) (1893) (noting that the Arts and Crafts Movement was a reaction "against the excesses of industrial capitalism").

47. To prevent itself from being swallowed up in the world of commercially oriented products, "fine art has generally disavowed any connection with function." Howard Risatti, *Metaphysical Implications of Function, Material, and Technique*, in SKILLED WORK: AMERICAN CRAFT IN THE RENWICK GALLERY 31, 47 (Janet Wilson ed., 1998). Risatti adds that for a craftsman "to stay within the crafts field and ignore function . . . is to abandon the field's single most important element." *Id.* at 34.

48. Aristotle notes that when a craftsman is engaged in his work, he often benefits from consultation with others; in practical matters, we are more likely to trust deliberations that are communal than deliberations that are solitary. See ARISTOTLE, NICOMACHEAN ETHICS, *supra*

more likely to favor incremental change over radical innovation⁴⁹ and view their work with a mixture of pride and humility.⁵⁰

Legal craftsmanship also involves the skillful use of materials and tools.⁵¹ These materials include sources of law (such as constitutions, statutes, and precedents), the foundational principles and ideals of the law (including freedom, equality, fairness, and due process), and various sets of rules and guidelines (such as the Rules of Civil Procedure). The best lawyers are craftsmen. Learning to be a lawyer should be much like learning to be a craftsman in other craft traditions. Not only must we learn the rules and the

note 10, at IX.9.1170b11–12. Aristotle maintains that even when the activity is contemplation, an activity that is "loved for its own sake" and from which "nothing arises . . . apart from the contemplating," the wise man who contemplates truth "can perhaps do so better if he has fellow-workers." *Id.* at X.7.1177a33–1177b2.

49. Craftsmen are not opposed to innovation and change, but they tend to take a cautious attitude towards trying to make something entirely new. See PETER DORMER, *THE ART OF THE MAKER: SKILL AND ITS MEANING IN ART, CRAFT AND DESIGN* 26 (1994) (asserting that "the acquisition of craft knowledge entails learning rules and imitating other people's work"). Seonaid Mairi Robertson has observed, "[T]he great bulk of the world's traditional craftsmen have felt free to make modifications, to evolve slightly different forms or patterns, so long as these served the practical purpose." ROBERTSON, *supra* note 45, at 28.

50. See William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 149 (1993) (noting that the "distinguishing mark of the craftsman is pride in a job well done for its own sake" and that "[c]raftsmanship is more akin to a form of love"). Craftsmen are not "compared with the self-conscious, learned individualists of today, with all their aesthetic theories and scientific knowledge. Yet these humble craftsmen were able to produce works of consummate art which have become models for this refined posterity." ROBERTSON, *supra* note 45, at 32 (quoting Dr. Yanagi, Address at the International Conference of Potters and Weavers, Dartington Hall (1952)).

51. See LLEWELLYN, *supra* note 2, at 213–35 (describing appellate judging as a craft and discussing the application of various appellate judging techniques, as "today the appellate judges are becoming conscious of their craft as such, conscious of some of its problems"); Robert Satter, *Tools of the Trade: Judging, Like Carpentry, Requires Craftsmanship*, A.B.A. J., 104, 104 (1992) (reflecting upon Satter's own "surprise [about] what carpentry taught me about judging," and concluding that while "Judge Hand's urge to construct something he could see and touch was understandable after a lifetime of working with his mind," in reality "the carpenter and the judge both build edifices—only the materials they use are different"). A good example of a set of tools available to lawyers and judges are canons of construction. See generally J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970 (1998) (discussing the construction of legal canons of interpretation and how such "canonical features of pedagogy and academic theory shape . . . how students learn the law and how academics study and theorize about the law"); Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1 (1993) (examining the use of legal canons of interpretation in mineral deeds and leases); Robert J. Martinneau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 5 (1993) (arguing that judges use canons of construction and "grand theories" of statutory construction "to provide rational explanations for their decisions" although "other values lie behind the decisions").

theory and develop a body of knowledge, but we must also develop traits and habits through apprenticeship, repetitive work, and experiencing failure. One common characteristic of craftsmen is that as they become experts, rules and theory become less important to them. They have developed habits and knowledge which become part of them. They work swiftly and beautifully, sometimes even without thinking. And thus when we want the answer to a difficult legal question, we typically seek someone with experience, someone who has been dealing with a particular type of problem for a long time. We may be more likely to trust their judgment than the young novice even if the young novice is better at bluebooking, shepardizing, and citing chapter and verse.

Likewise, many craft objects in the law are also made by hand, one at a time. This is especially true in the adjudicative context, where cases and controversies are decided.⁵² Craft objects in the law are also defined by their use and usefulness, including contracts and judicial opinions.⁵³ Moreover, the law is rooted in the past through the tradition of precedent.⁵⁴

52. See U.S. CONST. art. III, § 2, cl. 1 (providing that the "judicial power shall extend" to a list of enumerated "cases" and "controversies"). One of the elementary aspects of the law taught to first year law students is the Supreme Court's refusal to issue advisory opinions—"opinions on the legality of executive or legislative action that did not involve an actual 'case.'" KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 46 (14th ed. 2001). Two commentators have discussed the differing functions of the legislature and the courts:

[D]ivision of responsibilities between the courts and the legislatures is a matter of logic. Legislatures are in the best position to consider far-reaching and complex public policy issues. First, they can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made . . . Courts, on the other hand, are best suited to make incremental changes over time. Judges decide cases one at a time. Their information-gathering is limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely *private* interests.

Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1219–20 (2001).

53. Judicial opinions are used as precedent, but are also useful as a guide to judicial reasoning. Much like useful craft objects that withstand the test of time, well-crafted judicial opinions can take on the status of art. See Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 596 (1996) (maintaining that "[g]reat judicial opinions resemble 'high art,' and some are of museum quality"); Rose Slivka, *The Persistent Object*, in THE CRAFTS OF THE MODERN WORLD 12, 20 (Rose Slivka ed., 1968) (discussing the permanence of good craftsmanship). Slivka writes:

Throughout their long history, crafts have produced useful objects which are later considered fine art. Time has a way of overwhelming the functional values of an object that outlives the men who made and used it, with the power of its own objective presence—that life-invested quality of being that transcends and energizes. When this happens, such objects are forever honored for their own

Rhetoric, Aristotle maintains, is comprised of three different modes of persuasion: *logos*, or reason;⁵⁵ *pathos*, or emotion;⁵⁶ and *ethos*, or character.⁵⁷ The first mode of persuasion is *logos*. Reason involves an appeal to the listener's mind and depends upon arguments that are logically cogent. Reason persuades as we explain things, as we marshal and present evidence, and as we make arguments that are structurally sound. The two primary types of argument employed by rhetoricians are example, which is a type of inductive argument,⁵⁸ and what Aristotle calls the *enthymeme*, which is a type of

sakes—they are art.

Id. In contrast, "[p]oor judicial technique has consequences—delay, laxity in controlling the course of litigation, and above all legal uncertainty—that increase both the number of lawsuits (in the case of uncertainty) and the judicial resources devoted to each lawsuit." RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 223 (1985).

54. Law's deference to the past explicitly manifests itself in the doctrine of precedent and makes the law in an important sense a fundamentally conservative institution. See Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1034 (1990) ("The law accords the past an authority that philosophy does not—an authority which indeed is incompatible with the independent spirit of all philosophical reflection.").

55. Aristotle divides the means of persuasion into three categories: "for some are in the character [*ēthos*] of the speaker, and some in disposing the listener in some way, and some in the argument [*logos*] itself, by showing or seeming to show something." ARISTOTLE, *RHETORIC*, *supra* note 31, at I.2.1356a1–4. "Persuasion occurs through the arguments [*logoi*] when we show the truth or the apparent truth from whatever is persuasive in each case." *Id.* at I.2.1356a23–25. Aristotle states:

[Whether people] reason in accordance with strict logic or more loosely (they do not take propositions from all sources but from those that are relevant to each subject), and since it is impossible through speech to demonstrate anything in any other way, it is evident that it is first necessary . . . to have selected statements about what is possible and most suited to the subject.

Id. at II.22.1396b1–5.

56. See *id.* at I.2.1356a17–19 ("[There is persuasion] through the hearers when they are led to feel emotion [*pathos*] by the speech; for we do not give the same judgment when grieved and rejoicing or when being friendly and hostile.").

57. Aristotle, on the topic of character, states:

[There is persuasion] through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt.

Id. at I.2.1356a5–10.

58. Aristotle describes induction in comparative terms:

In the case of persuasion through proving or seeming to prove something, just as in dialectic there is on the one hand induction [*epagōgē*] and on the other the syllogism and the apparent syllogism, so the situation is similar in rhetoric; for the *paradeigma* ["example"] is an induction, the *enthymema* a syllogism.

Id. at I.2.1356b1–5; see also GARVER, *supra* note 19, at 157 ("Example is the rhetorical version of induction, and so it has a rational structure—it reasons from particular cases to a general

deductive argument.⁵⁹ The *enthymeme* is the rhetorical counterpart of the syllogism in logic.⁶⁰ In contrast to the syllogism (in which the conclusion follows of necessity from the premises, and if the premises are true and justified, then the conclusion is of necessity true), the *enthymeme* is a type of argument that relies upon probabilities.⁶¹ The *enthymeme* works in the law

rule."). To reason inductively is to "make generalizations after observing a number of analogous facts (e.g., Every green apple that I bit into had a sour taste. All green apples must be sour.)." EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 18 (4th ed. 1999). Aristotle breaks down examples into "two species . . . for to speak of things that have happened before is one species of paradigm and to make up [an illustration] is another. Of the latter, comparison [*parabole*] is one kind, fables [*logoi*] another, for example, the Aesopic and Lybian." ARISTOTLE, RHETORIC, *supra* note 31, at II.20.1393a30–33. Aristotle counsels that the best use of an example is as a witness, or a "supplement to the enthymemes . . . when they are put at the end they become witnesses, and a witness is everywhere persuasive." *Id.* at II.20.1394a5–9.

59. To argue deductively is to "draw conclusions from affirmative or negative statements (e.g., No man can attain perfect happiness in this life; John is a man; therefore John cannot attain perfect happiness in this life)." CORBETT & CONNORS, *supra* note 58, at 18. Aristotle explains that an enthymeme is "a sort of syllogism" but "differs from those in dialectic; for [in rhetoric] the conclusion should not be drawn from far back, nor is it necessary to include everything And do not draw the conclusion only from what is necessarily valid, but also from what is true for the most part." ARISTOTLE, RHETORIC, *supra* note 31, at II.22.1395b20–22, II.22.1395b34–35.

60. See CORBETT & CONNORS, *supra* note 58, at 32 ("The appeals to reason that an orator might use do not violate the principles of strict logic; they are merely adaptations of logic. So, whereas the syllogism and induction are the forms that reasoning takes in logic, the enthymeme and the example are the forms that reasoning takes in rhetoric.").

61. A syllogism is constructed in the following manner:

The major premise of [the] syllogism—"All men are mortal"—states a universal truth. Both history and the evidence of our own senses tell us that all men must die. The minor premise—"Socrates is a man"—is a truth that can be unmistakably verified. From these two "truths" then we can arrive at the infallible conclusion that Socrates too will die.

Id. at 53–54. In contrast, the construction of an enthymeme does not require such universal truths:

"John will fail his examination because he hasn't studied." Here we have an enthymeme, both in the sense of a truncated syllogism and in the sense of a deductive argument based on probable premises. The truth of the minor premise here—"John hasn't studied"—could be confirmed. The probable premise resides in the unexpressed proposition—"Anyone who doesn't study will fail his examination." We all know that the latter proposition is not universally true. But we also know that those who do not study usually fail their examinations. It is, in other words, probable that those who do not study will fail. For all practical purposes, that probability is enough to persuade us that next week we will see John's name on the Dean's list of failures.

Id. at 54. Garver asserts that the difference between an enthymeme and a syllogism "will not just be a difference in premises. We cannot define the rhetorical syllogism as syllogism with defective or probable premises, or with a missing premise Rhetoric has to have

when one must rely on probabilities while reasoning from the general (a legal rule) to the specific (the application of the rule to a particular case).⁶²

The second mode of persuasion is *pathos*, or emotion, which centers on an appeal to the listener's heart and depends upon making appeals to the feelings and prejudices of one's audience.⁶³ Popular portrayals of lawyering often include the lawyer's ability to make emotional appeals.⁶⁴ Emotions such as anger, pity, fear, hate, and love affect the reasoning abilities and legal decisions of a judge or jury.⁶⁵ When lawyers focus solely on logic and organization, they

argumentative standards which are audience-relative The enthymeme is the body of rhetoric, and character is its soul." GARVER, *supra* note 19, at 149–50.

