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# Ethics of virtues and the education of the reasonable judge

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**Abstract** In contemporary society, as in classical Greece, we need citizens that deliberate well both for themselves and for society overall. Different competitors contend about the right principles in the theory of education. This paper holds that 'character education', descending from the ancient ethics of virtues, still represents the best option available for people who want to deliberate well for the common good. A special place in deliberation is taken by legal reasoning because the law is central in the distribution of goods in our society. Rather than focusing only on rules and principles I follow the EV approach and focus on the qualities of the good decision-maker, the reasonable judge. The intellectual virtues of phronesis and techné combine those personal and professional qualities that we want at work in any judge. But it is the exercise of the civic art of rhetoric that expresses at best the public dimension of the reasonable judge.

**Keywords** Ethics of virtues · Character education · Legal reasoning · Phronesis · Craft · Rhetoric

*PART I: EDUCATION TO PRACTICAL WISDOM.*

1.Introducing the Issue. 2. EV and Competitors in the Theory of Education. 3. Developing Practical Wisdom.

*PART II: THE REASONABLE JUDGE.*

4.1. Reasonableness in judging I: From the formalist judge to consequences. 4.2. Reasonableness in judging II: The consequentialist judge. 4.3. Reasonableness in judging III: From consequences to Hercules. 4.4. Reasonableness in judging IV: From Hercules to the reasonable judge. 5. Reasonableness as the persuasiveness of rhetoric.6.Conclusion.

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# Part I Education to practical wisdom

## Introducing the issue

Good legal reasoning is not just a matter of rule-following, applying valid syllogisms or showing those reasons that are relevant to the decision of the case. At least since Aristotle we know that good legal reasoning depends also on the qualities of the reasoner, his/her character. Recently we have assisted at an extensive revival of the ethics of virtues that has touched not only on moral and political philosophy but also on the law in its various departments. (Farrelly and Solum 2008) Several routes may be taken with regard to the connection between the EV and the law. For example, the well-known distinction between deontological and teleological theories – or Kantians and utilitarians – intrudes in the ethics of virtues and determines quite different shapes of the virtues. In particular, these different styles of the ethics of virtues (from now on EV) may determine different approaches to the law. I shall focus on the classical Aristotelian approach to the ethics of virtues that hinges, among other things, on the centrality of *phronesis* (Aristotelian practical wisdom) in the operation of the virtues, while setting aside full-blown EV approaches to legal theory such as Solum's proposal. (Solum 2003) *Phronesis* has attracted a large degree of theorising in ethical theory (Russel 2009) and some more specialised reflection in legal theory. (Michelon 2013) I believe such a thick concept can only be properly viewed through an analysis that explains legal reasoning also on the grounds of the qualities of the reasoner. I mean to emphasise two basic points: (1) *phronesis* is a quality that requires a long process of cultivation and education and at this stage we need to connect the EV with the theory of education; (2) *phronesis*, as it is traditionally conceived, may not be enough in legal reasoning. The good decision-maker has to exercise some other qualities that will be named 'craft' and 'rhetoric'. With the first he shows his technical expertise in the law, while rhetoric, when properly exercised, shows the capacity of the decision-maker to persuade the public of the validity of his decision.

I want to contend that the whole of these qualities – *phronesis*, craft and rhetoric – is necessary for the 'reasonable judge'. This can be considered on the side of decision-making the other face of the coin of the 'reasonable person', a well-known character in common law jurisprudence who serves the purpose of defining correct standards of evaluation of human conduct in many areas of the law. The reasonable judge is an ideal that represents the subjective counterpart of the ideal of the 'rule of law': to the extent that a legal system cannot be just a matter of rules and principles but also of people who apply them, we need to focus also on the subjective side of legal reasoning. In this sense this paper should provide a contribution that comes within the well-known terrain of character education but with the special shape offered by a certain development of the central features of *phronesis*, craft and rhetoric. It is important to emphasize at the start that the reflections that follow range in the domain of the ideal theory of education in which the best features of a 'reasonable judge' are discussed and some hints toward his path of development are provided. There is, however, no ambition to offer a view of a complete process of education of the reasonable judge because, first, judges come to exercise their role from a variety of different experiences and their process of education can never be the same; second, we can offer some suggestions to improve curricula in the law schools but it would be unrealistic to demand them big moves away from the usual curricula. What should be improved altogether is their awareness of the subjective side of legal decision-making, how ‘reasonable’ a judge should be.

In this paper I have a double concern. First, tracking a certain path of education of the good decision-maker (in particular, the good judge) among some of the options available in the theory of education. As I shall try to show, this path has some merits that make it a better option than other competitors. Second, while classical theory of education can lead us to reflect mainly on practical wisdom or *phronesis* as a crucial intellectual virtue in choosing the goods of human life, something more in terms of intellectual qualities is required of the good judge. My first concern will be developed in the following points: first, I tackle the utilitarian approach that is oriented to the well-known goal of maximizing preference satisfaction for the general welfare. Famously, Hume proposed virtues conducive to the working of capitalism and, to some degree, utility maximizing. In my view, the ‘reasonable judge’ requires a larger perspective than utility-maximizing virtues in our common sense understanding.

Second, it is important to consider Rawls’ approach to the philosophy of education – and some more liberal approaches – that, in my view, ranges much better than utilitarianism, being more attentive to the different stages of development of the human being. However, we may assume that the reasonable judge in Rawls’ view will be equipped with a sense of justice (in favour of the most disadvantaged) and a thin conception of the good by which he can express no more than considerations of instrumental rationality. Finally, I consider Kohlberg’s “bag of virtues” attack on EV as conducive to a ‘wishy-washy’, Charlie Brown-like character. With regard to liberal neutrality his endorsement of the virtue of justice is at least as much unfounded as his rejection of the other virtues whose contribution to the development of character is not carefully evaluated. In concluding on this part of the paper, by contrast, emphasis is given to how the EV encompasses a range of virtues that go beyond personal autonomy (of the liberal tradition), include both cognitive and affective dispositions that contribute to a correct moral choice and require context-sensitive application. All these points seem crucial to good judging.

In the second concern I want to focus on some more specific qualities that in my view make up the good judge. Not only do we need to make clear what *phronesis* amounts to in legal terms but we need to inquire into *craft* and *rhetoric* as those qualities that no judge can miss if he wants to play his role correctly. Craft ensures that the judge is competent with regard to legal rules as the technical tools he has to apply to conflictual situations. Rhetoric, in turn, gives a sense of the degree to which the judge is socially aware that his decisions affect to some extent the whole society – in some cases more than others – and, therefore, they have to be presented so that they can attract consent and be persuasive on different grounds. The first ground is obviously that of the good reasons that are called on to support certain conclusions (*logos*). But rhetoric can be influential in deliberation and decision also on the grounds of *pathos* (emotion) and *ethos* (character). The development of these qualities in the good citizen – and the good judge is a specially relevant exemplar of the good citizen – is the crucial focus of rhetoric as “such a high practical art for Aristotle that it is sometimes mistaken for politics itself.” (Garver 1993, 238) In my reconstruction, following Eugene Garver, rhetoric is not only connected to external success in persuading those who have to deliberate or decide but it is a civic practical art that combines the properties of *technè* (craft) and those criteria of choice and decision appropriate to citizens that derive from the application of *phronesis* and the moral virtues within the context of a *polis*. In modern society where the context has shifted from a polis to something else – something quite more complex – we need to inquire about developing capacities that still leave way to agents who want to contribute to the good life of citizens.

The combination among *phronesis*, craft and rhetoric is the ideal at which the good judge should aim but these qualities may be also considered as stages in a path of personal development in which it is not unlikely to find points of friction between any two of these qualities: for example, it is quite well known that a thorough application of general rules – according to craft – may conflict with making justice in the concrete case – according to *phronesis*. Dworkin's ideal judge Hercules is taken as a comparative test to clarify how those qualities work and interact.

## EV and competitors in the theory of education

In discussing the importance of character education with regard to those people who will choose the professional career of a judge I cannot help starting with a discussion of the merits of the classical Aristotelian approach to character education against competitors that usually enjoy a large consensus in our days as general normative theories: the liberal approach – within which we can distinguish the Kantian-Rawlsian view, the autonomy-oriented view and the libertarian view – and the utilitarian theories. I shall later consider briefly the Kohlberg's approach of education and his rejection of the so called 'bag of virtues' approach to moral education as a move in the liberal debate that is conducive to the Rawlsian position.

