BALANCING FREEDOM AND RESTRAINT: THE ROLE OF VIRTUE IN LEGAL ANALYSIS

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I. INTRODUCTION

This Article explores basic freedoms and restraints applicable to legal analysis and the role that virtue plays in balancing such freedoms and restraints.[1] As discussed below, such exploration covers: (i) the origin, nature, and purpose of concepts and categories used in legal analysis; (ii) the experiential nature of the meaning of such concepts and categories used in legal analysis; (iii) the freedoms and restraints applicable to such concepts and categories as a result of either experience or of the concepts or categories themselves; (iv) how workable notions of virtue rightly balance such freedoms and restraints in legal analysis; (v) the distinction between such virtue and skill; (vi) reconceiving the analytically virtuous mean as a proper balance between such applicable freedoms and restraints; and (vii) defining and surveying the particular virtues that lead us to such proper balance and thus to good legal analysis.

These explorations of what "really" occurs in legal analysis thus probe deeper than more obvious objections to legal formalism. Such objections include the straightforward points that syllogisms do not choose their own premises and that no system of rules can anticipate all circumstances and therefore remove all need for judgment. Such explorations can therefore be seen as perhaps an expansion of legal realism in what I would hope is an uncontroversial sense of the term: honestly reviewing legal analysis "as it works"[2] in our true world that Plato's snobbery eschewed. Such truthful

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 I wish to thank my legal assistant Ty Jameson for his invaluable help. Any errors are of course my own.

[1] Portions of this Article draw from and further develop parts of Harold Anthony Lloyd, Making Good Sense: Pragmatism's Mastery of Meaning, Truth, and Workable Rule of Law, 9 Wake Forest J.L. & Pol'y 199 (2019) (drawing from that article, I hope to show how the hermeneutic pragmatism set out in that article and legal "realism" as below defined can go hand in hand).

[2] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 510 (1960) (clarifying his sense of legal realism as a method of approaching law that would "[s]ee it as it works"). As will be seen in my discussion of the virtues culminating with that of phronesis (often translated as "practical wisdom" or "prudence"), I would also of course sympathize with Llewellyn's "prudential realism" which recognized the importance of "prudence or practical wisdom" when "seeing the law as it is." *See also* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 209 (1993). As to the judgment required for syllogisms despite their supposedly "mandating" conclusions, see LLEWELLYN, *supra*, at 13 ("we have large numbers of mutually inconsistent major premises available for choice") and JEROME FRANK, LAW AND THE MODERN MIND 72 (Anchor 1963) (1930) ("The syllogism will not supply either the major premise or the minor premise. The 'joker' is to be found in the selection of these premises."). *See also* FRANK, *supra*, at 108 ("In the case of the lawyer who is to present a case to a court, the dominance in his thinking of the conclusion over the premises is moderately obvious."). In discussing how logical form does not choose itself, one can also note Kronman's remarks on Langdell who wrongly thought that one could construct "a science of law without relying on the practitioner's worldly wisdom either for the establishment of its premises or for the derivation of its details." KRONMAN,

observations then soundly set up any normative claims associated with the virtues reviewed for good legal analysis. My hope is that lawyers and law schools in their curricula will follow such explorations to better understand legal analysis and how to teach and perform it well.

As I engage in such review, I hope that even the least informed formalist would concede the importance of certain virtues in performing legal analysis. For example, even if a formalist believes that the law is "a self-contained system of legal reasoning" from which we deduce "neutral," non-political conclusions from "general principles and analogies among cases and doctrines" (including formalist claims that judges simply call "balls and strikes" like umpires in a baseball game),[3] she should still consider certain characteristics of the party making such deductions or calling such "balls and strikes." If such party has questionable motivations, lacks proper perspective, does not grasp the flexibility in concepts in play, does not grasp the restraints on concepts in play, does not follow the proper processes involved, and lacks the detail, courage, and tenacity needed to reach the proper "deduction" or "call," on the face of things, the formalist too should have reason to re-examine any "deduction" or "call" by such party. Thus, even the least informed formalist should not deny the critical roles of personal characteristics when examining legal analysis—roles belying the notion of law as a possibly self-operating machine without reference to the decision makers themselves.