62. See, e.g., GARVER, *supra* note 19, at 97 ("Legal rhetoric is the only kind which has a theory, because it is the only place where reasoning from rule to case, i.e., the enthymeme, is central."); White, *supra* note 19, at 687 ("In the courtroom the truth is never known, and each of the lawyers tries to persuade the jury not of the truth, but that his (or her) view is more probable than the other one (or that the other side has not attained some requisite degree of probability).").

63. Garver states that:

Distinctions between *ēthos* and *pathos* and between *logos* and *pathos* were quite common before Aristotle, but the construction of this trio is original with him. The three sources of proof, *ēthos*, *pathos*, and *logos*, are not coequal

Stimulating the appropriate emotions in an audience is a necessary part of displaying the desired character in a speaker. *Pathos* is, in the art of rhetoric, subordinate to *ēthos*.

GARVER, *supra* note 19, at 110. The emotions "are part of the art of rhetoric because understanding them provides the speaker with ways of exhibiting *eunoia* [inoperative friendship], in that they enable him, and deliberators and judges in the audience, to apprehend the relevant particulars for sound ethical decision and *phronēsis*." *Id.* at 111.

64. See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 2 (Peter Brooks & Paul Gewirtz eds., 1996) ("Both scholars and the public have increasingly been drawn to law as an arena where vivid human stories are played out . . ."). There are:

proliferating portrayals of law in popular culture . . . whether in television programs such as *L.A. Law* and *NYPD Blue*, novels by John Grisham and Scott Turow, movies ranging from *The Accused* to *The Verdict*, or the news media's now-extensive coverage of law in real life . . . narrative and rhetoric pervade all of law and, in a sense, constitute law.

Id. at 2–3.

65. Aristotle states that the "emotions [*pathē*] are those things through which, by undergoing change, people come to differ in their judgments and which are accompanied by pain and pleasure, for example, anger, pity, fear, and other such things and their opposites." ARISTOTLE, RHETORIC, *supra* note 31, at II.1.1378a21–23. Aristotle further asserts:

[T]he audience to be disposed in a certain way [is more useful] in lawsuits; for things do not seem the same to those who are friendly and those who are hostile, nor [the same] to the angry and the calm but either altogether different or different in importance: to one who is friendly, the person about whom he passes judgment seems not to do wrong or only in a small way; to one who is hostile, the

overlook the tremendous impact the emotional aspect of a case can have on their audience.⁶⁶

The third mode of persuasion is *ethos*, or character. This mode of persuasion, Aristotle suggests, is the most persuasive of all, because we are likely to believe those whom we trust.⁶⁷ Many contemporary interpreters of Aristotle translate *ethos* as reputation, image, credibility, or persona, but Aristotle had something much deeper in mind.⁶⁸ *Ethos* is not primarily a matter

opposite

Id. at II.1.1377b32–1378a2; *see id.* at II.2–11 for Aristotle's in-depth coverage of the emotions he deems most useful to a speaker for all types of rhetoric: anger, calmness, friendliness, enmity, fear, confidence, shame, shamelessness, kindness, unkindness, pity, indignation, envy, and emulation.

66. *See* Michael Frost, *Ethos, Pathos, and Legal Audience*, 99 DICK. L. REV. 85, 85–86 (1994) (discussing the acknowledged importance of emotion when presenting a case). Frost notes:

Although treatises on appellate advocacy and other general advocacy treatises sometimes discuss the part that emotion and lawyer credibility play in persuasive discourse, the fullest treatment of the topic appears in trial advocacy treatises . . . [that] usually discuss how emotion . . . play[s] an important part in persuading courts and juries to the lawyer's point of view. And, in their periodical literature and journals, trial lawyers frequently remind one another, formally and informally, that legal arguments are not won solely on the basis of logical consistency and substantive merits and that intangible factors often affect the outcome.

Id.

67. Aristotle asserts that "character is almost, so to speak, the controlling factor in persuasion." ARISTOTLE, RHETORIC, *supra* note 31, at I.2.1356a15–16; *see also* GARVER, *supra* note 19, at 91 ("Aristotle remind[s] his readers that persuasiveness is persuasiveness to someone, and so choice too is relative to the characters of the speaker and hearer . . ."). Garver further asserts that *ethos* persuades because "the end of rhetoric is belief and trust, and belief and trust attach primarily to people whom we trust, and only derivatively to propositions that we believe." *Id.* at 146.

68. *See, e.g.,* Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167, 168 (2002) (equating *ethos* with "an advocate's credibility" and using principles of rhetoric to evaluate Scalia's dissent in the *VMI* case); Eileen A. Scallen & William E. Wiethoff, *The Ethos of Expert Witnesses: Confusing the Admissibility, Sufficiency and Credibility of Expert Testimony*, 49 HASTINGS L.J. 1143, 1146 (1998) (asserting that "[a]s it was used in ancient Greece, the term *ethos* is generally translated as the speaker's reputation for wisdom, virtue, and good will toward the audience" but that "[t]o Aristotle, proofs of *ethos*—or competence, character, and benevolence—are drawn from self-referential statements by orators and nowhere else. That is, the speaker's general and pre-existing reputation is irrelevant"); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991) (identifying *ethos* as "a distinct and identifiable personality"). Aristotle points out that character and reputation are not necessarily synonymous when he states that discerning a person's character "should result from the speech, not from a previous opinion that the speaker is a certain kind of person." ARISTOTLE, RHETORIC, *supra* note 31, at I.2.1356a10–11. "The first time Aristotle introduces the idea that *ēthos* is a source of conviction, he stresses the fact that it must be *ēthos* that comes

of who people think you are, but of the type of person you really are. The public face of character is reputation, which does not necessarily present an accurate reflection of character.⁶⁹ Therefore, it is the role of the speaker to establish *ethos* for the audience.

The skillful lawyer will be adept at all three modes of persuasion. Exercising an understanding of psychology helps the skilled rhetorician connect with the audience through *ethos*, *pathos*, and *logos*.⁷⁰ Aristotle stressed that all three elements are essential and inexorably linked to successful persuasion.⁷¹

from the argument itself, not some preexisting reputation of the speaker." GARVER, *supra* note 19, at 15 (citation omitted). One commentator has described the issue of character in these words:

The character of the speaker is manifest in his discourse—in what he says and how he says it. It is implicit in the way he argues and in the way he addresses the character and emotions of his audience. Particularly when he might seem to speak from his own interests or on his own behalf, the rhetorician must establish his credibility, his intelligence (*phronēsis* and *eunoia*), and character (*aretē*) as such traits might be perceived by his audience.

Amélie Oksenberg Rorty, *Structuring Rhetoric*, in *ESSAYS ON ARISTOTLE'S RHETORIC* 1, 8–9 (Amélie Oksenberg Rorty ed., 1996).

69. See Pamela S. Karlan, *The Path of the Law Firm: A Comment on Ribstein's "Ethical Rules, Agency Costs, and Law Firm Structure"*, 84 VA. L. REV. 1761, 1764 (1998) (discussing the possibility of a lack of correlation between reputation and character). Karlan writes:

Having a reputation for possessing a particular virtue is not the same thing as actually possessing that virtue. This insight underlies the conventional legal understanding that "character" describes an individual's actual qualities and traits while "reputation" describes what the community thinks of her. Over time, of course, a person's reputation may align with her character, but that alignment is not inevitable, and at any given time an outside observer might not be entirely confident that reputation reflects character. Reputation, as essentially an amalgamation of individual opinions, is subject to all the cognitive biases that impair individual judgment. While individuals' mistaken judgments may sometimes cancel one another out and provide an accurate picture they may also exacerbate each other and produce cumulative error.

Id. Rule 405 of the Federal Rules of Evidence provides, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." FED. R. EVID. 405(a). Testimony about reputation is based on opinion and does not necessarily reflect the true character of the accused; therefore, "the trier of fact is less likely to be misled when the evidence is properly labeled as opinion." Fred Warren Bennett, *Criminal Law Symposium: Is the Witness Believable? A New Look at Truth and Veracity Character Evidence and Bad Acts Relevant to Truthfulness in a Criminal Case*, 9 ST. THOMAS L. REV. 569, 581 (1997).

70. See Rorty, *supra* note 68, at 8 ("First, the knowledge of psychology enables the orator to present himself as having a trustworthy *ethos*. Second, it enables him to address the interests of his audience persuasively. Third, it provides some of the basic premises for his arguments.").

71. See ARISTOTLE, *RHETORIC*, *supra* note 31, at I.2.1356a5–20 (describing how *logos*, *ethos*, and *pathos* create successful persuasion).

C. *Distinctive Characteristics*

Practical wisdom, craft, and rhetoric are each defined by different distinctive characteristics. Practical wisdom is distinctive in its focus on *what* should be done. In answering this question, the combination of experience and virtue of character plays a decisive role. One must have a certain degree of experience to discern what the correct end should be.⁷² Virtue of character is central to practical wisdom because a person's character shapes his thoughts and desires, and ultimately, his ends (the choice of what should be done).⁷³

Craft's focus is not primarily on what should be done, but rather on *how* something should be done.⁷⁴ Craftsmanship is largely a matter of mastery of technique.⁷⁵ In answering the question of how something should be done, the relationship of craft with the past and with a particular craft tradition and the limits of rules and theory in encompassing the realm of craft knowledge are of particular significance. Because the craft tradition is rooted in the past, the craftsman looks to the techniques of his predecessors to decide how to accomplish his work.⁷⁶ As Peter Dormer has explained, "rules are learnt and

72. ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at VI.8.1142a13–15 ("[I]t is thought that a young man of practical wisdom cannot be found. The cause is that such wisdom is concerned not only with universals but with particulars, which become familiar from experience, but a young man has no experience, for it is length of time that gives experience . . ."); SHERMAN, *supra* note 16, at 39 ("Given the wide array of contexts and variables, the exercise of practical reason will require considerable empirical exposure, as well as the inductive capacities to learn from such experience.").

73. See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at I.2.1139a31–35 (claiming that the origin of action is choice, which involves reasoning toward an end, requiring a combination of thought and desire); see also Rorty, *supra* note 68, at 13 (considering the relationship between choices and ends). Rorty argues:

In one way, therefore, a person's character can be summarized by his ends: they form an organized system of ordered preferences, the structure of his practical reasoning Since thought moves nothing, choices require a combination of thought and *ethos*. The ultimate source (*arche*) of action is the person (*anthropos*), presumably conceived as a structured unity of his character traits . . . the union of reason and desire.

Id.

74. See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at VI.4.1140a11–12 (stating that craft is "concerned with coming into being, i.e. with contriving and considering *how* something may come into being which is capable of either being or not being" (emphasis added)).

75. See *id.* at VI.12.1144a28–30 (arguing that a skilled craftsman must have the ability to habitually produce the desired product, or in other words, he must be a master of the technique).

76. See ROBERTSON, *supra* note 45, at 43 (observing that "in an age which has almost lost its craft traditions a much greater responsibility is put on the individual craftsman, to draw strength from the past and yet be alive to the needs of the present" and that "[m]en and women today who devote their lives to any aspect of art or craft must resolve their relationship to the

then, as one becomes expert, 'forgotten' (they become second nature and we take them for granted)."⁷⁷ Indeed, if you speak to a master carpenter or a master potter, he may have a difficult time explaining the work he does. In addition, an element of uncertainty exists in craft. Craftsmen are accustomed to failure. They often have to start over, put the clay back into a lump, and try again. And often they are uncertain as to whether they have succeeded.

In contrast, rhetoric is distinguished by its focus on *why* something should be done, and the temporal focus of rhetoric will vary by context. Rhetoric is particularly important in three types of situations: (1) the legislative context, in which the emphasis is upon deliberating about the future;⁷⁸ (2) the judicial context, in which the emphasis is upon doing justice based upon events of the past;⁷⁹ and (3) the critical context, in which the emphasis is upon evaluating something in the present. These are differences of degree rather than category. Legislative deliberation is not limited to deliberating about the future; past experience and present perspectives will be relevant. Nevertheless, the focus of legislation is on the future. Similarly, the adjudicative context is not entirely backward looking; concern for the future and the present may be relevant to judicial choice. Despite this relevance, the focus of litigation is upon events of the past and what should be done based upon what happened at some time in the past. The critical context does not focus exclusively upon the present, but while concern for the past and the future can inform critical assessment, it is characterized by its focus on the present time. The law is concerned with all three of these distinctive characteristics of practical wisdom, craft, and rhetoric.

past").

77. DORMER, *supra* note 49, at 20. "Craft knowledge is often difficult or even impossible to translate into theory or to encode (for the purposes of computing) into mathematical or logical languages." *Id.* at 11.