Utilitarianism, having the goal of maximizing social utility, proposes to educate the young to develop those talents and capacities which best allow them to contribute to overall social utility, measured by the way in which preferences are satisfied.[1] Since utilitarianism does not have a critical potential toward the preferences we have, social utility will be measured on the grounds of existing preferences. (Gutmann 1982, 262 ff.) Since individual utility corresponds to individual's greatest preference-satisfaction and social utility is nothing else than the aggregation of preference-satisfaction of all the individuals living in a society, an educational policy of a utilitarian kind as much as an economically oriented education will be strictly relative to the criteria of success present within a certain society. However, at some point individual success and social success will diverge. Although the metric of value is the same in both cases – preference-satisfaction – a utilitarian educational policy will teach to give always priority to the preferences of people in general over one's own, while a market-oriented education policy will teach the individual to give priority to his own preferences. While economic laws justify individual maximizing of preference-satisfaction as a means to maximizing the general wellbeing, the intuitive perception is that preference-satisfaction realizes individual wellbeing. Notwithstanding the fact that utilitarianism is a moral theory and economics is a social theory concerned with self-serving conduct, they share common roots

[1] In order to maximize social productivity, economists argue, universities have to provide through education 'commodities', i.e. information and skills, that the market fails to provide. (Stigliz 1975, 298) Basically, economists see universities as production processes whose value is to be maximized, following the preferences expressed by the market. (Klitgaard 1985, 184, 61–84)

with regard to the metric of value. All values can be reduced to utility as preference-satisfaction, hindering any critical understanding of values.[2]

According to the divergence between general wellbeing and individual wellbeing, utilitarian and market-oriented education policies will have to develop certain qualities of character rather than others. But the set of qualities conducive to social utility can go hand in hand with those conducive to individual utility. It is worth noticing that the kind of character that a utilitarian education aims to promote can be described through the catalogue of virtues that Hume found functional to social utility: social virtues such as beneficence, charity, generosity, clemency, moderation and equity and virtues whose utility derives from the interest of the one who has them, such as moderation, prudence, frugality, industriousness and enterprise, among others. Utilitarian and market-oriented education policies can agree also in promoting the formation of capabilities and competences to fulfil successfully any social role. What makes the difference between the two policies will just be the element of motivation: self-oriented in the case of market-oriented education and other-oriented in the case of utilitarian education. None of these policies should pre-empt children's choice of their conceptions of the good. From Bentham on utilitarian education has been presumably based on neutrality among possible conceptions of the good life. But if we observe Hume's catalogue of virtues, we notice that it discourages the formation of characters oriented to waste, immoderation, indolence, stinginess, prodigality, imprudence and many others. (Russel 2009, 145)[3] Hume explicitly advocates a conception of the good conducive to capitalism: his virtues enhance production and wealth-maximization in the economic and social environment of his time. Similarly, education for preference-satisfaction, either self-oriented or other-oriented, in our society makes children fit their society as it is, offering no critical potential against existing values. (Gutmann 1982)[4] In concluding on this point I should emphasize that the utilitarian and economic theories on education are 'models' that are applied only to some extent to real society where other practical and theoretical constraints are at work as counterbalances.

Among liberal approaches to education, does Rawls's justice as fairness fare any better than utilitarianism in proposing a critical potential for education? As is well-known, Rawls outlines a theory of moral development on three different levels. At the first level, that of the *morality of authority*, children learn norms and learn to observe them because their parents or other authorities have issued them. (Rawls 1971, 462–467) At the second level, *the morality of association,* norms are accepted because appropriate to perform certain social roles that each individual finds himself to face. The underlying motivations of this acceptance are those of benefiting the association

[2] It should be stressed that, notwithstanding their apparent opposition, market economy and utilitarianism are two faces of the same coin. The employment of the same metric of value gives utilitarianism the possibility of compensating the moral weaknesses of market economy, its lack of altruistic motivations.

[3] The problem of the 'catalogue of virtues' is a big problem for EV. It is a problem shown by Hume's views, for example, insofar as his virtues constitute a different set from those of – i.e. – Aristotle and even in case of coincidence of names the Scottish philosopher gives a different meaning. While I believe that only the general outlook on human wellbeing endorsed by each author can make sense of his catalogue of virtues, I would keep the catalogue problem separated from the 'enumeration problem': if there are so many –'infinitely many' – virtues, how can EV say what the right action is?

[4] Even if we want to consider the hedonistic version of utilitarianism which wants to educate children to happiness, this is defined in a subjective sense and does not present the risk of imposing criteria of value from the outside but, mostly, the opposed risk of missing criteria of orientation to realize children's future happiness.

one belongs to – and so also oneself. (Rawls 1971, 467–472 Finally, the last level is that of the *morality of principles* where we desire to observe directly the moral principles which concur to found a just society. According to Rawls, the desire to apply the principles of justice develops once we realize that the social organization based on them promotes both our own good and that of our fellows. (Rawls 1971, 474) A successful educational policy, according to this perspective, would be that of educating citizens intending to promote the justice of our society, interpreted as an improvement of the condition of the most disadvantaged.

Rawls builds his theory of moral development on the rational tradition of Kant and Rousseau, according to which "principles of right and justice spring from our nature and are not at odds with our good". (Rawls 1971, 461) For his three-stage theory he also draws on more recent writers, such as McDougall, Piaget and Kohlberg. Rawls describes his theory of justice as giving the correct content of the morality of principles that we learn to respect at the end of our educational curriculum. The first and the second stages are equally important to form those motives that lead us to comply with the principles of justice. In the stage of the morality of authority the child complies with the precepts of his parents because they represent the powerful persons in his world. The child comes to develop his abilities and recognize his worth through the love and affection of his parents who support and encourage him. (Rawls 1971, 463–4) In the second stage, the morality of association, the child develops the skills and standards of conduct suitable to his role. Through cooperation with others he learns to perceive the other person's wants and ends. His moral sensibility is affected by participating in the association. Mutual trust and friendship engender a desire to benefit others, knowing that we benefit from the activities of others. (Rawls 1971, 468–71) Finally, in the last stage, the morality of principles develops from affiliation with others and from those ties of fellow-feeling that are common among people living in the same society. Once such conditions are established people learn to apply and to act upon principles of justice. In general terms, they come to desire to act from a conception of right and justice, not subordinating the right action to the realization of happiness or to other moral concepts. In particular, Rawls founds the sentiment of justice on a desire to act on principles that rational individuals would consent to in an initial situation of choice. (Rawls 1971, 474–8).

What is, then, the kind of character that the educational policies called for by Rawls' theory of justice aim to promote? We know that in Rawls' theory persons are equipped with a conception of the good and a sense of justice where the first is subordinated to the second. The sense of justice depends on the justice of the basic structure of society. In the contractualist framework that Rawls sets up it is rational to act on the grounds of the principles of justice and want others to do the same. Virtues or constitutive qualities of character are identified, according to this approach, on the grounds of the right actions to which they lead through their exercise. Rawls defines a person of good character by his possessing, to a degree higher than normal, those qualities which it is rational for people in the original position to want mutually in each other. One has to conclude that the concept of a morally valuable person, a person of good character, according to Rawls, has a close resemblance to that of goodness as rationality (e.g. a knife is good if it has those qualities that make it a good knife, such as sharpness, etc.). (Rawls 1971, 437) Since Rawls' conception of rationality, although constrained by the veil of ignorance, is instrumental and unable to touch on human ends, we can move against Rawls' conception of the good character an objection similar to but weaker than that moved against utilitarianism. The good citizen who has developed a sense of justice acts advancing the ideal of a just society where resources are distributed so as to favour the most disadvantaged. But moral development, according to Rawls, does not provide citizens with a critical potential for discussing public choices relative to the development of fundamental human capacities. The liberal egalitarian approach is here limited because of neutrality: once we make a distribution of resources which respects principles of justice neither society nor individual citizens have reasons to worry about what each can do with the resources he has available, with the ends to which he addresses those resources and with the capacities he wants to develop.

Besides Rawlsian contractualism there are other two liberal approaches that are worth-mentioning. The first is the liberal-perfectionist view of personal autonomy. It holds the necessity for the liberal state to educate its citizens to decide for themselves on their own interests and to govern their own lives, choosing each by himself his direction. As some theorists hold, personal autonomy is a political ideal particularly important for modern societies where social and economic circumstances favour an autonomous style of life. (Raz 1986, 369 ff.) We want the perfectionist state not only to protect the right to autonomy of its citizens, protecting them from violence, fraud, exploitation, manipulation, etc., but also, and especially, to promote personal autonomy, encouraging them, for instance, to reflect on the direction of their life. Educational curricula oriented to promote personal autonomy are non-neutral in the sense that at least they discourage individuals from making conformist choices of life.

The second well-known view is libertarian education. It can count quite a number of followers, especially in the American debate in which there is a traditional suspicion toward the role of the state in education. Libertarian education promotes diversity and choice of educative curricula unless there are powerful and reasonable grounds to deny choice. In the traditional confrontation between parents and the state as the alternative central poles of authority in education libertarianism places all authority on parents, reserving eventually to the state a right to check the quality of the education provided. (Gutmann 1987, 28 ff.) Usually libertarian positions have been put forward to support the right to send children to religious schools of some Christian denomination. More recently the question has been raised with regard to Muslim schools in European countries such as the United Kingdom. Critics object that they would transmit non-Christian and non-liberal values to children, violating also the principle of neutrality. (Hargreaves 1996, 133–4).