Thus, again, this Article will highlight such roles and the importance of cultivating a number of such characteristics required for good legal analysis. In doing so, this Article will address both *objective legal analysis* and *persuasive legal analysis*. By the former, I mean a "neutral assessment of a legal problem that overtly discusses both the strengths and weaknesses of a client's legal position and predicts the most likely outcome."[4] By the latter, I mean analysis that advocates for a client.

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supra, at 174 (1993). As to the point that no system of rules can anticipate all circumstances and therefore remove all need for judgment, see, for example, FRANK, *supra*, at 204 ("[N]o one can foresee all future combinations of events."). See also the following paragraph of this introduction and *infra* note 3 for further notes and citations on the nature of formalism.

[3] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16–17 (1992) (providing a definition of formalism without reference to baseball); *see also* Jim Evans, *Sorry, Judges, We Umpires Do More Than Call Balls and Strikes*, WASH. POST (Sept. 7, 2018), https://www.washingtonpost.com/outlook/sorry-judges-we-umpires-do-more-than-call-balls-and-strikes/2018/09/07/bd6ba7a2-b227-11e8-a20b-5f4f84429666_story.html?utm_term=.6ed3461b9e07 [https://perma.cc/8FSV-KCN6] (exploring how baseball umpires do more than simply call balls and strikes). Frank believes that the formalist retains childish notions and craves father figures in the law who are "infallible" and whose judgment can be made "unwavering, fixed and settled." *See* FRANK, *supra* note 2, at 20–21. I believe that formalism can realistically be explained in other ways. First, it can flow from basic misunderstandings as to the ways the freedoms and restraints discussed below function in legal analysis. The merely uninformed formalist errs in her overemphasis of restraint and her failure to understand the role of will as well as reason in legal analysis. Thus, Llewellyn defines the "Formal Style" in part as follows: "the rules of law are to decide cases; policy is for the legislature, not for the courts, and so is change in in pure common law." *See* LLEWELLYN, *supra* note 2, at 38. Second, the change or chaos-paranoid formalist fails to grasp how restraint tempers freedom in the real world in which we live. Third, the dishonest, Tartuffian formalist purports to wield the powers of logic to forge or defend results as he would have them despite any questions of their soundness. Thus, the Tartuffe would forge his doctrine however sound "in deductive form with an air or expression of single-line inevitability." *See id.*

[4] *See* CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 413 (3d ed.). Except perhaps for the certain finitude of all legal lives, such predictive analysis is consistent with Llewellyn's "as-it-is" realist claim: "I see no absolute

II. CONCEPTS, CATEGORIES, PRAGMATISM, AND THE ATTENDANT ROLE OF VIRTUE IN LEGAL ANALYSIS

A. THE ORIGIN, NATURE, AND PURPOSE OF CONCEPTS AND CATEGORIES IN LEGAL ANALYSIS

Before turning to definitions and explorations of virtue itself, as well as individual virtues, I first set out what I mean by "concept" and "category" at play in legal analysis relying upon virtue. Categories are "set[s] of things" "treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other."[5] Membership in such categories turns upon "the criteria chosen to measure likeness or unlikeness."[6]

> A concept is that which is understood by a term, particularly a predicate. To possess a concept is to be able to deploy a term expressing it in making judgments: the ability connects with such things as recognizing when the term applies, and being able to understand the consequences of its application.[7]