78. See ARISTOTLE, RHETORIC, *supra* note 31, at I.3.1358a36–b5 ("The species [*eidē*] of rhetoric are three in number; for such is the number [of classes] to which the hearers of speeches belong A member of a democratic assembly is an example of one judging about future happenings."). Aristotle also writes:

Each of these has its own "time": for the deliberative speaker, the future (for whether exhorting or dissuading he advises about future events) . . . for the deliberative speaker [the end] is the advantageous [*sympheron*] and the harmful (for someone urging something advises it as the better course and one dissuading dissuades on the ground that it is worse), and he includes other factors as incidental: whether it is just or unjust, or honorable or disgraceful"

Id. at I.3.1358b14–22.

79. See *id.* at I.3.1358b6 ("[A] juryman [is] an example of one judging the past"). Aristotle argues further that "for the speaker in court" the time is "the past (for he always prosecutes or defends concerning what has been done) . . . for those speaking in law courts [the end] is the just [*dikaion*] and the unjust." *Id.* at I.3.1358b23.

What should be done, how it should be done, and why it should be done are questions that are ever present in the law.

D. Success

Success is measured differently for practical wisdom, craft, and rhetoric. Practical wisdom measures success according to whether deliberation, choice, and action are correct or right.⁸⁰ In the adjudicative context, one measure of a judge's success is whether or not the correct outcome was achieved in a particular case.⁸¹ Winning is not the only measure of success, for history often labels judicial victories (majority positions) as mistakes and judicial defeats (minority positions) as correct.⁸²

80. See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 16, at VI.2.1139a22–b3 (arguing that choice is central to practical wisdom). Aristotle claims:

[M]oral excellence is a state concerned with choice, and choice is deliberate desire, therefore both the reasoning must be true and the desire right, if the choice is to be good, and the latter must pursue just what the former asserts . . . for good action is an end, and desire aims at this.

Id.

81. See James Boyd White, *Judicial Opinion Writing: What's An Opinion For?*, 62 U. CHI. L. REV. 1363, 1366–67 (1995) (evaluating judicial opinions and their effect over time). White writes:

For in every case the court is saying not only, "This is the right outcome for this case," but also, "This is the right way to think and talk about this case, and others like it." The opinion in this way gives authority to its own modes of thought and expression, to its own intellectual and literary forms. These, like modes of reasoning in other fields, may be sound or defective, and this is true not only intellectually but ethically and politically too. An opinion may be authoritarian or democratic, generous or mean-spirited, doctrinaire or open to multiple arguments, and so on—indeed, it may exhibit many of the ethical and political qualities that other kinds of conduct can. Action with words is after all a form of action, in relation both to a cultural inheritance and to other people, and it is charged with ethical and political significance. The excellence of the opinion is not one of "mere style," but an excellence of thought, represented and enacted in language in such a way as to live in the minds of others.

Id.

82. See, e.g., Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689, 1694 (1994) (noting Supreme Court cases that have overruled previous Court decisions). As Padden explains:

Overruling precedent has long been an accepted part of the Supreme Court's jurisprudence, dating back to the Court's first overruling of a Supreme Court decision in *Hudson v. Guestier*, which overruled *Rose v. Himley*. Today, most commentators agree that stare decisis is not an inexorable command; in certain contexts, overruling precedent is justified and, in some cases, even necessary

In comparison, the measure of success for craft is the successful synthesis of form and function.⁸³ For example, a chair will not only be evaluated based on whether it is beautiful or well-made (its form), but it will also be judged according to whether it will bear weight or whether it gives someone sitting on it a back ache (its function). Judicial opinions are often evaluated based upon criteria familiar to crafts and are commonly described as being solid, sound, or well-crafted.⁸⁴

The measure of success for rhetoric is two-fold. One measure of success is victory, which is the external end of rhetoric.⁸⁵ By this measure, an

Id. (citations omitted). As an example, Justice O'Connor maintained that the case of *Booth v. Maryland*, 482 U.S. 496 (1987), was "'wrongly decided.' She noted that she had joined both dissents in *Booth* and, therefore, stood ready to overrule it if the Court would do so." Padden, *supra*, at 1700. The Supreme Court once addressed *Booth* as precedent in the case of *Payne v. Tennessee*, 498 U.S. 1080 (1991), and concluded that *Booth* was "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," and as a result, *Booth* was overruled. Padden, *supra*, at 1702-03.

83. Function relates to how well an object meets its intended purpose and form relates to the object's aesthetics, namely attention to detail, finish quality, and integrity. Scharffs, *Law as Craft*, *supra* note 18, at 2299. Mass production focuses on function while art focuses on form, but a delicate fusion of form and function is required to raise an object to the level of a craft. *Id.* at 2299-2301. For example, "[t]he value of furniture depends on the directness of its response to the requirements that called it into being, and to the nature of the conditions that evoked it." Halsey Ricardo, *Of the Room and Furniture*, in ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 274, 279 (William Morris ed., photo. reprint 1996) (1893).

84. See RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 7-8 (1992) ("No opinion with a misguided outcome has ever in fact been 'well crafted' . . . an opinion wrong in its outcome may not at the same time be excellent in its craftsmanship."); Richard S. Markovits, *Taking Legal Argument Seriously: An Introduction*, 74 CHI.-KENT. L. REV. 317, 318 (1999) (discussing the value of a well-crafted argument). Markovits writes:

[A]n individual takes a given society's legal argument seriously in a "pragmatic-craftsmanship" sense if he believes that the effectiveness of any argument that might be used to determine what the law is in that culture will be increased if the argument is well crafted and perceived to be a valid legal argument.

Id. Judicial opinions, like craft objects, are often evaluated on the synthesis of form and function. See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1456 (1995) (explaining that people "expect judicial opinions to either be accurate reflections of the reasoning processes of their authors, or literary performances to be appreciated like we appreciate a novel, a poem, or even an elegantly written work of nonfiction," but asserting that "function lies much closer to that served by the less literary legal performances we find in the *Statutes at Large* and the *Code of Federal Regulations*"). If this contention is true, Schauer states, "then the formal and a literary style of many contemporary judicial opinions may be less an object of scorn and more of an indication—hardly yet an exemplar—of the functions that judicial opinions might serve in the actual operation of the law." *Id.*

85. See ARISTOTLE, RHETORIC, *supra* note 31, at I.1.1354b28-29 (asserting that to be successful at the external end of rhetoric, one must "gain over the hearer; for the judgment is about other people's business and the judges, considering the matter in relation to their own

advertiser is successful if a consumer buys her television, a politician is successful if she is elected, a lawyer is successful if she wins her case, and a judge is successful if she garners a majority in favor of her favored outcome and a higher court does not reverse the panel. A second measure of success is whether the rhetorician makes the best possible argument on behalf of a particular position, which is the internal end of rhetoric.⁸⁶

As advocates, lawyers face both external and internal measures of success. The lawyer who makes the best argument on behalf of his client does not necessarily win. Judges are familiar with the experience of one side winning a case, even though the lawyers on the other side did a better job of presenting their case.⁸⁷ Lawyers who win cases may mistakenly conclude that they have succeeded in the second internal sense, although their victory is limited to the first external sense. Indeed, judges may regret rewarding certain lawyers with victory when the lawyer's performance is weak although their case is strong.⁸⁸ Moot court

affairs and listening with partiality, lend themselves to [the needs of] the litigants"); GARVER, *supra* note 19, at 44 ("Rhetoric has two ends, the internal good of finding in each case the available means of persuasion, and the external good of successfully persuading.").

86. See ARISTOTLE, RHETORIC, *supra* note 31, at I.1.1355a6–7 (defining the internal end of rhetoric as seeing "the available means of persuasion in each case, as is true also in all the other arts"). As Eugene Garver asserts:

In cases where there is an art, practitioners do better because their eye is on the guiding (internal) end and not the given (external), end, and the guiding end is more determinate—easier to aim at, easier to tell when you have hit it—and more practicable—easier to posit as an end toward which to calculate means.

GARVER, *supra* note 19, at 33. "Socrates in the *Gorgias* accuses the sophists of having no guiding end at all, but only the vulgar given end, which is not sufficiently determinate to be the end of an art. The sophist has a knack, an *empeiria*, for bringing about the given end, persuasion." *Id.* at 30.

87. See Alex Kozinski, *In Praise of Moot Court—NOT*, 97 COLUM. L. REV. 178, 183 (1997) ("A lawyer can exercise all the lawyerly skills in a technically flawless fashion and still not carry the day because she didn't figure out what was really important to the judges or did not manage to gain their confidence."); Alvin B. Rubin, *What Appeals to the Court*, 67 TEX. L. REV. 225, 225 (1998) (book review) ("There are many brilliant lawyers who argue magnificently in front of the Supreme Court. They mostly lose. The Justices are stubborn and intelligent." (quoting Lawrence M. Friedman, *Justices in Black and White*, N.Y. TIMES, June 24, 1984, § 7 (Book Review Section), at 18)).

88. See Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1, 7 (1980) (commenting on "the possible causes of the inadequate courtroom performances of far too many American lawyers" and suggesting how professional adequacy may be achieved); Roger C. Cramton & Erik M. Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 J. LEGAL EDUC. 253, 256 (1979) (noting a survey wherein 41.3% of the federal judges responding believed there to be a "serious problem of inadequate trial advocacy in their courts"); Irving R. Kaufman, *Attorney*

competitions attempt to reward rhetoric based upon the internal rather than external end, and this feature has received criticism because it encourages young lawyers at a very impressionable time in their legal careers to measure success entirely on instrumental value, rather than on the end to which they work.⁸⁹ Likewise, judges are subject to both external and internal measures of success. A dissenting judge may have the better of the argument even though assessed by external ends she loses (that is, is in a minority). Figure 2 summarizes the concern, components, distinctive characteristics, and measure of success for practical wisdom, craft, and rhetoric.

Incompetence: A Plea for Reform, 69 A.B.A. J. 308, 308–11 (1983) (reflecting on incompetent representation in criminal trials and presenting ideas to remedy this problem). One article describes a common view of litigation:

[A] competition between teams of lawyers, and thus the performance of the lawyers, rather than the merits of the client's case, is the center of litigation While this is contrary to the view of many judges and attorneys, the frequent use of such language in judicial opinions leads to a public perception that this is indeed the way the legal system operates.

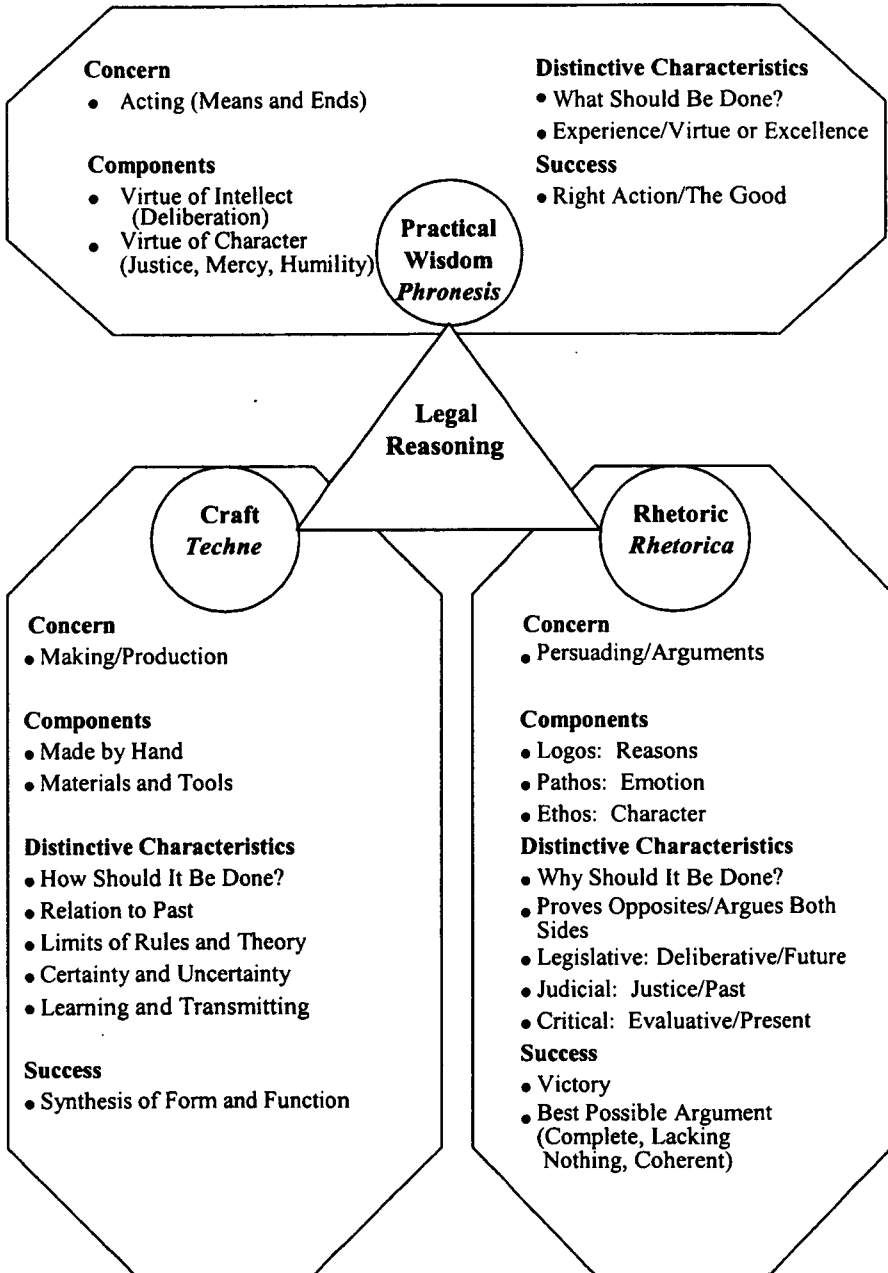
Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225, 239 (1998).