The problem of respecting neutrality among values in education is also the main problem that appears behind Kohlberg's rejection of the so called 'bag of virtues' approach – although neutrality was not an explicit concern for Kohlberg. Rawls and Kohlberg share a concern for justice as the main target of education. Justice, Kohlberg holds, following Plato, is the only virtue that deserves to be developed, regardless of climate and culture. (Kohlberg 1981, 30–1) The universality of justice is contrasted with the variety of the bags of virtues described by theorists that have approached the problem of character education before him. Many different directions in character education can be described according to the central virtue that one wants to identify: for example, honesty, altruism, obedience, self-discipline, creativity, just to quote a few that emerge from Kohlberg's discussion. (Kohlberg 1981, 31–5) Given this variety of virtues, Kohlberg concludes, one person that wants to define his moral aims in terms of virtues and vices and, so, in terms of the praise and blame of others ends up trying to be all things to all people and, like Charlie Brown in the famous song *You Are a Good Man, Charlie Brown*, he ends up being "wishy-washy". (Kohlberg 1981, 35).[5]

In proposing a justice-oriented approach to moral education Kohlberg is not tackling the problem of neutrality that constantly hunts liberal authors discussing the problem of the purposes of education. (Gutmann 1987, 33 ff.) Perhaps, he had good reasons in ridiculing the bag-of-virtues-Aristotelianism that was common in his times, because authors proposing different and incompatible sets of virtues were paying only lip service to Aristotle's ethics of virtues. Aristotle's ideal of the virtuous person has very little in common with Charlie Brown character: on the contrary, the virtuous man aims at exercising a certain set of virtues that concern 'essential spheres of human life', such as living with others, the vulnerability of our body, the pleasures of food, drinking and sex, and some more. (Nussbaum 1988) This paper is no place to put forward a complete argument in favour of the classical Aristotelian catalogue of virtues that would run against a wide rejection of the so called 'unity of the moral' thesis. (Flanagan and Jackson 1987) Rather, I would more narrowly point out that Kohlberg (I) did not bother himself with considering the real strengths of the Aristotelian model that represented the legacy of an ancient tradition of Western philosophy. He was content with attacking the weak epigones of his times and their theoretically unfounded proposals. (II) He did not consider that his ideal of a virtue of justice as the only purpose of education was at least as much controversial with regard to the liberal ideal of neutrality as the bag of virtues approach. Unsurprisingly, a philosophically better informed proposal, such as Rawls's, does not drive out entirely the idea of character education, while keeping close to a certain ideal of justice. (III) Finally, as we shall see in the following section, the virtues that are conducive to good judging do not reduce to justice and so education would do a poor job in not promoting other virtues together with justice.

By contrast, from a constructive point of view, following a well-established interpretation, I take Aristotelian virtue ethics as characterized in the following ways with regard to education: (1) differently from an ethics based on Kantian personal autonomy an Aristotelian EV is aimed at developing a full range of moral – and non-moral – virtues that go largely beyond the individualistic perspective of personal autonomy; (2) insofar as the virtues entail both cognitive and affective dispositions, an EV approach to education is superior to its rationalistic competitors because it is concerned both with a teaching that takes care of the emotional reactions of students and with forming their rational equipment that contributes to a correct moral choice beyond (strictly) rational deliberation, *pace* Kohlberg who explicitly rejected Aristotle's division between passions and motives within character virtues and cognitive abilities within intellectual virtues; (3) finally, an EV approach proposes the virtues as moral 'principles' that cannot be applied "without sensitive interpretation and adaptation to context." (Carr 2007, 376) It is important to emphasize that contextual interpretation requires judgment

[5] Notwithstanding his sceptical position on the virtues, Kohlberg had a positive attitude with regard to the practice of moral education and proposed, for example, the method of examining the lives of moral exemplars who practiced principled morals such as Martin Luther King, Jr., Socrates, and Abraham Lincoln. He believed that moral exemplars' words and deeds promoted the capacity of reasoning morally in those who watched and listened to them. Another method was that of "the just communities" that was aimed at building democratic values and promoting moral reasoning in school students. (This second method was influenced by his living in a Israeli kibbutz after World War II.)

to a large degree. In many professions but especially in the legal profession interpretation and judgement require at any moment of one's personal development the employment of intellectual virtues such as *phronesis* and craft. (Scharffs 2004, 743 ff.) According to Aristotle, they are not the only intellectual virtues but they are central in the development of the good judge – as of any good professional – and require a special attention.

What kind of outcome can we derive from this general discussion of the purposes of education with regard to legal education? The latter is a well-frequented issue of discussion and a specialized topic for more than one journal but I believe that within the thrust of this paper we can conclude just by pointing out a consideration that enlightens the position of the virtues in the education of the liberal lawyer and, particularly, of the liberal judge. Liberal approaches to education such as Rawlsian contractualism, autonomy-oriented liberal perfectionism and libertarianism can equip young judges with important intellectual tools for a successful performance in their profession – for example, the attitude to take seriously and discuss others' reasons – but only the injection of some ethics of virtues into legal education can, for example, make judges aware of their special role as citizens and as public officers (Kronman 1993; Glendon 1994; Hirshman 1993) or of the importance of a participative and sympathetic attitude toward the parties of their lawsuits.

## Developing practical wisdom

While I postpone to the second part of this paper a more specialized treatment of the three qualities that are central to the conduct of the 'good judge', now we have to focus on practical wisdom (from now on PW) in its process of development and in its relations with *craft*, those professional qualities that grant the competence of a lawyer (as much as that of a doctor, teacher, plumber, electrician and so on). (Broadie 1991, 190 ff.)[6] After (1) a quick inquiry into the potential educational features that may lead to the development of practical wisdom (from now on PW),[7] (2) I want to dwell on the importance of character education with regard to professional training in professions such as law, medicine or teaching in which decision-making depends on the interplay of theoretical, moral and technical considerations. Finally, (3) with regard to certain occupations – such as the ones just noted – I put forward the claim that agents can perform their tasks well only when they do not separate sharply between personal and professional values.

(1) In the first place, can PW be taught or is it something that each person can – or cannot – develop only according to his own potentialities? It is no place here to inquire on those constitutive parts of *phronesis* that Aristotle describes as *sunesis* (comprehension), *gnomè* (sense, sensiteveness), *nous* (intelligence), and *denotes* (cleverness). (Aristotle, 1143 a11-b17) Rather, we need to reflect on the kind of thinking and judgment that those qualities make possible. I wonder about the extent to which it is possible to train young learners to make certain kinds of choices. Assuming that in the

[6] In treating these concepts Aristotle's ethics will be my guide, although I will not tackle the thorny exegetical issue of the analogy between craft and PW because it is beyond the boundaries of this inquiry.

[7] At this stage I shall be concerned with 'young learners' who are not yet professionally focussed. Insofar as education is a process that comprises a series of stages the first stages mark essentially the shape of the following steps in educating one's mind.

first place the learner has a correct understanding of moral values (the moral virtues), he is supposed to balance between these universal values and the particulars of his concrete situation. The practical best of the medical practitioner is not simply deliberating with a view to healing but defining what healing is in a particular situation, with regard to a particular patient.[8] (Broadie 1991, 239) The Aristotelian agent, in general terms, always deliberates with a view to what is best but the best differs in different situations because particulars are different from case to case. In grasping particulars – with a view to the universals of which they are instances – the deliberator grasps those 'facts' that are relevant to a certain situation. It is to be emphasized that the grasp of the facts of the particular situation does not amount to a 'particularistic' understanding of Aristotelian *phronesis*. I agree with Kristjan Kristjansson in interpreting *phronesis* as a virtue by which we balance the understanding of the situation details and a clear view of the "grand-blueprints truths (the relevant *whys*) about human *eudaimonia*." (Kristjansson 2015, 312).

In the second place, in learning to read correctly the situation that is in front of him the deliberator has also to employ quite often, though to different degrees, theoretical intelligence. This concerns, Aristotle holds, explanatory first principles of science (Aristotle 1985, 1140 b31–1141 a8) that have to be shaped according to concrete circumstances. For example, a medical practitioner may have an accurate knowledge of the pathology of lungs but his diagnosis depends on the capacity of applying those general notions to the particular symptoms of his patient. (Broadie 1991, 244) In a similar way the young judge is called to apply her general notions of law to hard cases where her perception of the salient features of the situation may be more helpful than all the legal doctrine of Dworkin's Hercules (cf. sect. 4.3).

In the third place, even the best knowledge of law can be not enough for the legal practitioner – and especially the young judge – to offer an adequate response. He has to apply, on the one hand, a problem-solving ability that derives only from experience and, on the other, he has to show a sympathetic understanding of the party's – client's – situation. The emotional response and involvement with the party is a feature of correct conduct that the practitioner learns as belonging to all those virtues of care that have to be exercised in the course of his profession.[9]

In the fourth place, the agent who deliberates on a certain objective such as healing has to make a fine and accurate selection of all those means that are conducive to the concrete objective of healing this particular patient on the grounds of a factually correct chain of causes and consequences. Here it is clear that excellence in deliberation can be achieved only learning from the experts and from repetition of acts of the same kind. Similarly, in taking a legal decision, both on the side of the lawyer and on that of the judge, experience and advise by expert colleagues and the study of precedents may be

[8] Although the focus of these reflections is on legal education, I cannot help following Aristotle's leading example that is focussed on the medical practitioner as the paradigm of a deliberator who has to make his choices keeping a balance between the general truths he knows about medicine and the variety of concrete particulars he has to tackle in concrete cases. Of course, Aristotle's example can be easily translated into the legal profession by all those familiar with its generalities (norms) and particularities (the nuances of concrete judicial cases). *Phronesis* as a balance between general theory and particularities in medical ethics is discussed in Beresford 1996.