To give an example of the use of such categories or concepts, Judge Smith might categorize or conceptualize a "suitable clerk" as one who graduated from a top-fourteen law school and who graduated with a grade point average of at least an A. Judge Jones, on the other hand, might categorize or conceptualize a "suitable clerk" as one who graduated with a grade point average of at least an A- from an accredited law school of any rank. Judge Smith and Judge Jones of course engage in such activities to make their life experiences easier and more predictable. Hopefully based upon a sufficient amount of experience, they have both concluded that the pool of suitable clerks must come from within the parameters they have defined, and this permits easier decision- making by eliminating other applicants.[8]

This example also highlights another point that is critical for legal analysis and exploration of the character traits that assist such analysis: there is no "natural" concept or category here of the "suitable clerk" apart from the linguistic criteria used. The term simply turns on the criteria that the judges choose. Since this same point could be made about any other concept or category that we use, this also helps demonstrate the point that no natural categories or concepts exist apart from the linguistic criteria used. This is important for persuasive analysis because it highlights flexibility we may have in persuading. This is important for objective analysis because

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certainty in any aspect of legal life, and think that no man should ever have imagined that any such thing could be . . . . Instead I see degrees of lessening uncertainty of outcome." LLEWELLYN, *supra* note 2, at 17. Given the judgment involved in the freedoms and restraints of analysis discussed below, Llewellyn is no doubt right in discussing forecast of probabilities in lieu of certainty.

[5] *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 20 (2002). Merriam-Webster defines categories as "any of several fundamental and distinct classes to which entities or concepts belong." *Category*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/category [https://perma.cc/9CXG-DUR9].

[6] AMSTERDAM & BRUNER, *supra* note 5, at 49.

[7] *Concept*, OXFORD DICTIONARY OF PHILOSOPHY 94 (3d ed. 2016).

[8] Whether these criteria actually "work" is a separate question turning on the notion of workability discussed in Section II.D below.

objective prediction must recognize that decision makers will not be necessarily driven by non-existent "natural" or "inevitable" ways of handling categories and concepts.

Instead, when exploring objective analysis and the character traits that assist such analysis, we must thus remember that concepts and categories ultimately come from us and the linguistic or semiotic systems we use.[9] Knowing that we, through language, generate our concepts and categories rather than them being imposed upon us from nature reminds us that (in theory, at least) we have the power to better mold our concepts and categories. This, again, is important for persuasive analysis because it highlights flexibility we may have in persuading and is, again, important for objective analysis because objective prediction must recognize that decision makers will not be necessarily driven by non-existent "natural" or "inevitable" ways of handling categories and concepts.

Thus, it is critical to remember that nature (apart perhaps from any linguistic or semiotic concepts of "nature" that we happen to employ) does not generate or impose our concepts and categories. It therefore follows that nature (apart from perhaps any linguistic or semiotic notions of "nature" that we happen to employ) does not impose how those concepts and categories interrelate and therefore does not necessarily impose any single persuasive or objective analysis to be used with such concepts and categories. Instead, we and our linguistic and semiotic systems are left to perform that function as well as possible, and we must be concerned with the workability of such analyses. Thus, we must be concerned with both how to evaluate such analysis and with the character traits that will serve such analysis.

B. CONCEPTS, CATEGORIES, AND HERMENEUTIC PRAGMATISM IN LEGAL ANALYSIS

Since, as with Judges Smith and Jones, we use our concepts and categories as tools for organizing experience and we want them to work (a term discussed in more detail below), we therefore find ourselves embracing pragmatism when we understand this role of categories and concepts. Additionally, since we cannot rationally work with what we cannot interpret and understand, such a pragmatism is also a "hermeneutic" pragmatism. I use "hermeneutic" here both as a synonym for "interpretive" and in honor of Gadamer's "philosophical hermeneutics" that recognizes that "[f]or human beings, experiencing is preeminently participating in meaning."[10] This Article shall therefore explore the relationship between what I call "hermeneutic pragmatism" and various virtues required by such pragmatism.

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[9] *See* AMSTERDAM & BRUNER, *supra* note 5, at 50.

[10] *See Hermeneutic*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014); JEAN GRONDIN, HANS-GEORG GADAMER: A BIOGRAPHY 287 (Joel Weinsheimer trans., Yale Univ. Press 2003) (1999).