89. See Kozinski, *supra* note 87, at 181–82 (criticizing such competitions' emphasis on advocacy skills over the merits of a case). Judge Kozinski describes the problem:

Perhaps no rule is more universally accepted among moot court competitions than the rule that winners and losers are judged not on the merits of the case, but on their advocacy skills. This principle is so widely accepted—and with so little question—that no one bothers to offer a justification for it. Yet this is a drastic departure from the way things happen in real life. It's as if a medical school held a competition for treating patients, but the contestants were judged on their bedside manner, not on how often their patients survive. In real court, the advocate's focus is on winning the case for the client. The client's and lawyer's interests almost always dovetail, so the lawyer isn't happy unless the client wins. No lawyer I know—no self-respecting lawyer at least—is satisfied with praise for a brilliant oral argument if he winds up losing the case.

Id. (citations omitted).

Figure 2. Concerns, Components, Distinctive Characteristics, and Successes of Practical Wisdom, Craft, and Rhetoric



III. *The Dark Side of Practical Wisdom, Craft, and Rhetoric*

Although practical wisdom, craft, and rhetoric are each important components of legal and judicial reasoning, each concept by itself is an incomplete account of legal and judicial reasoning. Moreover, each concept has significant weaknesses, an accompanying set of risks—a dark side. Thus, each concept is not only incomplete as an account of legal reasoning, but by itself each of these concepts constitutes a potentially dangerous account of legal reasoning. In this section, I will briefly examine the chief risks or weaknesses associated with practical wisdom, craft, and rhetoric. Figure 3 illustrates the dark side of each concept.

A. *Practical Wisdom*

The primary criticism and greatest risk associated with practical wisdom is its latent elitism.⁹⁰ Some people are more practically wise than others. Thus, virtues of intellect and character are not distributed equitably among all people, lawyers, or judges. Perhaps the elitist nature of practical wisdom should not be considered a disadvantage, but rather only a feature of practical wisdom, a feature that highlights the importance of caution in whom we appoint to serve as judges.⁹¹ But, even granting that care should be taken in selecting judges,

90. See Adam Thurschwell, *Friendship, Tradition, Democracy: Two Readings of Aristotle*, 5 LAW, TEXT & CULTURE 271, 285 (2001) (commenting on the "charge that any political philosophy rooted in Aristotle will necessarily carry his elitism along with it"). Classical theory is "permeated by a sense of elitism; certain individuals are deemed better suited for the role of citizen/statesman/lawyer, and not surprisingly, they have tended to be educated males in charge of their households." Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1730 (1995). Kronman asserts that practical wisdom belongs to "the one who serves as a model for the rest." KRONMAN, *supra* note 17, at 2. Kronman calls this elite figure the "lawyer-statesman" who "embod[ies] not merely a generalized conception of political virtue but a distinctive professional ideal." *Id.* at 109.

91. See Lawrence B. Solum, Comment, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1738 (1988) (arguing for the need for "judicial virtue" to serve as a meritorious basis for the selection of judges). The judicial appointment process is based on the idea that "the judiciary should be representative," and "Supreme Court appointments, for example, have always reflected a balance of religion, geography, and background." Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725, 747 (1992). The idea of a representative judiciary was taken to the extreme, however, in Senator Roman Hruska's statement that G. Harold Carswell should sit on the Court because "[e]ven if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance. We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that there." HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 16–17 (2d ed. 1985) (quoting Senator

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.⁹² Our discomfort with practical wisdom is heightened by our justified contempt for Aristotle's biological elitism.⁹³ On the other hand, Professor Anthony Kronman has argued that while we have every reason to reject Aristotle's biological elitism, Aristotle's virtue-based elitism may stand on a stronger footing.⁹⁴

Hruska's defense of the Supreme Court nomination of Carswell, considered a third-rate intellect).

92. Kronman sets forth the inegalitarian nature of practical wisdom in his description of the "lawyer-statesman ideal," claiming that "some citizens have a superior ability to discern the public good . . . this superiority is due to their excellence of judgment; and . . . good judgment is a trait of character and not simply an intellectual skill." KRONMAN, *supra* note 17, at 35. One of the primary criticisms of the inegalitarian nature of practical wisdom is that inequality can lead to injustice. See BERLIN, *supra* note 43, at 14–16 (reinforcing that millions have been slaughtered in the name of saving those who possess "superior attributes"); Edward Allen Kent, *Justice*, in LAW AND PHILOSOPHY: READINGS IN LEGAL PHILOSOPHY 463, 463 (Edward Allen Kent ed., 1970) (asserting that justice entails "the conflict of competing claims and not infrequently the clash of powerful social interests with the rights of individuals").

93. Numerous scholars have discussed Aristotle's sexism and racism. See, e.g., MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 370–71 (1986) (suggesting that Aristotle's "investigation of women's potential for excellence" was "notoriously crude and hasty"); Sandra Harding & Merrill B. Hintikka, *Introduction to DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE* i, xi–xii (Sandra Harding & Merrill B. Hintikka eds., 1983) (arguing that Aristotle's sexism cannot effectively be separated from his philosophy, as both are firmly entangled, and concluding that Aristotle's sexism warps his entire political philosophy); Stephen R.L. Clark, *Aristotle's Woman*, 3 HIST. POL. THOUGHT 177, 179–83 (1982) (describing Aristotle's characterizations of women and emphasizing Aristotle's sexist positions in his comparisons of women and men, such as "that women were weaker than men, and with less steady judgment"). Professor Nussbaum explains that Aristotle "is able to bypass the problem of developing their (women's) capabilities and he is able to deny them a share in the highest *philia*, as a result of bare assertions about their incapacity for full adult moral choice that show no sign of either sensitivity or close attention." NUSSBAUM, *supra*, at 371 (citing G.E.R. LLOYD, SCIENCE AND SPECULATION 128–64 (1983)) (arguing that Aristotle echoes and supports the "pervasive ideology of his culture" in his work on women); Martha C. Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 221, 227 (1990) (stating that in Aristotle's ideal political arrangement everyone has potential to flourish and noting that Aristotle clearly excluded women and slaves). Kronman explains that Aristotle thought some human beings are unqualified for participation in political affairs on account of their age or sex, and others—whom he called natural slaves—because of their native incapacity for self-government. In fact Aristotle ascribed the capacity for citizenship to only one small group of human beings: the adult male heads of households. All others, he felt, were incapable of the self-rule that politics implies and so had to be ruled despotically, outside the realm of politics, by others. KRONMAN, *supra* note 17, at 37.

94. As Professor Kronman asserts:

[T]here is no reason to think that just because more people participate in politics, the superior ability of some to do it well will disappear . . . the distinction Aristotle

Another reason to be suspicious of practical wisdom's elitism is that the person of practical wisdom may be unable to explain, at least fully, the reasons and grounds for her judgments.⁹⁵ Practical wisdom's inarticulateness may leave us wondering whether judgment reflects wisdom, mere cleverness, or simple raw power.⁹⁶ Practical wisdom poses the risk that public reasons given in favor of a course of action are incomplete or even pretextual.⁹⁷ This risk is

emphasizes, between the master of politics and the ordinary citizen, would remain, and for the reasons he gives. Repudiating Aristotle's biological elitism (which shapes his conception of the limits of the public realm) thus leaves this other, character-based elitism (which underlies his account of excellence within that realm) in place.

KRONMAN, *supra* note 17, at 42.

95. Judge Benjamin Cardozo described the inarticulateness of judicial decisionmaking as follows:

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: He will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft Some principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been

Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, in *LAW AND PHILOSOPHY: READINGS IN LEGAL PHILOSOPHY* 393, 393-94 (Edward Allen Kent ed., 1970). Justice Holmes "did not believe that 'theory and philosophy' necessarily supplied the practical knowledge and understanding that made a good judicial legislator. As a pragmatist, . . . he thought that 'successful men of affairs' operated on 'premises' that though 'inarticulate' were often 'profound.'" Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 848 (1989) (quoting from *I HOLMES-LASKI LETTERS* 121 (M. Howe ed., 1953) (letter dated Dec. 26, 1917)).

96. One commentator describes the consideration in the following manner:

If there were a direct proportion between rationality and persuasiveness, then the ethical distinction between *phronēsis* [practical wisdom] and cleverness would be irrelevant rhetorically, just as it is out of place in logic or science People are persuaded by what they think is *phronēsis*; they are not persuaded by what they take to be cleverness.

GARVER, *supra* note 19, at 147.

97. There is a concern that judges give public reasons for decisions that are not their "real" reasons. See ALAN N. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 5 (2001) (arguing that the Supreme Court justices were "motivated by partisan advantage, while others were motivated by expectation of personal gain" in the *Bush v. Gore* decision). *But see* RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* ix (2001) (arguing that "the U.S. Supreme Court's interventions in the postelection struggle were not the outrages that its liberal critics have claimed them to be but, rather, a pragmatically defensible series of responses to a looming political and constitutional crisis").

compounded by the fact that just because someone is powerful does not mean that he is right. This brings to mind the old saw that the United States Supreme Court is not final because they are infallible, but rather that they are infallible because they are final.⁹⁸

Practical wisdom's elitism and inarticulateness may combine to lead to even more insidious dangers, those associated with private truths. One may be so convinced that one understands what is good and right that he is willing to impose that view on others even at tremendous costs, and this conviction leads to totalitarianism. Isaiah Berlin provided 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, 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."⁹⁹ The rights of others are often trampled in the quest to achieve the aim of totalitarianism, an illusory end.¹⁰⁰

98. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., dissenting). Fortunately, finality in the law is not absolute in the face of injustice. See Harry W. Jones, *The Practice of Justice*, in *LAW AND PHILOSOPHY: READINGS IN LEGAL PHILOSOPHY* 425, 429 (Edward Allen Kent ed., 1970) (noting the malleability of *stare decisis*). Jones argues that courts have some discretion even when confronted by previous and pertinent case law:

To say that a court follows the principle of *stare decisis* does not mean that it applies, in a mechanical and indiscriminating way, the general propositions of law stated in past judicial opinions. In the use of case-law precedents there is always room for necessary case-to-case individualization, always leeway for Aristotle's "rectification of law where law is defective because of its generality."

Id.

99. BERLIN, *supra* note 43, at 15. Berlin asserts that the very idea of a "final solution," or the creation of a harmonious, utopian society, is a dangerous one because "surely no cost would be too high to obtain it: to make mankind just and happy and creative and harmonious for ever—what could be too high a price to pay for that?" *Id.* To achieve such a result, hundreds of thousands may have to be sacrificed and the "one thing that we may be sure of is the reality of the sacrifice, the dying and the dead. But the ideal for the sake of which they die remains unrealized. The eggs are broken, and the habit of breaking them grows, but the omelet remains invisible." *Id.* at 16.

100. Berlin describes the totalitarian viewpoint as follows:

Since I know the only true path to the ultimate solution of the problems of society, I know which way to drive the human caravan; and since you are ignorant of what I know, you cannot be allowed to have liberty of choice even within the narrowest limits, if the goal is to be reached. You declare that a given policy will make you happier, or freer, or give you room to breathe; but I know that you are mistaken, I know what you need, what all men need; and if there is resistance based on ignorance or malevolence, then it must be broken and hundreds of thousands may have to perish to make millions happy for all time If your desire to save mankind is serious, you must harden your heart, and not reckon the cost.

Id. at 15–16.