[9] In a recent research project on medical ethics in the UK many doctors said that "medical *phronesis* is not inborn—it requires attention and training, both in medical education and even in the workplace". Kristjansson 2015, 317) Similar calls come from recent literature: Bryan and Babelay 2009; Boudreau and Fuks 2015.

of great help in understanding a particular hard case in which even the best law school education does not provide a definitive solution.

Now, back to the main issue of the development of qualities in decision-makers, in particular judges, the challenge to educators in my view is that of proposing curricula that can promote understanding of universals and application to particular situations; a grasp of facts that entails, at the same time, a grasp of those values that emerge in the situation; understanding of conditions and consequences of a situation that brings about the capacity of selecting those means that are necessary to a rational choice aimed at the correct end; finally, one of the most difficult achievement of the young learner will be that of developing the appropriate emotional response in complex situations of choice. [10]

(2) The second issue that needs to be discussed here with regard to character education is the aspect of professional training that in the case of occupations such as law or medicine entails a special relation between personal and professional values or, in other words, between PW and craft. As is well-known, the analogy between PW and craft is one controversial point in Aristotelian exegesis and it is no place here to get deep into it. However, in discussing my issue, I cannot help touching on a few points regarding the connection between those two intellectual virtues. (Broadie 1991, 190 ff.) These few points only concern the educational aspects that lead to the development of PW and craft, while I postpone to the second part of this paper a more detailed treatment of the structural relations of PW and craft with regard to law.

A first point, also recognized by Aristotle, (Aristotle 1143 b 21–33 and 1144 a 1–6) is that while we can consult an expert in a craft like medicine and recover our health in this way, we cannot get full benefit of PW without having it ourselves: a person who would only trust the suggestions of others with regard to how to live best would remain humanly incomplete. By contrast, a lawyer (or a physician) may be good at his craft even when not showing PW, although, as we shall see, a merely technically competent expert may not appear to his potential interlocutors as trustworthy as someone exhibiting some degree of PW.

A second worth-considering point concerns the way craft is learnt and applied: in areas such as plumbing or auto-mechanics all that counts is applying procedures or rule-following. Technical competence may, thus, be acquired in a way that remains entirely devoid of moral dimensions. By contrast, in complex areas such as law or medicine judgment that comes from experience and from PW requires much more than routine technical procedures. For example, the moral quiddities that a young lawyer encounters at the beginning of his career cannot be worked out simply on the grounds of rules learnt on textbooks but require a degree of understanding that comes from *good* practice and being confronted with exemplary models of judgment.

[10] It is not my task here to devise a detailed curriculum of studies for the development of these capacities but two points can be emphasized: (1) studies in the humanities may present the young learner with a large array of past cases in which those capacities have (or have not) been exercised, showing how to deliberate correctly; (2) models of character and their conduct in situations of conflict of values may be used as *examples*, according to the EV tradition. This would entail going quite beyond the classical curricula of the Western tradition that included *trivium* (grammar, logic and rhetoric) and *quadrivium* (arithmetic, geometry, music and astronomy). While the fostering of PW may require a considerable effort from teachers – and family alike – craft can be brought about only in more professional schools.

My third and final point here is a general point that comes directly from Aristotelian doctrine: PW as much as craft and theoretical wisdom have different ends, though being all intellectual excellences. To some degree, however, PW and craft are similar insofar as both are worried about the correct ends to reach a certain goal but PW is also concerned that the end itself be right. This may happen only through the connection established by Aristotle between PW and moral excellence. (Broadie 1991, 191).

(3) These last considerations bring me to the final point of my agenda: the necessary connection between personal and professional values in certain activities such as law or teaching.[11] The thesis that I want to hold, following David Carr, is that in such professions a good practician cannot be just someone who observes her duty and shows the skills characteristic of her activity. She also needs to have and show good character because in her role she has a special responsibility toward her fellow citizens. This is true not only for teachers who have a special task of moral improvement of children, as Carr emphasizes, (Carr 2006, 177 ff.) but also for lawyers whose task in advising their clients goes well beyond the limited boundaries of craft. This is all the more so with regard to judges whose opinions affect the life of many people (also through the impact of precedents).

The point that is worth-emphasising here is that in certain professions such as medicine, law and teaching – differently from plumbing or auto mechanics or pottery – there are ethical constraints and considerations that are *constitutive* of those occupations rather than just *regulative,* as it happens with a wide range of occupations. (Carr 2006, 172) We usually expect that any trade-person behaves according to general ethical standards – e.g. without deceiving his customers – but even though a – say – potter did not respect the ethical norms of his trade, he could be called a "good potter" with regard to his products. This is not the case with regard to a lawyer, a doctor or a teacher whose standards of correct conduct are constituted also by ethical norms.

My final point here is that of putting into doubt ethical *norms*, deontic considerations, as the only ethical standards that count for those categories of professionals. I assume, following an ancient tradition, that in these cases we, as citizens interacting with those professionals, expect them to show certain qualities of character and intellect usually summarised in the concept of *phronesis*. It is to its development and its interplay with craft and rhetoric that we should now turn.

## Part II: The reasonable judge

### Reasonableness in judging I: From the formalist judge to consequences

Given certain general presuppositions of a correct path of professional and personal development, in the next sections I will focus on the special needs of the judge who, more than other kinds of lawyers, has an ethical load to discharge in the exercise of his functions. A judge by definition of his role has to make justice in all those cases of legal

[11] Although my main focus remains on legal education I believe that the parallel with teaching or medicine is fertile to show how legal professionals cannot divorce craft from *phronesis* because, as in the other cases, ethical constraints are commonly perceived as a necessary component of one's successful performance as a teacher, judge or doctor.

conflict that are brought to his attention. In this sense more than almost everybody else in our society he has an ethical load that matches, at least to a certain degree, citizens' expectancies with regard to a 'just society'.[12] However, this is not the only kind of expectancies that we have with regard to the judge's job. We also expect him to be well-known and legally competent in all those aspects that make up the 'craft of law'. When he is not competent and his judgement is revealed as patently faulty he receives at least as much discredit as in the case in which he makes injustice. Finally, a just and technically correct decision requires also a correct communication: it may or may not become a landmark decision that affects (or not) the public opinion according to the judge's rhetorical capacity.

Periodically big economic and/or political scandals, such as the Watergate in the '70s, the Whitewater in the '90s and the Lehmann Brothers in the first decade of the '00s, have brought to the public attention the necessity of a 'character education' for lawyers. An education to the moral virtues, many would say, might improve the sense of responsibility for the common good that has been missing so often. A few decades ago some authors have revived the virtue ethics tradition and, particularly, 'practical wisdom' or *phronesis* in the common law. Anthony Kronman and Mary Ann Glendon have carried the banner of virtue ethics in the '90s, advocating the exercise of virtues rather than the recourse to rules to solve problems of legal practice. (Kronman 1993; Glendon 1994).[13]

In my view the EV brings in the most interesting and fertile proposal in the field of legal education but we should not forget that several other attitudes are open to the judge who wants to exercise correctly his job. None of them can be charged with patent wrongness but only with being inadequate to discharge the complex and integrated job of the good judge: applying general rules in the concrete case with all its particulars. The attitudes of judging on which I shall dwell are the following: *legal formalism, consequentialism, respect of human rights* and *the EV approach*. This analysis will be successful to some extent if it allows us to recognise and distinguish these attitudes at work in real judges. But most of the times we shall confront mixed combinations in which eventually one trait will emerge as prevalent or only temporarily so. Finally, the analysis I am putting forward does not affect only a synchronic aspect but also a diachronic one: those attitudes do not only pertain to different judges but may also represent – although not in each case – a path of professional and personal development that aims at the ideal level, at a judge exercising *phronesis*, craft and rhetoric.

The first attitude I want to discuss is that of legal formalism or the *formal-positivist model* that is usually considered as the 'safest' way of judicial decision-making, the one that minimizes the risks of arbitrariness and discretional application of the law. The judge who decides according to this model decides following legally binding norms

[12] It is worth-mentioning from now that my account of the various stages of development of the reasonable judge is an 'ideal path' that considers mainly the positive aspects that the judge can achieve at each stage. I do not dwell on entirely negative examples, such as 'the corrupted judge'.

[13] Kronman and Glendon were not the only ones to advocate legal curricula more oriented towards civic virtues. Other authors, such as Gutmann (1993) or Hirshman (1993), have emphasized the necessity of stressing an education to the virtues in order to advance the aspirations of citizenship in a society divided by pluralism and diversity. Their preoccupation is – among other thing – the 'zealous' lawyer who cares only about winning lawsuits: according to my categories, the problem is that of a character, expert in craft or rhetoric but disconnected from PW and the ethical virtues.

and setting aside all individual preferences, values and emotions. If the personal element is marginalized, the legal value that is most cherished by this attitude is that of the *rule of law*. The judge who has developed the formal-positivist attitude tends to employ a syllogistic style of reasoning, deciding in a mechanical and ritualized way, without developing professional skills nor judicial virtues. (Stepien 2013, 139–40) This attitude tends to have a bad name especially in civil law contexts in which the formalist judge is discredited because he feels constrained solely by the text of legal norms rather than by their grounding reasons.