C. CONCEPTS, CATEGORIES, AND THE SENSE OF SENSE IN LEGAL ANALYSIS

Given the interrelated roles of concepts, categories, and experience in such hermeneutic pragmatism (and therefore in the virtues explored in this Article), such pragmatism must "recognize the inextricable role of experience in meaning."[11] Thus, such pragmatism (and its interrelation with the virtues) takes as a given that the sense of a concept or category, on its face, is experiential in the sense noted in the next sentence. That is, sense is thus the total actual and possibly conceivable[12] ways in which that concept or category unfolds over time in experience (including both what I would call "objective" and internal or private experience).[13]

For example, if I speak of "my home," the sense of that term, on its face, is an experiential notion of something unfolding through time. If one were to visit my home today, one would encounter a structure with an unpainted brick exterior and green shutters. However, if I decide to paint the house white, one would then encounter a structure with green shutters and white-painted brick. If one were to ask me what I meant by "my house," I would have to concede that the sense of the term includes these actualities and possibilities. For today, one would encounter a structure as first described, but experience of the structure could include such change of color, and I would not mean to suggest otherwise when using the phrase "my house." Grasping this concept is critical for both objective and persuasive legal analysis since both would want to work in such ever-flowing context of experience.

D. CONCEPTS, CATEGORIES, AND WORKABILITY IN LEGAL ANALYSIS

Finally, when we are discussing workable concepts and virtues, we must of course have an acceptable notion of the workable. On the face of things, one best begins by embracing the claim of William James that the workable should require a coherence that "fits every part of life best and combines with the collectivity of experience's demands, *nothing being omitted*."[14] Otherwise, by any omission, one risks having less than the fully workable.

This broad notion of workable includes not only matters of fact but matters of morality as well. Thus, if I am in need of a car, it would not "work" and thus be proper for me to steal that car because I would commit a moral violation. To ensure lack of confusion regarding workability and its moral

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[11] *See* Lloyd, *supra* note 1, at 202.

[12] "Possible" here also includes a normative as well as factual sense: it is impossible in commonly accepted speech for a *typical* cat to have sixteen legs or fourteen eyes. This could of course change, however, if we embrace other concepts of a typical cat.

[13] This is a variation of Peirce's formulation: "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 5.402 (Charles Hartshorne & Paul Weiss eds. (vols. 1–6) & Arthur Burkes ed. (vol. 7–8), (1931–58) (1906). Although I shall not explore it here, meaning broadly considered must also have a reference component that ties sense to the world of experience. *See* WINFRIED NÖTH, HANDBOOK OF SEMIOTICS 92–100 (Ind. Univ. Press 1995) (1985). For example, the phrases "the greatest American philosopher" and "that person called Peirce" have very different senses but can have the same reference.

[14] *See* WILLIAM JAMES, PRAGMATISM 18, 32 (Thomas Crofts & Philip Smith eds., Dover Publ'ns 1995) (1907) (emphasis added).

component in the remainder of the paper, the defined term "Proper" will embrace the broad sense of workability (including moral workability) as stated by James and as further explored by me in detail elsewhere.[15] "Improper" covers cases lacking such broad workability. All this matters because as ethical lawyers we will want both our objective and persuasive legal analysis to be Proper in this sense.

III. HERMENEUTIC PRAGMATISM AND A PROPER SENSE OF VIRTUE IN LEGAL ANALYSIS

A. DEFINING VIRTUE

Having explored the pragmatic role of concepts and categories with which the virtuous must deal, we are now in a position to set forth an initial working definition of "virtue." Remembering that our concepts and categories come from us, that our language is not imposed by some external nature existing apart from our language, concepts, and categories themselves, and that we want our concepts and categories to be Proper in the sense discussed above, we should give ourselves sufficient latitude to seek the definition we find most Proper[16] for purposes of this Article. I therefore do not intend to survey and set out in detail the vast philosophical literature on the nature of virtue but instead intend to use the available intellectual freedom that I have to come up with a Proper definition that conforms with the hermeneutic pragmatism embraced by this Article. After having finished this Article, I invite the reader to return to this initial working definition and to our final working definition and consider possible improvements. This approach is an inevitable hermeneutic circle where we must define virtue before we can attempt to refine it or otherwise to speak of the specific virtues that might be useful in an analysis of our definition of "virtue" itself.