Lawyers and especially judges might be particularly susceptible to these risks and dangers, given their access to the levers of influence and power. Common themes in discussions of judges include their tendency to become arrogant,¹⁰¹ and complaints about the "imperial judiciary."¹⁰² Indeed, judges who become accustomed to receiving tremendous deference, having people stop talking when they interrupt, addressing them as "your honor," and reliably laughing at their jokes, could easily come to think of themselves as persons of great practical wisdom, when in reality this may be far from the truth.¹⁰³

A defender of practical wisdom might respond that these criticisms are apropos not of practical wisdom but of distortions or perversions of the concept.¹⁰⁴ A person of practical wisdom who successfully and fully combines

101. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 446 (1992) (finding that many plaintiff attorneys prefer state courts to federal courts because of the "perception that federal judges are more aloof and arrogant than their state court counterparts"). Legislators often regard "federal judges as arrogant and sanctimonious creatures who never have to seek reelection." J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1187 (1994). One of the main reasons partisan elections for judicial positions were instituted during Andrew Jackson's presidency was because of the belief that judicial appointment methods produced "corrupt, elitist, and arrogant judges." Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 77 (2001). Aharon Barak, the President of the Supreme Court in Israel, counsels that judges should be careful not to abuse their power and also should display "modesty and an absence of arrogance." Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 61-62 (2002) (condemning Chief Justice Hughes's "perniciously arrogant" statement that "we are under a Constitution, but the Constitution is what the judges say it is").

102. See Charles Krauthammer, *Our Imperial Judiciary: We Need to Bring a Gavel Down on Arrogant Judges Like Florida's Supremes*, TIME, Dec. 4, 2000, at 46 (arguing that an imperial judiciary is a "debilitating constitutional problem we have been suffering for 40 years: arrogant, activist courts trampling the prerogatives of elected legislatures and elected governments in deciding how we are to live").

103. The deference afforded to judges is supported by "majestic symbols" that "reinforce the power and importance of law." Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. MICH. ST. U. L. REV. 935, 936 (1997). Judges wear "black robes and sit at high benches elevated above other people in the courtroom. Everyone must stand when a judge enters or leaves a courtroom and they must address the judge as 'your honor.' These traditional formal procedures give judicial officers . . . a unique measure of symbolic deference and respect . . ." CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 5-6 (2d ed. 1997). A visible threat to the success of a newly appointed federal judge is that "the new job itself might change him, whether because of its necessary isolation from everyday life or because of the extraordinary freedom, security, and deference that are the common lot of federal appellate judges." Tribute, *Remarks from the Investiture of Judge William A. Fletcher*, 87 CAL. L. REV. 511, 523 (1999) (statement of Steven McG. Bundy).

104. Criticisms of practical wisdom as an ideal may be tied, not to the true *phronimos*, but to those who only approximate the ideal. See KRONMAN, *supra* note 17, at 11 (commenting on the "demise of the lawyer-statesman as an important professional type and on the diminishing

the traits of virtue of intellect and virtue of character will not fall into these traps of elitism, inarticulateness, totalitarianism, or even arrogance. This is true. But, it is only a tentative or incomplete defense of practical wisdom, because sometimes it is not easy to distinguish those with practical wisdom from pretenders.¹⁰⁵ If one possesses intellect only, one is clever. But, without the requisite virtues of character, one will not be wise. This is true of judges as well. Amoral, clever judges are dangerous. Indeed, they are far more dangerous than dull or unintelligent amoral judges. If a judge or some other person who rules over us is truly possessed of practical wisdom, we may not be bothered, indeed we will be heartened, by the fact that the judge is smarter and more virtuous than the rest of us. We may not care whether they are unable completely to explain the basis for their judgments; and we may even be tolerant of a certain arrogance or imperial temperament on the part of such a judge or ruler.¹⁰⁶ But if we lack confidence that the judge or ruler is really the most practically wise among us, then the elitism, inarticulateness, and potential arrogance of those individuals will leave us with a healthy dose of discomfort at the fact that such a person wields such tremendous power over us. Because it is unlikely that we are to have such a high degree of confidence in our judges and rulers, it would seem that we are destined to remain somewhat suspicious of practical wisdom as an ideal, and claims of practical wisdom in practice.¹⁰⁷

role that such lawyers now play in American politics").

105. The difference between the practically wise and those who only appear to be is similar to the difference between the ethical rhetorician and the sophist. See GARVER, *supra* note 19, at 164 ("Logic is incapable of distinguishing the rhetorician from the sophist as it is in telling apart *phronēsis* and cleverness. Only ethical criteria will work.").

106. Judicial biographies are often prime examples of a willingness to set aside the frailties of a judge if one believes him to be possessed of a higher wisdom. Biographers often idealize the judge, "prun[ing] the 'nonessential' features." Richard A. Posner, *Objectivity and Hagiography in Judicial Biography: Judicial Biography*, 70 N.Y.U. L. REV. 502, 504 (1995).

107. One of the difficulties of living in the postmodern world, where the very idea of "objectivity" has been subject to devastating criticism, is a general loss of confidence in others. Berlin attributes this loss of confidence to "the spectre of relativism mak[ing] its dreaded appearance, and with it the beginning of the dissolution of faith in the very concept of universally valid goals." BERLIN, *supra* note 43, at 33. We tend to characterize the past in a very romantic way, but many believe that "the golden age is in a past which can never return." *Id.* at 21. Llewellyn describes the relation between the postmodern mindset and the legal system as follows:

No longer does the Supreme Court sit in a holy of holies which no respectable lawyer may profane by criticism or even honest inquiry. No longer is the established bar convinced that laws "and not" judges are doing the deciding of cases. No longer is "certainty" in the outcome of appellate cases an idol too sacred for binoculars. . . . The danger today is that an older generation of the bar may be losing all confidence in the steadiness of the courts in their work. That is bad. The danger today is that the middle and younger generation of the bar may have already

B. Craft

The dark side of craft is that it is largely amoral.¹⁰⁸ One can bring the skills of the craftsman to the service of questionable or even terrible ends. For example, there is nothing oxymoronic about speaking of the "Nazi craftsman."¹⁰⁹ A number of negative connotations of the term craft illustrate its

lost all confidence in the steadiness of both the courts in their work and in the law in its. That is worse.

LLEWELLYN, *supra* note 2, at 15.

108. This is not to say that craft is entirely devoid of moral content. Craftsmen are often characterized by their patience, care, and love of their craft, and these are moral traits. See Scharffs, *Law as Craft*, *supra* note 18, at 2272 (suggesting that these traits can accurately be characterized as virtues of character). Nevertheless, Aristotle characterizes craft as essentially amoral because craftsmen do not have to exercise moral virtue in order to apply their knowledge and create a good end product. See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at II.4.1105a27-32 (arguing that "if the acts that are in accordance with the excellences have themselves a certain character it does not follow that they are done justly or temperately").

109. See Thomas F. Lambert, Jr., *Recalling the War Crimes Trials of World War II*, 149 MIL. L. REV. 15, 19 (1995) (describing a Nazi general's conception of himself as a craftsman in his methods of execution during the Holocaust). Lambert recounts the Nuremberg trial examination of Otto Ohlendorf, a high-ranking SS General, as follows:

The examiner said to him, "Well, what was your group responsible for?"

And he answered very coolly, he was a cool character to anticipate that word, he was laid back. He was mild mannered, even had his own inverted charm, come to think of it, and he said, "Well, we were responsible for the liquidation (which he translated as meaning killing) of between 80,000 and 90,000 persons, mostly Jews, Russian commissars, gypsies, and other unworthies."

The examiner said, "Well, could you be more specific?"

Ohlendorf said, "No. It was between 80,000 and 90,000," a small smile playing about his thin lips. "You must allow me a margin of error."

Now, there we said, there was another action group over here, Einstazgruppen A, which seems to be responsible for 125,000. His pride was infringed. He was a craftsman. He snapped out, "My methods were more efficient."

The examiner responded, "What do you mean? Explain to us. Yours were more efficient?"

He said, "They used gas vans for their executions. Toward the end of the war, it became more difficult to get replacement parts for those gas vans. And the wretched inmates of the vans were told that they were just being relocated, but they would know better, and the wailing would begin, they knew they were heading for extinction."

And Ohlendorf said, "It disturbed the morale of the German civil population to hear all this wailing as the gas vans moved along their highways and other public ways. My methods were more efficient. I used rifle executions. Afterwards, it was so stressful, to the men of my firing squads that I allowed them to shovel dirt on the victims. I found that it relaxed their nerves. You might say that I did it out of," again that small smile, "considerations of humanity."

Id. at 19-20.

amoral character, including crafty, secretive, and misleading.¹¹⁰ Those who are crafty are viewed as being deceitful and cunning, and we sometimes refer to "tricks of the trade."¹¹¹ In short, the craftsman may be an amoral technician.¹¹²

While being called a craftsman is one of the greatest compliments that can be paid to a lawyer or judge, being described as crafty is dubious praise at best.¹¹³ The line between craft and crafty, however, is often difficult to draw.

110. Among the various definitions of craft in *The Oxford English Dictionary* are the following: "skill or art applied to deceive or overreach; deceit, guile, fraud, cunning" and "[a]n application of deceit; a trick, fraud, artifice." 3 THE OXFORD ENGLISH DICTIONARY, *supra* note 45, at 1128–29. When the law and lawyers are characterized as being "crafty," the description nearly always is intended to be negative, connoting a cunning and deceitfulness. Concern about crafty lawyers is not merely of recent vintage. See 1 AULUS GELLIUS, THE ATTIC NIGHTS 33 (John C. Rolfe trans., 1927) (quoting Titus Castricius: "It is the orator's [or trial lawyer's] privilege to make statements that are untrue, daring, crafty, deceptive and sophistical, provided they have some semblance of truth and can by any artifice be made to insinuate themselves into the minds of the persons who are to be influenced."); Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 352 n.31 (1998) (observing that lawyers engage "in unlawful shifts and devises so cunningly contrived . . . in deceit of the King's Courts, as oftentimes the Judges of the same were by such crafty and sinister shifts and practices inveigled and beguiled" (citing EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 212 (William S. Hein Co. 1986) (1642))).

111. See William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 150 (1993) (noting that "Llewellyn regularly proclaimed the importance of ideals and ethics, the quest for beauty, and the quest for justice, but in his course on advocacy he was not above teaching the tricks of the trade, including some that might be thought to be ethically dubious").

112. See, e.g., John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 909 (1997) (criticizing the traditional view of lawyers as "craft-oriented, amoral technicians . . . who are equally adept at arguing both sides" of a legal dispute); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. 613, 614–15 (justifying the amoral role of lawyers). *But cf.* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 5–6 (1975) (questioning the idea that in the legal profession it is one's job to be "in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of a client is established"). Some suggest that legal education forces fledgling lawyers to become amoral technicians, "teach[ing] . . . manipulation of power and people, not the development of character. To acknowledge emotion in law school is to invite pain. The refusal to become an amoral technician is dangerous." James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 528 (1996).

113. See Ira H. Leesfield, *Ex Parte Communications by Government Lawyers with Represented Parties*, FLA. B.J., Dec. 1998, at 18, 20 ("Crafty lawyers are able to find loopholes in even the most tightly worded statutes and holdings."); Tom H. Matheny, *My Faith and My Law*, 27 TEX. TECH L. REV. 1211, 1215 (1996) (implying that a crafty lawyer is one who will use illegitimate means). Matheny wrote:

When I first started practicing law, practically all of the other lawyers in the area warned me about one particular man. They said he was one of the best lawyers in the State but that he was crafty, that he would not do the right thing, that he would

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.¹¹⁴

C. Rhetoric

The primary difficulty with rhetoric is its win-at-any-costs mentality that a desired end justifies any means. With victory as the ultimate measure of success, rhetoric has developed a terrible reputation.¹¹⁵ The art of persuasion finds its purest expression in the field of advertising.¹¹⁶ Rhetoric is not only the

lie, that he would take advantage of you.

Id.; see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995) (observing that "Americans seem reluctant to have an open conversation about the relationship between race and crime" and that "[l]awmakers ignore the issue, judges run from it, and crafty defense lawyers exploit it").

114. James W. McElhane, *Dealing With Dirty Tricks*, LITIG., Winter 1981, at 45, 46. McElhane describes the legend:

Virtually everyone has heard of the Amazing Cigar Ash That Refused to Fall, an artifice often attributed to Clarence Darrow. The story is that a nearly invisible wire is inserted into a cigar so that when the cigar is smoked everyone's attention will be focused on the ash, which magically does not fall.

Id.