The formalist judge, on the one hand, shows a passion for logical rigour that he takes to lead to incontrovertible solutions. He would define his style of legal reasoning as professional, neutral, objective, etc., escaping all references to reasons and values underlying his decisions. On the other hand, especially in civil law contexts, the formalist judge employs an obscure and evasive language; appeals to instrumental values, such as legal security and due process, neglecting underlying substantial values; often emphasizes questions of proceedings, abstracting from substantial problems. (Atienza 2011, 199–201).

The account I have provided of the formalist judge emphasizes mainly his negative features, all those traits that, though staying within the rails of legal competence, marginalize the main goal of judging: making justice. However, despite the discredited formalist picture that has just been introduced, not all that comes with legal competence – as with any technical competence – is bad. On the contrary, as Aristotle taught, we can – and try to – achieve levels of excellence in most of our activities, both in certain areas of expertise such as medicine and law and in games such as chess and sports in general. “Craft” (*techné*) is the name we use for this intellectual ability or virtue and it requires a certain amount of practical deliberation aimed at producing the goal of each activity.

I can sketch in the following way what is most distinctive of craft: (1) its being a socially situated practice – as in the case of law or medicine – implying both practical and theoretical knowledge; (2) its being strongly connected to tradition, though some degree of innovation is accepted; (3) its being a body of knowledge transmitted through generations, where the weight of rules is greater than in PW (though it cannot be reduced to a hierarchy of rules); (4) its entailing the placement of certain constraints upon the craftperson. (Scharffs 2001, 2253–4).

If this description suits all sorts of craft, my next question is “how can it be accommodated in the legal context?”. A possible response may require a few steps to be spelled out. (1) Law can surely be defined as a socially situated practice where a common law or a civil law setting can make a big difference to what is legally ‘produced’. Further, legal differences concern not only products of legal decision-making but also the way they are brought about, that is based on local practical knowledge.

(2) The degree to which legal reasoning is connected to the past through rule-following and the observance of precedents both in the common law and in the civil law tradition. Law looks backwards, seeking fit and consistency with what has been decided before: at a minimum, justice can be done only if like cases are treated alike. But innovation is recognized to some degree because interpretation of past rules and precedents has always to proceed not only with a gaze on the present situation but also with an eye on the future and on the variety of new stances that show up.

(3) Bentham in the XVIII century was well aware of the common law as a body of knowledge transmitted from one generation to the other and gradually increasing its complexity. He saw it as a heap of natural law mistakes on which he thoroughly tried to innovate: but he was a theorist, a legal reformer, not a craftperson reasoning from inside the craft of law. This example is just useful to show that once you want to produce profound innovation, you are without the craft of law. (Scharffs 2001, 2254–7)[14] Being within entails following the rules of the game, although some degree of innovation can be accepted: what in civil law is called "extensive interpretation" makes sense of some progress in the understanding and applying of a rule to new situations. Evolution in the common law through analogical reasoning has been famously described by Edward Levi in his well-known *Introduction to Legal Reasoning*. (Levi 1948) Levi's writing makes clear how a legal concept evolves through a collective judicial work in which a precedent defines a rule whose further application is confronted each time a new case arises: skills of craft are crucial in this evolution.

(4) Finally, a commitment to legal craft entails the understanding and acceptance of certain constraints of coherence and consistency – using MacCormick's categories (MacCormick 1978, chaps.7–8) – which intrinsically belong to the law: the legal craftperson should not violate – e.g. in drafting a judicial rule – valid rules of the system of law and he should keep his justification within the boundaries of rational values, intelligible and shared within the legal system.[15]

## Reasonableness in judging II: The consequentialist judge

In many situations even the best legal competence of a 'craftsman' such as the formalist judge may not give a satisfactory answer to a conflictual situation. The observance of legally binding rules and syllogistic reasoning may leave the judge astray with regard to a difficult case on which important social/economic consequences depend. The consequentialist judge can be considered as a higher stage of development in the attitude of judging, able to overcome many strictures of the formal-positivist judge. He is characterized by taking into account the anticipated consequences of a decision on the legal system or by considering the micro- and macro-economic and social consequences. Thus, on this model the judge is inclined to evaluate the outcomes of different courses of action that may or may not be oriented to achieve specific goals. A specific goal in this sense is that of the judge who wants to decide according to the criteria of the EAL (economic analysis of law), wealth maximization or social utility or welfare. (Posner 2008; Foxall 2004).

The consequentialist model seems to be more responsive to the specific circumstances and context of a decision than the formal-positivist judge who has to stick to

[14] We should notice that, once the agent is concerned with a high degree of innovation, creativity and originality, he is in the realm of art rather than craft. This is not to say that there is a sharp divide between the two: in time objects of craft may be considered artistic, as it happens with many ancient objects exhibited in our museums. Also, in the field of law some great and revered opinions of high courts may be raised to the status of art. However, similarities between art and craft should not make us forget that only craft, and not art, is concerned with the relationship of form and function.

[15] A commitment to craft can be translated in terms of "fit" on the objective side, using Dworkin's well-known terminology – we should probably talk of "consistency" in MacCormick's terms –, while it is not so clear whether a commitment to moral principles – Dworkin's "substance" – can be associated with the idea of practical wisdom.

existing legal rules. But, on the one hand, one could argue that this model violates the rule of law: citizens cannot be certain about what to expect from a judge who decides on the grounds of economic considerations connected to the circumstances of the case. On the other hand, critics object that it is not easy for a judge to develop that competence in economics and statistics that is necessary to achieve the results expected by the EAL.

However, the consequentialist model ranges much wider than the EAL criteria. Neil MacCormick comments on a series of cases that concern constitutional law and beyond – particularly torts. Here we find a much more flexible understanding of the idea of consequences. In this kind of evaluation MacCormick identifies considerations of justice, political opportunity and public interest that may or may not confirm an existing legal rule. The consequentialist judge, he holds, often employs arguments that entail fundamental assumptions of political philosophy and general criteria of justice and "common sense". (MacCormick 1978, chap. 6).

The consequentialist judge, then, is someone who deals with consequences and values on a larger scale than his EAL counterpart. He introduces into legal reasoning a kind of considerations that escaped the formalist judge, representing a progress, in my view, from the point of view of justice, with regard to this model. However, there is much that is still missing in terms of respect for human rights in the model considered so far. So, if it makes sense to discuss a path of development of the good judge, we need to identify a further stage in which he can employ two kinds of substantial argument: consequentialist and human rights arguments. A good case in point for this judicial attitude is Dworkin's Hercules who is able to employ both kinds of arguments at an ideal level.

## Reasonableness in judging III: From consequences to Hercules

Dworkin proposes Hercules as a "lawyer of superhuman skill, learning, patience and acumen" with the task of considering theories of what legislative purpose and legal principles require." (Dworkin 1977, 105) Hercules represents an ideal in the development of judicial attitudes that goes some steps beyond the formal-positivist and the consequentialist model. In his first work, *Taking Rights Seriously* (TRS,), Dworkin presents basically two categories to decide on a hard case, *principles* and *policies*. The latter are aimed at reaching goals of general wellbeing and represent the substantiation of consequentialist reasoning. Arguments of policy are usually employed by legislators but can also be central in judicial reasoning, according to certain positions such as EAL. By contrast, Dworkin's Hercules holds that arguments of principle should always prevail on arguments of policy in hard cases because the former affirm individual rights and these are irreducible to any consideration of policy – whatever its metric of value, wealth, utility or else. Later on Dworkin develops his theory of rights into a theory of interpretation in which the central categories are 'fit' and 'substance'. (Dworkin 1986) 'Fit' represents an idea of legal coherence that the judge has to establish between the new rule that fits the case to be decided and the legal system. It is a level of interpretation that would meet the consent of the formal-positivist judge as well.

However, at some point Hercules realizes that the resources of fit run out because, for example, there are two possible solutions for a hard case, both of them fit and none is better than the other. At this point he brings in 'substance' that is political morality because there is no other way to work out the hard case than recurring to a justification based on values. It may be useful to follow Dworkin's scheme of reasoning in one well-known example from TRS. Here it is possible to run into both considerations of principles and policies and something that looks quite close to fit and substance.

The example that Dworkin presents addresses constitutional problems connected with liberty of religion. He supposes that a constitution in Hercules's legal system prevents any law from being valid if it establishes a religion. The question is whether a law that grants free busing of children to parochial schools is constitutional or not. Does busing entail that that religion is established by the state? Hercules's first task is that of interpreting the constitution in order to understand its political scheme, that is what principles have been settled. According to Dworkin, he can develop a full political theory that justifies the constitution as a whole. Hercules may interpret the provision against an established church as founded on a policy aimed at preventing social disorder or tension. Or, he can believe that the provision is based on a background right to religious liberty. (TRS, 106) If these two schemes of interpretation are equally justified, Hercules's next move is that to check those two theories against the remaining constitutional rules and settled practices. Suppose, Dworkin continues, that Hercules' conclusion is that the establishment provision is justified by a right to religious liberty. Hercules's third move is that of asking what religious liberty is. It may "include the right not to have one's taxes used for any purpose that helps a religion to survive" or "simply the right not to have one's taxes used to benefit one religion at the expense of another." (TRS, 107) How should Hercules decide? It is no more just a question of fit between a theory and the rules of the institution but it is also an issue of political philosophy. At some point he has to elaborate a conception that works out as the most satisfactory interpretation of the general idea of religious liberty. It is here that considerations of craft, depending on Hercules's expert knowledge of the legal system, are integrated by PW, meaning an interpretation of the moral and political principles relevant in the case.