To this end, common dictionary definitions of "virtue" include "a particular moral excellence" and "a commendable quality or trait."[17] Thus, one might say that "an excellence" is a "minimal core concept" of virtue.[18] I would add that a virtue is a "deep trait," and thus an "excellence of the person in a deep and lasting sense."[19] Virtues must be "deep" because they must guide us even in the most difficult or tempting times.[20]

From a standpoint of the Proper, I would disagree, however, with other common notions of virtue. In her fascinating analysis, Zagzebski tells us that a requirement that the excellence of virtue be "acquired" is "one of the less contentious claims."[21] The reason for this requirement is that voluntarily acquiring a virtue permits one to be morally responsible for the virtue.[22] This,

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[15] *See* Lloyd, supra note 1, at 264–74.

[16] Again, I use the defined term here as I will continue to do so throughout this Article.

[17] *Virtue*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/virtue [https://perma.cc/4BQ6-CHUT].

[18] LINDA ZAGZEBSKI, VIRTUES OF THE MIND 84 (1998).

[19] *Id.* at 89, 135. I have truncated Zagzebski's language which reads instead an "acquired excellence of the person." For reasons discussed below, I reject the notion that virtues cannot be innate.

[20] *Id.* at 84–85, 88–89, 178.

[21] *Id.* at 102.

[22] *Id.* at 103, 111.

however, seems to me to be an imposition of ethical theories of responsibility that simply do not work Properly in actual experience. There is no reason that one cannot be born with or non-voluntarily acquire "deep traits" of excellence. I cannot say from my own experience that the virtues of those whom I have met were all voluntarily acquired since they lead to workable results in the full Jamesian sense noted above.[23] However, their virtues' Properness is nonetheless a praiseworthy excellence from the standpoint of hermeneutic pragmatism.[24] For Christians, for example, the obvious exemplar of this point would be Christ who as God was presumably born with his virtues that were no less praiseworthy as a result.

This is not to say, however, that virtue cannot be acquired "through the imitation of virtuous persons and practice in acting virtuously."[25] It most certainly can be acquired in this way, and one of the goals of this Article is to promote Proper approaches to virtue acquisition in law school, law practice, and life.

From a standpoint of the Proper, I would also disagree with the common distinction (tracing back to Aristotle) between so-called intellectual virtues that "handle reason" and moral virtues that "handle desire."[26] Since all virtues aim toward the Proper, and since the Proper includes the moral, a nonmoral virtue makes no sense. Thus, I would agree with Zagzebski that "[i]ntellectual virtues are, in fact, forms of moral virtue."[27]

I would thus propose the following initial working definition of "virtue" for purposes of this Article: **"a deep and lasting disposition (i) that seeks out and is motivated by the Proper, (ii) that develops the skills (discussed below) necessary to achieve the Proper, and (iii) that is generally successful in achieving the Proper."** I include the final requirement of general success because it would be odd to consider as virtuous a person who never actually achieves the Proper even if such a person seeks out and is motivated by the Proper and develops the skills (discussed below) necessary to achieve the Proper. I thus also agree with Zagzebski in adding a success component to the definition of virtue.[28]

Since such an initial working definition requires a deep and lasting disposition, we also need a definition of "virtuous action" or "acts of virtue" to help us get off the ground with those initially lacking such a disposition.

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[23] In fact, Zagzebski notes that "There is a class of virtues that do not seem to be acquired by habit at all, however, and these are the virtues of originality and creativity. Not only do these excellences not require habituation, but they seem to flourish only in the absence of it." *Id.* at 123.