115. Eugene Garver asserts that each of the three kinds of rhetoric—logos, pathos, ethos—has "its own way of being simultaneously ethical and logical, and each, consequently, has its own characteristic danger and vice. The three kinds of surplus reappear as three opportunities for abuse as the logical and ethical sides of rhetorical argument fall apart." GARVER, *supra* note 19, at 69. "Corrupt pleading, legalism, and emotional appeals are abuses naturally at home in forensic rhetoric." *Id.* at 66. Another commentator has considered the perceived problems of rhetoric:

Socrates and his student Plato distrusted the teaching of both the sophists and the handbook writers, and Plato's dialogue *Gorgias* is the earliest example of an attack on rhetoric as essentially a form of flattery—morally irresponsible and not based on knowledge of the truth. The debate over the role of rhetoric in society has existed ever since; and there are still today people to whom the word *rhetoric* means empty words, misleading arguments, and appeal to base emotions.

George A. Kennedy, *Prooemion*, in ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE i, viii (George A. Kennedy ed., 1991).

116. See, e.g., White, *supra* note 19, at 687 (stating that rhetoric is "as contemporary as . . . the kind of advertising practiced by the wizards of Madison Avenue"). Another work claims:

Perhaps the most common, most ubiquitous, form of persuasive discourse in our society is advertising. Whether in the visual medium or in the sound medium, advertising is inescapable. Ads appear in newspapers, in magazines, in catalogues, in flyers, on billboards, on the radio, and on television Ad writers are some of the most skilled rhetoricians in our society. They may never have studied classical rhetoric, but they employ many of the strategies of this ancient art to influence the

art of persuasion, it is the art of manipulation.¹¹⁷ Kant famously dismissed rhetoric as the disreputable business of using others' weaknesses for one's own personal gain.¹¹⁸ The rhetorician may become a demagogue, someone who endeavors to convince others that his ends are theirs.¹¹⁹

Plato was especially critical of rhetoric, contrasting sophists who specialize in persuasion with philosophers, who search for wisdom and truth.¹²⁰

attitudes and actions of those who are exposed to the ads they compose.

CORBETT & CONNORS, *supra* note 58, at 2; *see also* GARVER, *supra* note 19, at 206 (discussing how Aristotle's writings may help a modern reader avoid manipulation by advertising). Garver states:

Contemporary readers of the *Rhetoric* see people constantly duped by slick commercial and political advertisements, and hope that the *Rhetoric* can help them become conscious of hidden persuasion, or able to make more morally based discriminations between decent appeals, which they should trust, and immoral ones, which they should reject.

Id.

117. *See* Robert Wardy, *Mighty is the Truth and it Shall Prevail?*, in *ESSAYS ON ARISTOTLE'S RHETORIC* 56, 56 (Amélie Oksenberg Rorty ed., 1996) ("Nowadays the term 'rhetoric' and its etymological kin in the Romance languages tend to suggest, in ordinary parlance, no more than the dissembling, manipulative abuse of linguistic resources for self-serving ends; outside certain antiquarian and literary critical coteries, the word is unfailingly pejorative."); White, *supra* note 19, at 687–88 ("Rhetoric, in short, is thought of . . . as a way of dealing with people instrumentally or manipulatively, in an attempt to get them to do something you want them to do.").

118. Garver writes:

[O]ratory (*ars oratoria*), the art of using people's weaknesses for one's own aims (no matter how good these may be in intention or even in fact), is unworthy of any respect whatsoever. Moreover, both in Athens and in Rome, it came to its peak only at a time when the state was hastening to its ruin, and any true patriotic way of thinking was extinct.

GARVER, *supra* note 19, at 10 (quoting from IMMANUEL KANT, *CRITIQUE OF JUDGMENT*, sec. 53, 198/328 n. 63).

119. *See* CORBETT & CONNORS, *supra* note 58, at 25 ("Closely allied to th[e] disreputable form of rhetoric is demagoguery [T]he most successful of the twentieth-century demagogues . . . were the exploiters of specious arguments, half-truths, and rank emotional appeals to gain personal advantage rather than to promote the public welfare.").

120. *See* GEORGE A. KENNEDY, *A NEW HISTORY OF CLASSICAL RHETORIC* 7–8 (1994) ("The sophists as a group were philosophical relativists, skeptical about the possibility of knowledge of universal truth," while "Socrates in the *Gorgias*, and elsewhere in Plato's dialogues, contends that there is such a thing as absolute truth and universal principles of right and wrong."). Plato objected to rhetoric on the following grounds:

[R]hetoricians, like poets, were more interested in opinions, in appearances, even in lies, than in the transcendental truth that the philosopher sought. They made the "worse appear the better reason." They were mere enchanters of the soul, more interested in dazzling their audience than in instructing it. Rhetoric—to bring it down to its lowest terms—was a form of flattery, like cosmetics.

CORBETT & CONNORS, *supra* note 58, at 492.

In Plato's *Gorgias*,¹²¹ Socrates interrogates Gorgias, a famous Sophist of the time period, about rhetoric. Using the character Socrates as his mouthpiece, Plato establishes his view of rhetoric as a knack for persuasion and a form of flattery.¹²² Plato also addresses the topic of rhetoric in the *Phaedrus*, and concedes the possibility of a true art of rhetoric.¹²³ 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,¹²⁴ makes the speech follow a logical structure by properly defining the subject and dividing it in a systematic way,¹²⁵ and tries to fashion his speech to suit the nature of his audience.¹²⁶ Plato did not trust the rhetoricians of his day to adapt their methods of persuasion to pursue rhetoric as philosophic art.¹²⁷

121. PLATO, *GORGAS* (Robin Waterfield trans., Oxford University Press 1994) (c. 400 B.C.).

122. When Socrates is asked what he thinks of rhetoric, he responds that it is an "experiential knack" for producing "pleasure and gratification." *Id.* at 462c. He also describes rhetoric as a form of "flattery," making an analogy to cooking [cookery], a branch of flattery. *Id.* at 463b. Kronman commented on Plato's analogy between rhetoric and cooking as follows:

Cooking is an art that caters to our appetite for food. It seeks to satisfy that appetite, but also to stimulate it by producing new and pleasing sensations of taste [T]he art of cooking resembles that of consumer advertising. Like the cook, the advertiser aims to stimulate, to satisfy and even to transform the tastes of his audience. His goal is to please them, sometimes by gratifying the tastes they have and sometimes by awakening new tastes whose gratification is then provided.

Kronman, *supra* note 19, at 680–81.

123. See PLATO, *PHAEDRUS* 259e (James H. Nichols Jr. trans., Cornell Univ. Press 1998) (exploring how speaking and writing a speech is artful and how it is not).

124. Plato continues:

[I]t is he who knows the truth that knows most beautifully how to find them . . . unless someone both enumerates the natures of those who will hear and is able to distinguish the beings by forms and to comprehend with one idea in accordance with each one thing, he will never be artful about speeches to the extent that this is in the power of a human being. And he will never possess these things without much diligent study.

Id. at 273d5–e5.

125. See *id.* at 263b6–9 ("[H]e who is to go after the rhetorical art must first divide up these things in a systematic way, and have grasped some characteristic of each form: that in which it's necessary that the multitude wander, and that in which not.").

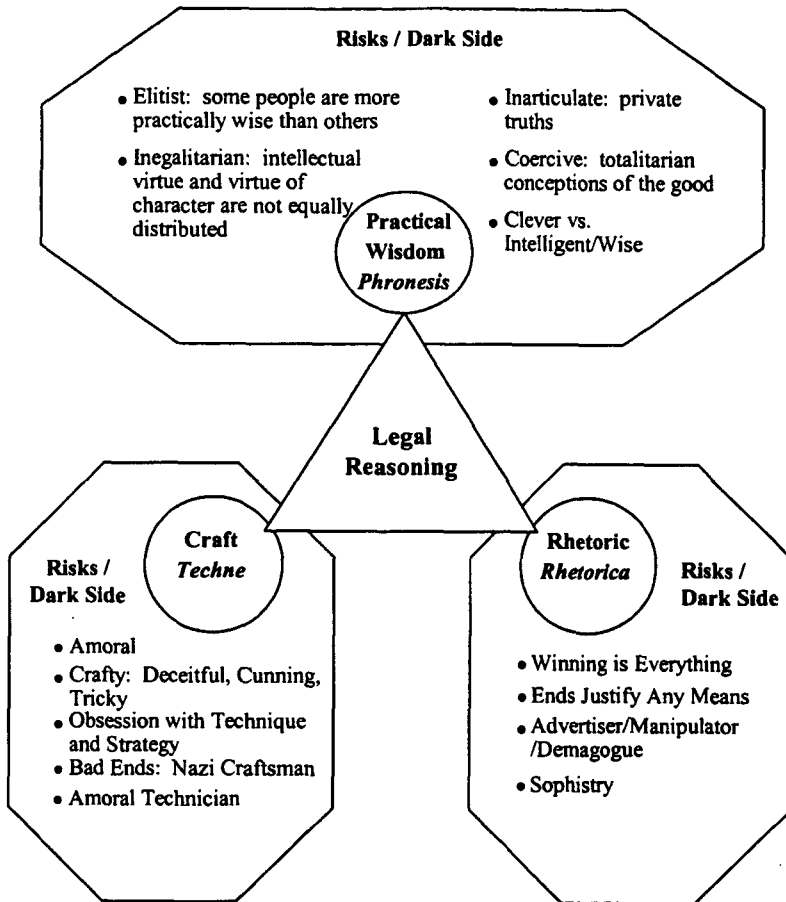
126. Plato goes on to say:

[H]aving arranged in order the classes of speeches and of soul and the things experienced by these, he will go through all the causes, fitting each together to each, and teaching through what cause one soul, being of such a sort, is of necessity persuaded by speeches of such a sort, and another remains unpersuaded.

Id. at 271b1–5.

127. Commenting on the many stipulations Plato places on rhetoric for it to be considered a philosophic art, Corbett and Connors assert that "[t]here are a lot of *ifs* here, and it is apparent

Figure 3. The Risks / Dark Sides of Practical Wisdom, Craft, and Rhetoric.



IV. The Tempering Effect of Each on Each

I have argued that practical wisdom, craft, and rhetoric are the three elements that compose or characterize legal reasoning.¹²⁸ I have also suggested that while each is an

that Plato does not have much confidence that rhetoricians, in their great eagerness to please the ignorant multitudes, will devise and teach such a rhetoric." CORBETT & CONNORS, *supra* note 58, at 492.

128. See *supra* Part II (discussing how the characteristics of these three elements are

important part of legal reasoning, each is an incomplete, and even dangerous, account of legal reasoning.¹²⁹ The problems with practical wisdom are that it is elitist, may be inarticulate, and may incline one to become arrogant or imperial in outlook and temperament.¹³⁰ The problems with craft are that it is amoral, can degenerate into an obsession with technique and strategy, and can be brought into the service of objectionable ends.¹³¹ The problems with rhetoric are its winning-is-everything mentality that can justify the use of any means to achieve a desired end, and the risk that it can degenerate into manipulateness and demagoguery.¹³²

In this Part, I will try to explain how each of these features or dimensions of legal reasoning plays an important role in tempering or ameliorating the negative tendencies of the other two components of legal reasoning. Practical wisdom ameliorates or helps temper the dangers and excesses of craft and rhetoric. Craftsmanship reduces the risks associated with practical wisdom and rhetoric. Rhetoric helps address the problems that arise with practical wisdom and craft. Understanding how these concepts relate to each other helps us see why one, or even two, of these concepts is an incomplete account of legal reasoning. The tempering effects of each of these concepts upon the others are outlined in Figures 4, 5, and 6.

A. How Practical Wisdom Tempers Craft and Rhetoric

Practical wisdom tempers the worst tendencies of craft. Unlike craft, which is a virtue of intellect only, practical wisdom is a virtue of both intellect and character.¹³³

implicated by the practice of law).

129. See *supra* Part III (examining weaknesses associated with practical wisdom, craft, and rhetoric).

130. See *supra* Part III.A (noting that elitism is the chief problem with practical wisdom and may make someone susceptible to arrogance and inarticulateness).

131. See *supra* Part III.B (examining how the dark side of craft is amoral by detailing the negative connotations of the term "crafty" and discussing the meaning of the "Nazi craftsman").

132. See *supra* Part III.C (citing advertising and Plato's critiques of rhetoric as examples of rhetoric's poor reputation).

133. Under the Aristotelian model, a person of practical wisdom needs both intellect and character to deliberate, make choices, and *take action*. Aristotle states:

The origin of action—its efficient, not its final cause—is choice, and that of choice is desire and reasoning with a view to an end. This is why choice cannot exist either without thought and intellect or without a moral state; for good action and its opposite cannot exist without a combination of intellect and character.

ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 10, at VI.2.1139a31–35. In contrast, the emphasis for craft is on making, not acting, and therefore, while intellect is necessary, a moral state, or good character, is not. Aristotle states that "making and acting are different . . . so that the reasoned state of capacity to act is different from the reasoned state of capacity to make. Nor are they included one in the other; for neither is acting making nor is making acting." *Id.* at

Thus when craft is coupled with practical wisdom, craft is imbued with a moral dimension that it otherwise lacks. Practical wisdom, unlike craft, does not tend to become deceitful, cunning, or tricky. Aristotle states that when exercising practical wisdom, virtue of character helps ensure that the ends pursued are right, while virtue of intellect helps ensure that the means to that end are appropriate.¹³⁴ If craft is combined with practical wisdom, then the ends pursued in a craftsmanlike way will 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. It is significant that for Aristotle, craft is an inferior and subordinate virtue to practical wisdom.¹³⁵ Fusing craftsmanship with practical wisdom has the primary benefit of giving direction to craft and the craftsman, ensuring that the craftsman's ends will be correct or appropriate.

In the legal context, we will be much relieved if the best lawyers and judges are laboring to create legal arguments or write legal opinions to explain and justify correct outcomes rather than incorrect outcomes. The meticulous legal craftsman with poor practical judgment is a menace. If a lawyer is arguing for the wrong side of a case, or if a judge is writing an opinion in support of an incorrect outcome, we might prefer for that lawyer or judge not to be a skillful craftsman, because the mischief they can accomplish will be much greater if they are gifted in their craft.

Practical wisdom also tempers the worst tendencies of rhetoric. When rhetoric is placed in the service of practical wisdom, the worst excesses of rhetoric are curbed. When rhetoric is practiced by a person of practical wisdom, the rhetorician becomes something more than a mere sophist, gladiator, or hired gun.

VI.4.1140a2–6. Aristotle further explains:

[The] products of the arts have their goodness in themselves, so that it is enough that they should have a certain character, but if the acts that are in accordance with the excellences have themselves a certain character it does not follow that they are done justly or temperately. The agent also must be in a certain condition when he does them

Id. at II.4.1105a28–30.

134. Aristotle states:

[I]n order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves. Now excellence makes the choice right, but the question of the things which should naturally be done to carry out our choice belongs not to excellence but to another faculty [T]o be able to the things that tend toward the mark . . . and to hit it.

Id. at VI.12.1144a18–26.

135. See *id.* at VI.12.1144a28–30 (treating *techne* as a subordinate concept to *phronesis* and suggesting that one cannot exercise practical wisdom without having a sufficient level of technical competence). Seen in this way, *techne* is a necessary, but not sufficient, condition for the exercise of *phronesis*.

Rhetoric tempered by practical wisdom is less glib, more disciplined, and has an element of gravitas that is lacking when rhetoric is untethered to practical wisdom.

Rhetoric often employs appeals to emotion and other informal logical fallacies that distract from logic and reason. In order to be effective, lawyers must know how and when to employ logical error in their arguments and appeals. Legal argument, discourse, and rhetoric are awash with logical fallacies. Consider the following abbreviated list of informal fallacies that logicians condemn,¹³⁶ each of which is commonplace in the law: the appeal to pity,¹³⁷ the fallacy of complex question,¹³⁸ the fallacy of special pleading,¹³⁹ the red herring,¹⁴⁰ the slippery slope argument,¹⁴¹

136. See ALDISERT, *supra* note 8, at 141 (defining informal fallacy as an argument that does not properly establish the supported conclusion, and such a fallacy cannot be detected in the form of the argument, but rather in some other way); COPI & COHEN, *supra* note 14, at 128–29 (noting several logicians, including Socrates, who condemned informal fallacies that appealed to emotion and pity); DAVIS, *supra* note 14, at 61–62 (introducing several biasing and prejudicial influences that at times impermissibly affect clear thinking and correct reasoning); ENGEL, *supra* note 14, at 192–93 (offering a table of "fallacies of relevance" that defines and gives several examples for each fallacy); PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 104 (3d ed. 1988) (introducing the different kinds of informal fallacies); EDWARD MACKINNON, BASIC REASONING 265 (1985) (detailing the different fallacies of irrelevance).

137. See ENGEL, *supra* note 14, at 192 (stating that the fallacy of appeal to pity or other emotions seeks to persuade "not by presenting evidence but by arousing pity"); MACKINNON, *supra* note 136, at 275 (explaining that "[t]his is a fallacy when one is expected to accept the truth of a conclusion out of pity for someone who would suffer if the conclusion were not accepted as true"). The fallacy of appeal to pity or other emotions is also known as the *argumentum ad misericordiam*. For a discussion of the fallacy of appeal to pity, see ALDISERT, *supra* note 8, at 144; COPI & COHEN, *supra* note 14, at 129–30, 163; DAVIS, *supra* note 14, at 62, 175–80; ENGEL, *supra* note 14, at 192, 209–12; HURLEY, *supra* note 136, at 108–09; MACKINNON, *supra* note 136, at 274–75, 292; Douglas Walton, *Informal Fallacy*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 373, 373 (Robert Audi ed., 1995).

138. See ALDISERT, *supra* note 8, at 207 (stating that the "fallacy arises when (1) two or more questions are asked at once, and a single answer is required; (2) a question is phrased as to beg another question; (3) the question makes a false presumption; or (4) the assertion frames a complex question but demands a simple answer"); MACKINNON, *supra* note 136, at 291 (explaining that a "question is complex in the pejorative sense when either an affirmative or a negative answer implicitly affirms a debatable presupposition of the question"). The fallacy of complex question is also referred to as the fallacy of compound question. For a discussion of the fallacy of complex question, see ALDISERT, *supra* note 8, at 206–08; COPI & COHEN, *supra* note 14, at 120–22, 163; ENGEL, *supra* note 14, at 127, 148–51; HURLEY, *supra* note 136, at 139–40; MACKINNON, *supra* note 136, at 272, 291; Walton, *supra* note 137, at 376.

139. See ENGEL, *supra* note 14, at 151 (stating that the fallacy of special pleading attempts to "apply a double standard: one for ourselves (because we are special) and another (stricter one) for everyone else"). Engaging in a special pleading involves being "partial and inconsistent. It is to regard one's own situation as privileged while failing to apply to others the standard we set for ourselves." *Id.* at 152.

140. See HURLEY, *supra* note 136, at 116 (noting that the red herring fallacy occurs when "the arguer diverts the attention of the reader or listener by changing the subject to a different

the straw man fallacy,¹⁴² fallacies of personal attack (such as the genetic fallacy, *ad hominem* arguments, and the fallacy of poisoning the well),¹⁴³ the appeal to terror, fear, or force,¹⁴⁴ and the appeal to authority or prestige.¹⁴⁵

but sometimes subtly related one" and that "[h]e or she then finishes by either drawing a conclusion about this different issue or by merely presuming that some conclusion has been established"). Professor Hurley explains that the name of the fallacy comes from a method of training hunting dogs to follow a scent: "A red herring (or bag of them) is dragged across the trail with the aim of leading the dogs astray. Since red herrings have an especially potent scent (caused in part by the smoking process used to preserve them), only the best dogs will follow the original scent." *Id.* In a similar manner, the red herring is a deliberate attempt to lead one's audience astray. *Id.* The red herring fallacy goes by a number of different names, including irrelevant conclusion, ignoring the issue, befogging the issue, and diversion. For a discussion of the red herring, see ENGEL, *supra* note 14, at 165–70; HURLEY, *supra* note 136, at 116–18.

141. See HURLEY, *supra* note 136, at 128 (stating that the fallacy of the slippery slope "occurs when the conclusion of an argument rests upon an alleged chain reaction and there is not sufficient reason to think that the chain reaction will actually take place"). A slippery slope argument "counsels against some contemplated action (or inaction) on the ground that, once taken, it will be a first step in a sequence of events that will be difficult to resist and will (or must) lead to some dangerous (or undesirable or disastrous) outcome in the end." Walton, *supra* note 137, at 376. For a discussion of the fallacy of the slippery slope, see HURLEY, *supra* note 136, at 128–29; MACKINNON, *supra* note 136, at 279, 280, 292; Walton, *supra* note 137, at 376.

142. See MACKINNON, *supra* note 136, at 292 (noting that the straw man fallacy "occurs when one refutes a distorted or grossly oversimplified version of an opposing argument rather than the real argument"). As Professor Hurley describes it, "[t]he straw man fallacy is committed when an arguer distorts an opponent's argument for the purpose of more easily attacking it, demolishes the distorted argument, and then concludes that the opponent's real argument has been demolished." HURLEY, *supra* note 136, at 114. For a discussion of the straw man fallacy, see *id.* at 114–16; MACKINNON, *supra* note 136, at 284–85, 292.

143. Fallacies of personal attack are arguments "that divert[] attention away from the question being argued by focusing instead on those arguing it." ENGEL, *supra* note 14, at 194. Three common variations of this fallacy are the genetic fallacy, the *ad hominem*, and the fallacy of poisoning the well. ALDISERT, *supra* note 8, at 182–85; COPI & COHEN, *supra* note 14, at 122–24, 163; DAVIS, *supra* note 14, at 60–63, 72; ENGEL, *supra* note 14, at 194–99; HURLEY, *supra* note 136, at 111–13; MACKINNON, *supra* note 136, at 275, 292; Walton, *supra* note 137, at 373–74. The genetic fallacy is committed when one "attempts . . . to prove a conclusion false by condemning its source or genesis." ENGEL, *supra* note 14, at 194. The *ad hominem* argument is closely related to the genetic fallacy, and involves attempting "to refute an opponent by attacking his or her character rather than his or her arguments." MACKINNON, *supra* note 136, at 292. The fallacy of poisoning the well involves "[f]orestalling disagreement by positively characterizing those who would agree with the speaker's position or negatively characterizing those who would disagree." DAVIS, *supra* note 14, at 62.

144. See ALDISERT, *supra* note 8, at 188 (stating that the fallacy of the appeal to terror, fear, or force "makes an appeal to fear of exaggerated consequences in the event an adversary's argument prevails"). The fallacy of appeal to terror, fear, or force is also called the *argumentum ad terrorem*, the argument to the club, and the *argumentum ad baculum*. For a discussion of the fallacy of appeal to terror, fear, or force, see *id.*, *supra* note 8, at 144, 188–89; COPI & COHEN, *supra* note 14, at 130, 163; ENGEL, *supra* note 14, at 193, 219–22; MACKINNON, *supra* note 136, at 275, 292; Walton, *supra* note 137, at 374–75.

145. See ALDISERT, *supra* note 8, at 180 (explaining that "[t]his fallacy makes an appeal to

If one were scrupulously to avoid all of these types of logical error, it would be almost impossible to be effective as a lawyer. Not only does the law tolerate logical error, but competent lawyers are expected to know how and when, and in what manner and to what extent, to make arguments that would be considered fallacious by logicians. Equally important, however, are the law's limits upon what counts as a permissible use of logical error. Logical fallacies cannot be committed indiscriminately or without consequence. Uncritically making fallacious arguments can destroy one's credibility and, ultimately, one's self-respect. Logical fallacies are dangerous, and even when the law tolerates, permits, or encourages logical error, it places limits (albeit of an often undefined and contestable nature) on the permissible use of logical error. Attorneys must concern themselves not only with whether an intended audience will find their arguments to be persuasive; they must also concern themselves with whether their arguments are respectable, credible, and ultimately, honest.