Similarly with precedents Hercules's task is that of showing that the law is a "seamless web". He is called Hercules because he has to "construct a scheme of abstract and concrete principle that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well." (TRS, 116–7) However, his search of fit in all cases run the risk of finding holes: this is to say that even his "superb imagination" may be "unable to find a set of principles that reconciles all standing statutes and precedents." (TRS, 119) So, Hercules is faced with the difficult task of elaborating a theory of error that explains how some decisions, some statutes or some part of the institutional history may be mistaken. In this elaboration a first move will be that of distinguishing between the specific authority of some legal event – such as a statute or a court's decision – and its gravitational force. If Hercules judges some legal event mistaken, he does not deny its specific authority but its *gravitational force*: it cannot influence any more later decisions or statutes. Dworkin explains the gravitational force of precedents on the grounds of the principle "treating like cases alike". A precedent has the value of a political decision that offers reasons to be followed also in future cases. According to Dworkin, however, the gravitational force is reserved to the arguments of principle – that support background rights – while arguments of policy are aimed at collective goals and their strength is a contingent factual question. Thus, arguments of policy do not have the same gravitational force than the arguments of principle because the former depend on the collective goals of government.

**Reasonableness in judging IV: From Hercules to the reasonable judge**

Can we take the judicial attitude centered on human rights, exemplified by Hercules, as the last stage of development in the ideal judicial path whose previous stages I have identified as formal-positivist and consequentialist? Dworkin would have no doubts about the progress represented by his theory but, if we want to learn something from tradition, I believe we should consider the central virtue of the EV, *phronesis*. *Phronesis* or practical wisdom (PW) represents even better than craft the subjective side of decision-making. Differently from Hercules's application of legal and moral principles, PW is applied also through the exercise of judicial virtues such as courage, temperance, impartiality and justice. (Solum 2003)[16] But our focus here should be especially on those features that make it specifically an intellectual virtue. What follows on PW and the ethical virtues is to be taken as a contribution to the theory of character education that concerns legal practitioners. It is a set of philosophical reflections that dwell on an ideal picture – including also craft and rhetoric – that, on the one hand, has many points of contact with reality – what really happens in legal education – and, on the other, is meant to induce some degree of correction where education goes the wrong way.[17]

I have already dwelled on the development of PW in general terms (sect. 4). We should now assume that a young judge who starts the profession has already a pre-built disposition of PW: he cannot improvise certain qualities of character with regard to law, if he does not possess them already, at least to some extent. The special configuration of PW as a judicial attitude derives from the judge's task of applying rigid rules and arguments of law. These have to be combined with the understanding of what is morally required in a set of given circumstances. Through PW moral virtues enter the scene by contributing to identify the right choice in given circumstances. However, the working of PW is more complex than what I have just hinted at. I believe we can consider at least the following areas of concern: 1) the means-end relation; 2) the ability to perceive and to feel appropriately; 3) the ability to perceive what is relevantly

[16] Solum develops a nuanced theory of virtue jurisprudence in which the most common judicial vices are pointed out: corruption, civic cowardice, bad temper, incompetence, foolishness. (Solum 2003, 186–8) Some of them are tackled by what I have described as the previous stages of development of the reasonable judge but the worst cases, such as 'the corrupted judge', are simply beyond the reach of the EV approach I am taking here. I am concerned with young practitioners – lawyers and judges alike – who have gradually acquired the habits for virtues in the course of their curriculum of education. As Aristotle taught, virtues are habits that develop through time, starting in the young age: once someone gets to mature age it is quite unlikely that the EV can teach him what to do in situations of ethical conflict.

[17] One can wonder about real character education in the law schools and the extent to which reality comes close to the theoretical ideal. My sketchy hints can be taken as gesturing toward a model that should be implemented at least from the high school on, given the long time of habituation to the virtues that Aristotle was already aware of. Some useful suggestion – although not specifically focused on the EV – can be found in Nussbaum 2003.

unusual in a context. In turn, these qualities reflect their potentialities in legal reasoning, especially with regard to the relation between universals and particulars.

Some of these points have been already discussed in the first part of the paper as components of PW that a correct process of education has to develop in each person. We need to make now just a few additional considerations that lead to the exercise of PW in legal reasoning. What will clearly emerge, in my view, is the advancement that a judge applying PW represents with regard to Hercules' 'principles' and 'substance'.

(1) No judge can limit himself to a 'means' reasoning, considering the end as fixed. Rather he has to consider and ponder different ends that may conflict among themselves, evaluating their different weights and consequences. The identification of means to a certain end and the pondering against alternative means contributes to that process of 'end-specification' that Richardson shows as a plausible interpretation of Aristotelian practical reasoning. (Richardson 1997, chap. 10) Further, the technique of 'balancing', usually employed by Supreme and Constitutional Courts (US, EU, Germany, Italy among others), shows how judges in hard cases cannot help deliberating about ends. PW is, then, crucially necessary at these junctures.

(2) The ability to perceive and feel appropriately is far from being innate in us. An hypothetical person deprived of normal physical, sensorial or emotional stimuli would be seriously at odds in relating to her fellows. We generally acquire our ability of perceiving and feeling through correct processes of socialization that take place in the family and in the school. But, as Martha Nussbaum and others have pointed out, we can also develop those abilities by being exposed to storytelling. Exemplary characters and the novel's narrative structure provide each of us – and especially the young learners – with an effective equipment to develop our sense-perception. (Michelon 2013, 42–3) Getting closer to some extent to the ground of effective legal education, Nussbaum's advice about the Socratic model deserves attention for being explicitly descending from ancient EV. (Nussbaum 2003, 272 ff.) A Socratic model 'seriously' applied in law schools would lead, on the one hand, to teach more toward the search of truth and less toward winning cases by amassing all relevant materials and, on the other, to foster students to develop that passion for justice and the other ethical virtues that typically belong to the tradition of the EV.[18]

(3) Finally, developing sense-perception in general is not all that matters to PW. There is also an ability "to single out the odd one": in a given context we should be able to discern what is relevantly unusual, the exercise and improvement of this ability brings about an enlargement of our perceptual framework and understanding. When we are unable to learn and react appropriately to changes in our framework we have examples of intellectual failure such as dogmatism. This can be taken as a "disposition to respond irrationally to the oppositions to the belief held." (Roberts and Wood 2007, 197; Michelon 2013, 44–5).

[18] Nussbaum also correctly emphasizes the importance of a comparative approach in the law schools, aimed at enlarging the perspectives of students who, as lawyers or judges, will be very likely confronted with other legal systems and different experiences in our increasingly globalized world. But it is her final point, that of stimulating empathy and imagination through appropriately designed curricula and courses, that deserves all our attention from an EV standpoint. (Nussbaum 2003, 275 ff.)

Practical wisdom and its cognate 'craft' are intellectual virtues. But they need to be applied in contexts of action in which the correct choice comes from a combination of virtues of character and intellectual virtues. I believe we can find a bilateral relation between these two kinds of virtues: perceptual anomalies may affect choice (as in the case of someone who chooses dogmatically, neglecting contrary opinions and objections) but also wrong choices may affect our perceptual framework (someone who chooses unjustly – say, out of corruption – may develop a distorted perception of the situation and its priorities). Thus, notwithstanding the crucial importance of PW in practical reasoning, we should not forget that an ethically correct choice is always dependent also on the possession of certain character traits.

What I have outlined in general with regard to the development of practical wisdom can be specified with regard to legal reasoning. We find here a special twist depending on the connection between universals and particulars that define the boundaries of subjectivity. Practical wisdom is what belongs to the subjectivity of the agent, though connecting with the objective world. This connection takes place not through some mysterious faculty of divination – as some people have objected to *phronesis* but through a "legal peripheral conceptual perception": the idea is that if a legal decision-maker learns the regular case of concept application, he will be helped to perceive the awkward element in a particular case. Following Zenon Bankowski and the ideas I have already sketched, the legal decision-maker learns from experience to apply correctly legal categories (what I have called 'craft') but also to make a change when he finds an awkward element in a particular case. (Bankowski 2001, 104–8; 135) It is quite clear how the shape of decision-making by practical wisdom escapes any deontological category based on principles such as Dworkin's.