[24] I thus do not distinguish for purposes of the Article between dispositions, traits, talents, and temperaments. *See* JASON BAEHR, THE INQUIRING MIND: ON INTELLECTUAL VIRTUE & VIRTUE EPISTEMOLOGY 25–29, 32 (2011).

[25] ZAGZEBSKI, *supra* note 18, at 157–58.

[26] *See id.* at 217. Interestingly, Aristotle believed that "[i]ntellectual virtues are qualities that can be taught, whereas moral virtues are habits that are acquired by practice and training." *Id.* at 149. Baehr would make the intellectual-moral distinction as follows: intellectual virtues are "character traits aimed at epistemic ends" while moral virtues are "character traits that are others-regarding or that are aimed at (one aspect or another of) the well-being of another." BAEHR, *supra* note 24, at 220. However, since the epistemic seeks the Proper and the Proper involves the moral, this distinction collapses.

[27] ZAGZEBSKI, *supra* note 18, at xiv, 139. Zagzebski comes to this view by holding that intellectual virtues are "based in the motivation for knowledge" and "knowledge is a form of the good." *Id.* at 167–68.

[28] Zagzebski defines a virtue as "a deep and enduring acquired excellence of a person, involving a characteristic motivation to produce a desired end, and reliable success in bringing about that end." *Id.* at 137.

We must remember that virtue likely "requires some time to develop and mature in an agent, and yet it is likely that such agents can [act virtuously] long before they are fully virtuous."[29] Such a definition can also recognize that virtue is developed by repetition of virtuous action. In coming up with such a definition, I thus agree with Zagzebski that for virtuous action to occur:

> It is not necessary that the agent actually possess the virtue. But she must be virtually motivated, she must act the way of virtuous person would characteristically act in the same circumstances, and she must be successful because of these features of her act. What she may lack is the entrenched [deep character trait] that allows her to be generally reliable in bringing about the virtuous end. This definition permits those who do not yet fully possess a virtue but are virtuous-in-training to perform acts of the virtue in question.[30]

Thus, I would generally also agree with Zagzebski that something may be called an act of virtue A if and only if it arises from the motivational component of A, it is something a person with virtue A would (probably) do in the circumstances, and it is successful in bringing about the end (if any) of virtue A because of these features of the act.[31]

B. DISTINGUISHING VIRTUE FROM SKILLS IN LEGAL ANALYSIS AND PRACTICE

In refining these initial working definitions of "virtue" and "virtuous action" in the case of legal analysis, we also need to distinguish them from skills. A common definition of skill is "a learned power of doing something competently."[32] I agree with philosophers such as Baehr that "skills are characteristically cultivated through repetition or practice, that is, through repeated performance of the task associated with the skill in question."[33] That said, however, one can certainly imagine a person having a "power of doing something competently" that is not learned. For example, certain math skills may be innate.[34] In seeking a Proper definition of "skill," I would therefore parse down the definition of "skill" above to "a power of doing something competently."

In any case, skill so defined should not be confused with virtue. As Baehr points out, skills "are compatible with a wide range of motivations."[35] To the extent skills are employed to achieve the Improper (which, again, includes a moral element), such skills are, on their face, not virtuous as we have defined the term "virtue." This is possible because the definition of "skill" does not

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[29] *See id.* at 276 (discussing intellectual courage and intellectual virtues).
[30] *Id.* at 279 (I substituted "deep character trait" for her use of "habit.").
[31] *Id.* at 248 (bolding and italics omitted).
[32] *Skill*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/skill [https://perma.cc/4MLY-CP3E].
[33] BAEHR, *supra* note 24, at 29 (addressing "intellectual skills").
[34] *See* Ariel Starr, Melissa E. Libertus & Elizabeth M. Brannon, *Number Sense in Infancy Predicts Mathematical Abilities in Childhood*, 110 PROC. NAT'L ACAD. SCIS. U.S. (2013) (addressing certain math skills in infants).
[35] BAEHR, *supra* note 24, at 30.

contain a motivational element and thus radically distinguishes skill from "virtue" that does contain a motivational element.