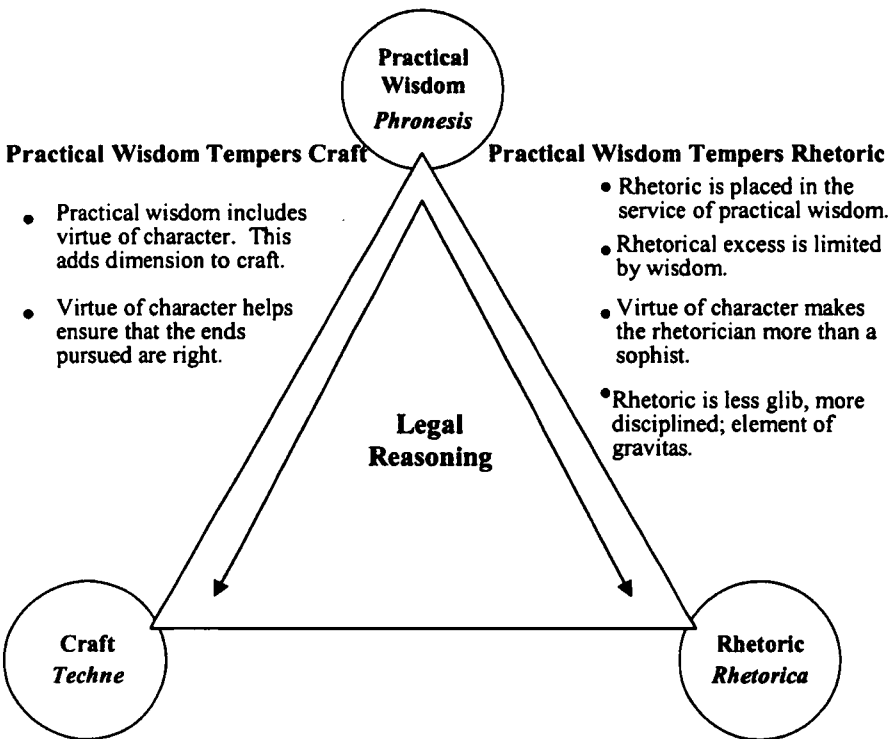
The best and worst lawyers will each be distinctive in their respective understanding or misunderstanding of how and when to employ arguments that are logically fallacious. The difference between these two types of lawyer will be that the best lawyers will be not only skilled rhetoricians, but they will also be people of practical wisdom, and their good sense and judgment will enable them to differentiate between appropriate and inappropriate appeals that may involve informal fallacies. On the other hand, the worst lawyers, 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, *ad hominem* attacks, slippery slope arguments, and other fallacies. The ways in which they commit logical error will make them less persuasive rather than more persuasive, and in extreme cases bad lawyers will appear foolish and become objects of ridicule. Even if their rhetorical ploys appear to work to their short-term advantage, they may suffer tremendous damage to their credibility or reputation because of their inappropriate use of logical fallacies.¹⁴⁶

authority or prestige of parties having no legitimate claim to authority in the matter at hand"). Appeals to authority are fallacious when "we cite those who have no special competence regarding the matter at hand." ENGEL, *supra* note 14, at 212. Professor James Gordon has remarked, "Seventy percent of all legal reasoning is the logical fallacy of appeal to authority. The other forty percent is simply mathematical errors." James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 1000 n.93 (1990). The fallacy of appeal to authority or prestige is also known as the *argumentum ad verecundiam*. For a discussion of arguments that appeal to authority, see ALDISERT, *supra* note 8, at 144, 180-82; COPI & COHEN, *supra* note 14, at 118-20; DAVIS, *supra* note 14, at 70; ENGEL, *supra* note 14, at 212-14; HURLEY, *supra* note 136, at 121-23; MACKINNON, *supra* note 136, at 211-16; Walton, *supra* note 137, at 375.

146. An example in many people's eyes was Johnnie Cochran's rhetorical riff in his closing argument in the O.J. Simpson trial: "By your decision, you control [Simpson's] very life in your hands. Treat it carefully. Treat it fairly. Be fair. Don't be part of this continuing coverup.

There are some arguments and appeals that an advertiser, hired gun, or mercenary will be able and willing to make that the person of practical wisdom will not be able and willing to make. This is because practical wisdom has a disciplining or tempering effect on rhetoric. Consider Aristotle’s insight that the most persuasive form of rhetoric is *ethos*, or character. If we have confidence in the character of the person making an argument, if we trust him, we are more likely to be persuaded by what he has to say. *Ethos*, rather than just a matter of reputation, image, or persona, is really a matter of character. If we know a person to be someone of practical wisdom, and we trust both her intellect and her moral character, we will be more likely to believe her than if she is just a skillful and accomplished rhetorician.

Figure 4. How Practical Wisdom Tempers Craft and Rhetoric



Do the right thing, remembering that if [the glove] doesn't fit, you must acquit . . ." *The Closing Argument of the Defense, in FRANK SCHMALLEGER, TRIAL OF THE CENTURY: PEOPLE OF THE STATE OF CALIFORNIA VS. ORENTHAL JAMES SIMPSON 290, 344 (1996).*

B. How Craft Tempers Practical Wisdom and Rhetoric

Craft tempers or ameliorates the troubling tendencies of practical wisdom. Craft makes practical wisdom more humble. One of the primary concerns about practical wisdom is its tendency to be elitist and prone to arrogance. In contrast with practical wisdom, which is at the pinnacle of Aristotle's practical philosophy, the status of the craftsman is much less exalted. Craftsmen are at the lower end of the social spectrum—the cobbler making shoes, the potter spinning clay—these typically are not people who are prideful and powerful. This was certainly the case in ancient Greek society, and it remains true in early twenty-first century America.

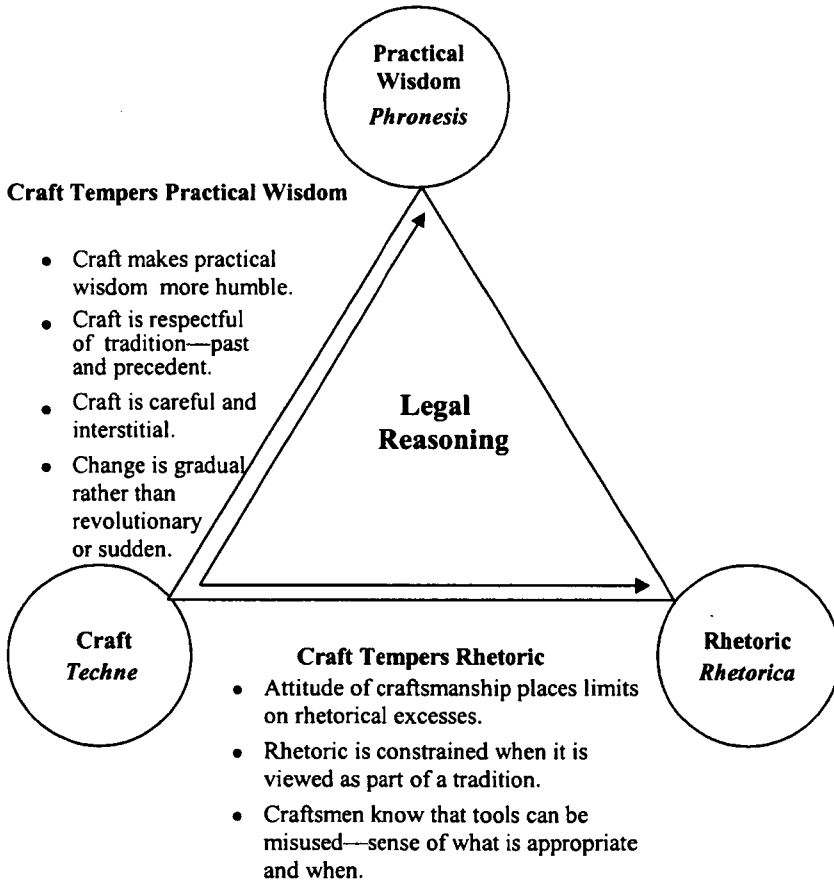
Craft also has an attitude and posture toward the past that counteracts arrogance and elitism. Craft is respectful of tradition and precedent. In craft traditions, change tends to be gradual and interstitial, rather than revolutionary or sudden. Creativity is welcome, but it is bounded by tradition. The craftsman is unlikely to be impressed with grand theories and universal truths. Rather, craft depends upon know-how and experience, with a deep familiarity with what does and does not work.

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 more likely view themselves as part of a tradition that is to be respected and treated with care. Even when departures from and refinements of the tradition are warranted, the departures and refinements will likely be of a more careful and considered nature.

Craft also reduces and addresses the worst excesses of rhetoric. An attitude of craftsmanship places limits on rhetorical excess. Rhetoric is 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. Some rhetoricians seem to view every problem as a nail and behave as if the only tool necessary is a hammer. A craftsman is going to have a more subtle appreciation of the differences of tools and what is appropriate in different types of situations. This sense of what is appropriate and what works will provide a constraining effect on rhetoric. In the law, we encourage lawyers to study the work of great lawyers before them. For example, if one 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.

Figure 5. How Craft Tempers Practical Wisdom and Rhetoric



C. How Rhetoric Tempers Practical Wisdom and Craft

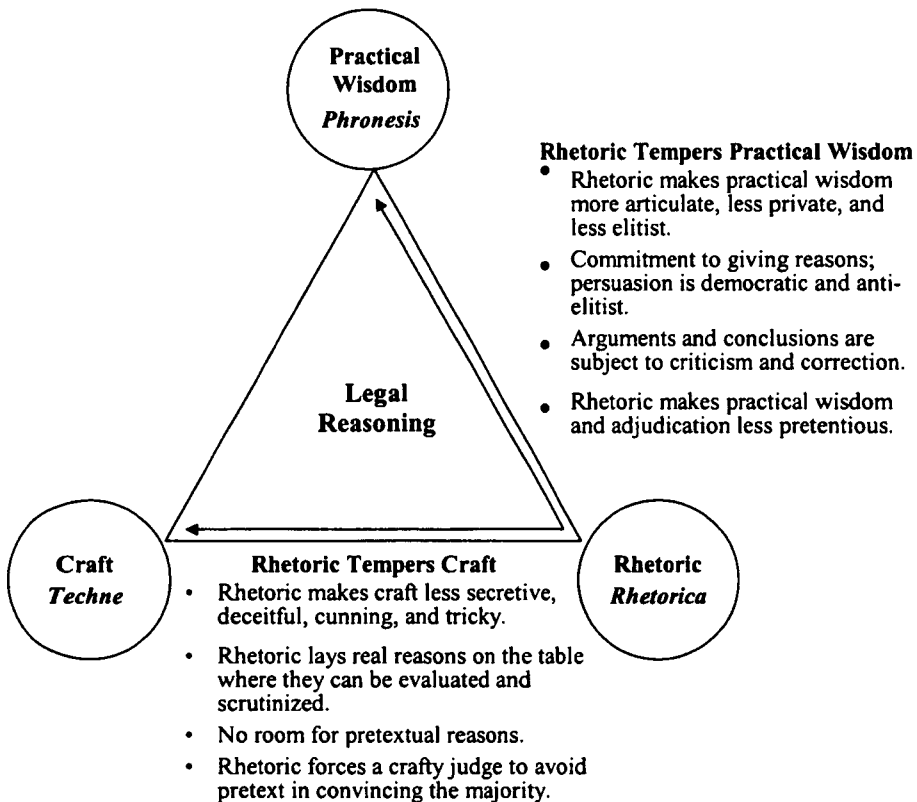
Rhetoric tempers the risks associated with practical wisdom. Rhetoric makes practical wisdom more articulate and less private. Rhetoric also makes practical wisdom and adjudication less pretentious, and helps knock those attributes off their "high horse." Rhetoric is committed to reasoning, and in its desire to persuade it is deeply democratic. One reason we

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, unlike practical wisdom, the premises, arguments and conclusions are subject to scrutiny, criticism, and correction. When the rhetorician commits a logical error, with practice we can recognize it for what it is and call him on it. Emotional appeals, as well as appeals that employ other logical fallacies, lose some of their persuasive effect if they are identified and called out by name. If a judgment, even a seemingly good judgment, is not supported by good reasons, we will be more likely to question it. Upon further reflection and examination, we may determine that what appeared to be a good judgment is found wanting.

Most judges have had the experience of believing a certain outcome is correct in a case, but are unable to create an argument to justify that outcome. Written law and precedent just push too hard in the opposite direction. 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. If binding precedent precludes a desired outcome, a judge who understands her obligations to provide public justifications that are persuasive will generally yield to clear authority. The requirement that judges give public justifications and explanations for their judgments 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 helps address some of the troubling aspects 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. Rhetoric does not engage in pretext; rather, it lays its reasons bare so we can examine them critically. While a crafty judge may rely upon pretext, if that judge is required to convince a majority of other judges on the panel that he is right, it is less likely that the pretext will be able to stand.

Figure 6. How Rhetoric Tempers Practical Wisdom and Craft



V. Conclusion

Legal, and especially judicial, reasoning is a complex combination of practical wisdom (*phronesis*), craft (*techne*), and rhetoric (*rhetorica*). These three concepts have unique concerns, components, distinctive characteristics, and measures of success. Each of the concepts is also accompanied by risks, or what I have termed the dark sides of practical wisdom, craft, and rhetoric. While these concepts, when taken individually, provide an incomplete and even dangerous account of legal reasoning, these dangers are overcome when they are united to form the bedrock characteristics of the good lawyer and judge.

The virtues of intellect and character inherent to practical wisdom temper the risks associated with craft and rhetoric. Practical wisdom imbues craft with

a moral dimension that it otherwise lacks and elevates rhetoric above mere sophistry. Craft's connection with the past tempers the troubling tendencies associated with practical wisdom and rhetoric. Craft balances the elitist and arrogant tendencies of practical wisdom by adding an aspect of humility and grounds rhetoric in a tradition that helps limit rhetorical excesses. Rhetoric's commitment to giving reasons makes practical wisdom more articulate and craft less secretive, cunning, and tricky. Only in combination do practical wisdom, craft, and rhetoric create a balanced, complete, and compelling account of legal reasoning.

NOTES