The *phronetic* model of the good judge seems to enclose most of what we normally assume to belong to our ideal of decision-making from the subjective point of view. It seems to represent a higher stage of development with regard to previous models, provided that it can be coordinated with craft because this brings about also the values of the 'rule of law'. These are basic values for the continuity of society that have to be protected together with moral and political values. The coordination between practical wisdom and craft should ensure of a correct legal reasoning that overcomes the weaknesses of previous models. However, if we focus on the judicial context of a lawsuit, we can see how something else, beside practical wisdom and craft, is missing. The judge – as much as the lawyer in general – has to give the correct answer, according to legal and moral criteria, but he has also to communicate persuasively his arguments. It is, then, to the sphere of 'social acceptability' that we have to address our attention now and especially to *rhetoric*, being the kind of 'art of persuasion' that a good decision-maker should have in his baggage. The good judge should not only hit the target but also communicate persuasively to the parties and the public opinion his decision and the arguments that support it.[19]

[19] It may be objected that if one accepts Dworkin's 'one right answer' thesis there is no more place for rhetoric. If the judge decides correctly, why should he be concerned with persuasion? The reason is that even the best decision, according to the situation, has to be accepted by the parties and the public opinion. The reasonable decision-maker has to render his decision socially acceptable because he knows that what it is right in the abstract has to be put in context. Even Dworkin's Hercules knows that his decisions, whatever their 'rightness', have to accepted by a public opinion.

In order to understand rhetoric and its role in legal reasoning we need to analyse its components, not only to have a grasp of the gist of rhetoric but also to check whether its development is compatible with the development of virtues of intellect such as practical wisdom and craft. Running ahead of the argument, I would assume that, out of the three constituents of rhetoric, according to Aristotle, *logos, pathos* and *ethos*, *logos* is the rational element that can be developed in accordance with what is rational – or reasonable – in practical wisdom and craft; the component of *ethos* or character represents a clear connection with the virtues of character that operate through practical wisdom; similarly, *pathos,* the emotional factor, can operate within the rails of the virtues of character that work to keep in check irrational impulses. Of course, this is an optimistic view on the development of rhetorical capacities that follows Aristotle's proposal of the necessary connection between rhetoric and ethics. As we shall see, that development may go astray with regard to each of the three elements and we may find judges who decide irrationally or simply out of emotional impulses or without any connection with the virtues.

**Reasonableness as the persuasiveness of rhetoric**

How should we approach such a tradition-loaded issue as rhetoric? From an Aristotelian orthodox point of view, one may object to my locating rhetoric in parallel with craft and *phronesis* because it cannot be considered a virtue of intellect as the other two. Rhetoric can be taken to combine the properties of craft and *phronesis*, as the central qualities of citizenship, if it is taken as a 'civic art of rhetoric' with no specialised object but a general concern for politics and justice. This is true both for the politician who deliberates for the good of his community and for the judge who is asked to make justice in a concrete case. (Garver 1993, 22–3) What follows is a general discussion of rhetoric that can be applied both to lawyers and to judges but my Aristotelian account in terms of a 'civic art' and of the central values of truth and justice applies primarily to judges who have the official role of participating to the public discussion with an aim at the common good. This is the often implicit core of Aristotelian rhetoric.

Rhetoric, since ancient ages, concerns quasi-logical forms of discourse insofar as it is aimed at persuading the audience. In its current prevailing understanding rhetoric is no more than manipulative discourse, application of technical rationality by the rhetor for self-serving purposes. This approach is not new in the philosophical arena since it can be said to rely back on Plato's view, as expressed in the *Gorgias* through Socrates. However, immediately after Plato's chastising, Aristotle came to rescue rhetoric from its bad name although, if we look at present common usages of 'rhetoric', Plato seems the more successful at least as far as average people use the term. By contrast, legal use has seen a resurgence of interest for rhetoric as an important tool of legal reasoning. (Perelman and Olbrechts-Tytecà 1969)[20] In particular, in the judicial use the reasoning of rhetoric persuades by the employment of logical argument – precedent, analogy and example – that expresses the rational side of rhetoric. The reasons for persuasion here are internal to the practice of judging, although not necessarily to the person who judges.

[20] Starting from the pioneering work by Perelman the legal use of rhetoric is now wide-spread.

In order to reach a full understanding of subjective reasonableness we need to complete our picture, including aside of PW and craft also rhetoric as a third component that covers aspects of reasoning and communication left aside by the first two components. However, before tackling the issue of what rhetoric is and what entails it is relevant to recall its controversial ethical thrust, following the ancient distinction between a Platonic pejorative view and an Aristotelian positive view of rhetoric. The former describes rhetoric as moved by the concern of persuading through arguments and as aimed at success against competing arguments. On this view, the rhetor would be entirely careless about acting rightly and aiming at the good. By contrast, on the Aristotelian view, rhetoric is not just an "art of persuasion" which may be aimed at any target but, rather, a discipline strictly interconnected with ethical ideals such as truth and justice. (Garver 1993) Aristotle viewed rhetoric as an art which could not be detached from ethics, so that probabilistic reasoning remained "under the check" of the ideals of truth and justice. In this guise it is quite evident that judges are the first recipients of Aristotelian rhetoric, though by no means the only ones.

Once we address the same issue in contemporary terms the detachment between ethics and rhetoric is quite evident and so the appeal to practical wisdom as the component of subjective reasonableness through which values and evaluations come in seems both plausible and necessary. As Aristotle noted and Garver emphasizes, "arguments persuade us to the extent that they make us believe and trust the speaker." (Garver 1993, 146; Aristotle 2006, 1356 a 5–13) We can trust speakers when they show evidence of *ethos* and *phronesis*, good character and intelligence as connected to the moral virtues.

While the craftperson does not need to have a dialogue with others in order to exercise her capacities, instead rhetoric is characterized by public reason-giving, by a democratic desire to persuade the audience in order to win its consent. All the legal experience and understanding and the careful elaboration of craft are laid on the table, so that in the best case third parties, such as the judge, the jury or the public opinion can discuss and examine critically those reasons. This is the side of rhetoric in which public openness is most evident and useful: by contrast, in the case of the appeal to emotions or to the orator's *ethos* the desire of publicity does not overlap precisely with the desire for a transparent public reason-giving. The orator may have a double level of communication: what is said because it is conducive to what the audience wants to hear and what is not said but is behind the orator's thoughts and encloses his real purposes. The latter may or may not determine a case of manipulation according to the degree of divergence or, rather, overlapping with the initial purposes (if any) of the audience. But, of course, if *phronesis* and character are in charge, rhetoric will not be manipulative but only less logically cogent insofar as the *enthymeme* is the body of rhetoric that expresses proofs that are not simply demonstrated as in a geometrical demonstration but supported *also* by the character of the speaker.

Going back to the best case of persuasion through argumentation, rhetoric comes in to persuade the jury, the parties and the public opinion that all relevant points of justification and explanation for the decision have been carefully assessed by the judge. In short, what has been carefully elaborated in terms of craft and PW in the legal context will be, then, brought to the attention and check of a jury – and/or judge – by lawyers and to the attention of the general public by the judge, using in all cases rhetorical means of persuasion. Something – e.g. an opinion – may be right but its arguments have to be presented in the correct way – and by a credible speaker – to gain the persuasion of the audience. The Aristotelian conception of rhetoric together with the employment of PW should warrant against manipulative uses of rhetoric. However, since rhetoric, as Aristotle taught, is comprised of three modes of persuasion that have become a legacy of tradition – namely, *logos, pathos* and *ethos* – we need to check how those modes can convey persuasion without recurring to unethical means, without distorting the correct communication between the orator and her audience. If we can assess that correct rhetorical communication is a real possibility rather than just a vague eventuality, we can obtain a sound argument against the well-known charges of legal realism and legal scepticism that consider rhetoric instrumental to any purpose. While these theories often hold that law is just disguised politics and rhetoric is a useful means to persuade public opinion towards any "truth", by contrast I want to support the claim that rhetoric can usefully contribute to argumentation and justification of a legal decision and, thus, it is an irreplaceable tool for the judge.

Now, the task I want to perform here is that of trying to grasp a bit more in depth the elements of rhetoric already identified that concur to shape a reasonable decision and, thus, the features of the reasonable judge. We need to inquire into each of the modes of persuasion identified by Aristotle. First, *logos* or reason entails the employment of arguments which are logically cogent such as *paradeigma* (example) and the *enthymeme* (an abridged kind of syllogism). While the former is an inductive argument which leads to probabilistic conclusions, the latter is a rhetorical syllogism, performed at the level of the audience, starting from what is probable and from what the audience thinks. It consists of inferences to be presented to non-specialized, non-expert audience: then, it is a public reasoning that can be accepted and understood by people without culture. (Aristotle 2006, 1355 a 8) Different audiences can be persuaded by rhetorical syllogisms, insofar as they participate to public deliberation and want to promote the common good, even though they are unable to follow complicated logical reasoning. The probabilistic reasoning that characterizes both kinds of argument is the most common in legal reasoning and, so, its understanding should be common ground for the reasonable decision-maker.

The second mode of persuasion which deserves our attention is *pathos* or emotion which expresses the ability of the rhetor to grasp the feelings and prejudices of the audience and direct them towards his purposes. It is well-known that emotions such as love, anger, fear, pity and hate among others strongly affect one's capacities of reasoning. The lawyer's emotional appeal may entirely change the mind of a judge or a jury. Outside of the legal field all of us are frequently exposed to the emotional appeal of advertisement which tries to move us in ways not checked by our reason. Since Aristotle's times lawyers knew that in order to obtain a favourable verdict the audience (the jury) has to be disposed in friendly ways and that an intelligent appeal to the appropriate emotions is the best means to achieve that result. However, *pathos* is a mode of persuasion that easily lends itself to manipulation in favour of the speaker's purposes which may not be in the interest of the audience. Here, I believe, emerges the crucial role of the third mode of persuasion, *ethos* or character.

The third mode of persuasion, *character,* is, according to Aristotle, the controlling factor in persuasion. (Aristotle 2006, 1356 a 15–16) At its best it may be said to embed reputation for wisdom, virtue and good will. When the audience's emotions are appealed to people can believe or not the orator's arguments and belief and trust only depend on the character of the speaker. Although the judge has an institutional role and her opinions are binding for the parties and, to some extent, for later judges, her (good) character, on the one hand, is a controlling factor in determining the appropriateness of a decision and, on the other, affects her degree of persuasiveness. When people (including juries) make their choice, one of the main factors which affects them is the character of the person who is speaking to them. (Garver 1993, 147–8)[21] The real issue here is whether *ethos* regards who people think the speaker is or the type of person he really is: in other words, reputation or real character. Reputation is the public face of character and may not overlap with the real character, especially if, as many agree, it is the speaker himself to establish his own reputation, for example emphasizing to the audience that he speaks in their interest (this is all too common among political orators). Aristotle himself says that the discernment of a person's character should result from speech and not from a previous opinion about the person's character. (Aristotle 2006, 1356 a 10–11) A reasonable person, we should conclude, is someone who speaks from a good character or, at least, from the reputation of a good character and whose appeal to emotions can, thus, be trusted by the audience. He is reasonable because his appeal is socially acceptable from the point of view of the audience.

Insofar as character relies on self-constructed reputation, however, there is room for deception and the rhetorician can appeal to emotions as disconnected from truth and justice. Rhetoric may have a built-in remedy, according to Aristotle, if it is true that it cannot be disconnected from the ideals of truth and justice, as Plato would hold, because human beings have a natural disposition to aim at truth and justice and in any dialectical and rhetorical argumentation people tend to prefer true and just arguments rather than their opposites. Although, as it is well-known in the legal context, dialectic and rhetoric can help us to support persuasively opposite claims, the contents of arguments are not indifferent to people because true and best arguments are by their nature more adapt to syllogistic use and more persuasive. (Aristotle 2006, 1355 a 36–39) Ethical and political agents – as judges paradigmatically are – do not only use arguments but also perform their ethical and political functions emotionally as well as rationally.

It can be easily objected that my account so far is one-sided, that I have emphasized only the 'bright sides' of the features of subjective reasonableness that have been described: *phronesis*, craft and rhetoric. But quite often legal practice confronts us also with 'dark sides' which require our attention.[22] The lawyer of craft encompasses, on the one hand, the one-sided attention to legal forms against the contents of one's actions and decisions. He may be a skilful technician who, from his profound competence of the law, can provide the best technically argued opinion. On the other hand, he may be deceitful and cunning because his style is detached from the moral contents of the issue he is discussing. His experience and acquaintance with the law does not provide him with a capacity to perceive the ethically salient features of a legally controversial situation. In turn, the rhetorician wants to persuade his audience at all costs: when he is a lawyer he argues for victory in the legal arena and his reputation as a successful lawyer is established according to the number of trials where he has the upper hand.

[21] According to certain commentators, the leading factors that bring about persuasion are not reason or argument but *phronesis* and character.

[22] For what follows I am indebted with B.Sharffs, 2004, pp. 770–5.

When rhetoric is detached from ethics, as in Plato's characterization, there is no constraint at work against manipulation. While the political orator can try to persuade his audience towards virtually any end, despite its immorality, the legal orator pursues victory with any means, recurring to emotional appeal when possible. Rhetoric at its worst may be an art of 'flattery', manipulating people to believe whatever the orator wants for his interests.

In the end if we try to bring previous sets of considerations to bear on the issue of legal education, we should keep in mind at least the following points that involve both judges and lawyers: (1) the role of lawyers and judges in a democratic society, as also the idea of rhetoric as a civic art shows, is crucial in defending and pursing social justice (Gutmann 1993) and students of the law schools should be taught to engage as agents of normative ethical reasoning and decision-making (Nussbaum 2003); (2) the pursuit of victory of the zealous lawyer, following the revealed preferences of their clients, should always be filtered by the exercise of deliberation aimed at a better understanding of the value of legal action and its alternatives. Students of law should learn the importance of *phronetic* deliberation to foster their clients' 'best' desires rather than just success in litigation; (Gutmann 1993, p 1764 ff. (3) the role of judges and lawyers does not entail only the exercise of reason and deliberation but also attention to emotions and feelings. Insofar as the latter represent an inescapable part of human life, embedding a part of moral value, their perception and understanding has to be promoted in law school classrooms, given their frequent emergence in legal cases. (Harris and Shultz 1993).

Finally, one might wonder how in concrete we should articulate a full curriculum apt to shape the reasonable judges and lawyers. Only some hints are in place here because, otherwise, a full articulation would require a separate paper. (I) It is a long path of education that should start to some extent from school age by teaching the ethics of virtues and, especially, exposing students to exemplary characters that can be looked at as models of behaviour. (II) Development of legal curricula including courses where empathy and emotions are studied and cultivated, as Nussbaum suggests, might be helpful because literary imagination may improve the public life of a society. (Nussbaum 1995) (III) Inducing students to take a critical attitude toward "zealous advocacy", winning lawsuits at all costs, while keeping in sight the larger aim of the law in furthering social justice. (Luban 1988, 3–147, 393).

## Conclusion

Legal reasoning is not only a very frequented area of debate among theorists who prefer to escape the burdensome legacy of legal positivism and natural law (not forgetting legal realism). It is also one of the relevant moments of public deliberation in modern society. Judges – especially in the higher courts – are decision-makers whose decisions often affect important segments of society. In this paper I have argued that judges cannot decide only on the grounds of rules and principles in order to take the best decisions: they also have to be certain kinds of persons. The ideal of the 'reasonable judge' combines different kinds of personal and professional qualities, so to say. At this stage I have needed to introduce the ethics of virtues because it makes room for the subjectivity of the agent much better than rule-based (positivism) or principle-based (natural law theory) competitors.

A large set of qualities of character (or virtues) may be considered as necessary for the good judge but I have chosen to narrow my focus to those that are necessary for good deliberation in a judicial context. I have focussed on *phronesis* as central for good deliberation from a personal perspective as well as from a public perspective: as Aristotle taught, both the good man and the good citizen require *phronesis* for taking good decisions. However, judicial decision-making also needs a technical competence or professional qualities that are almost as much important as *phronesis*: I have dubbed craft (*techné*) this side of the agent's subjectivity, following Aristotle's usage.

In narrowing the focus of my inquiry from the 'good judge' *tout court* to the 'reasonable judge' whose intellectual virtues are especially emphasised, I have meant to focus on the path of development that leads to a certain frame of mind. I have, then, made a move toward the theory of education, arguing that the EV – or character education – is superior to competing approaches that are not aimed at developing the civic arts of deliberating and deciding – collectively or individually – for the common good. I have been considering the merits of competing approaches such as the utilitarian appeal to maximize general wellbeing, the Rawlsian development of a sense of justice in citizens regardless of the ends they want to pursue and, finally, Kohlberg's neutralist attack on the so called 'bag of virtues' approach to education that neglects all strengths of Aristotelian character education. Character education seems the most conducive to our model of the 'reasonable judge'. We live in times of pluralism of values and frequent conflict between competing conceptions of the good, so the reasonable judge seems the model best equipped to answer the demands of reasonable decisions that come from the public opinion and from conflicting parties.

In the model of the reasonable judge the crucial intellectual virtues that we need to develop are the ones we have already met, *phronesis* and craft, but with one important addition, rhetoric. The balance between *phronesis* and craft is not easy to reach because it entails the ability of the judge to balance ethical and legal features in the concrete situation of each decision. However, the model of the reasonable judge I want to account for is only an ideal and we can identify a few alternatives that are on sale in the market of ideas of legal reasoning. The alternatives have been described both as competing models available synchronically to judges and as different stages of a diachronic path of development that can start with the formal-positivist model. This is technically competent on all legal nuances but unable to deal with those ethical features that may emerge in each concrete case. A judge who follows this model at best develops and preserves craft. At the next stage the judge does not limit herself only to understand and apply existing rules but reasons also in terms of consequences, not only of an economic kind.

The third stage is what many consider the current milestone in the present debate of legal reasoning: it is Dworkin's ideal judge, Hercules. His privileged category of reasoning consists of principles aimed at the protection of individual rights. When they come to conflict with arguments of consequences they are always winning, according to Dworkin. However, drawing on the EV approach, I hold that Dworkin's model remains incomplete with regard to those specific features that characterise practical wisdom or *phronesis*: the means-end relation, the ability to perceive and feel appropriately and the ability to perceive what is relevantly unusual in a context.

Finally, I believe that the model of the reasonable judge may be complete only when it includes rhetoric, taken not simply as the ability to persuade successfully the audience but as the civic art to argue, deliberate and decide in the public arena, employing all the best tools of our humanity: *logos*, *pathos* and *ethos*. The judge who is able to employ correctly these features and to show them to the public is the one who gives good reasons to believe him: it is the reasonable judge.

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