Instead of confusing skills with virtues, one should thus heed Zagzebski: "[S]kills serve virtues by allowing a person who is virtuously motivated to be effective in action."[36] For example, as she points out, a teacher who is fair "would be motivated to learn procedures for fair grading" and "a courageous person in certain roles would be motivated to acquire the skills of effective combat."[37]

Additionally, one should take to heart how this virtue/skill distinction is hardly academic. Skill empowers virtue while virtue regulates skill. Thus, virtue without skill can be helpless while skill without virtue vile. Legal theory unchecked by virtue can also run morally amok. Therefore, law schools that simply address cases, statutes, and skills without addressing virtue are fundamentally flawed.

With "virtue" and "skill" thus defined and distinguished and the import of such distinction underscored, we can now move closer to our goal of surveying specific virtues required for objective and persuasive legal analysis. These virtues include virtues of motivation, virtues of perspective, virtues of opportunity, virtues of restraint, virtues of process, and virtues of courage and tenacity. In order to do this, I next briefly survey how the freedoms and restraints concepts, categories, and experiences provide and impose upon our ability to perform objective and persuasive legal analysis and the attendant effects upon virtues involved in such analysis.

IV. THREADING THE WIDE YET NARROW NEEDLE OF LEGAL ANALYSIS

A. THE WIDE NEEDLE OF LEGAL ANALYSIS

In exploring the Proper and the virtues necessary to achieve the same, we must recognize much theoretical freedom in creating, changing, or holding fast to concepts and categories in the case of both objective and persuasive analysis.

1. Freedoms to Change

As Quine notes: "Any statement can be held true, come what may, if we make drastic enough adjustments elsewhere in the system."[38] For example, we can (in theory, at least) attempt to address "recalcitrant experience by pleading hallucination" or change rules once considered unamendable.[39] Thus, there can be "much latitude of choice as to what statements to reevaluate in the light of any single contrary experience."[40]

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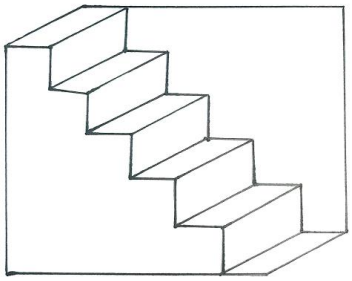
[36] ZAGZEBSKI, *supra* note 18, at 113.
[37] *Id.* at 115.
[38] *See* WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 43 (2d ed., rev. 1980).
[39] *Id.*
[40] *Id.* at 42–43.

2. Freedom to Interpret

Such freedoms also theoretically apply to interpretation (even resistant interpretation) as Peirce points out using a drawing of Schroeder's stairs:[41]



As Peirce remarks:

> [Y]ou seem to be looking at the stairs from above. You cannot conceive it otherwise. Continue to gaze at it, and after two or three minutes the back wall of the stairs will jump forward and you will now be looking at the under side of them from below, and again cannot see the figure otherwise. After a shorter interval, the upper wall, which is now near to you, will spring back, and you will again be looking from above. These changes will take place more and more rapidly . . . until at length, you will find you can at will make it look either way.[42]

One lacking the imagination to see the stairs running in both directions will not be able to perform as complete an analysis of the stairs as one who has such necessary imagination.

Thus, to perform an objective or persuasive analysis of such stairs, one can begin to see the need for certain traits such as imagination in the person performing the analysis. One can also see that the answer to the question of stair direction here is not simply like calling balls and strikes. There is no one answer since the stairs can run both ways (they are thus effectively at the same time both balls and strikes). Both objective and persuasive analyses thus need to grasp such freedoms of interpretation in choosing, advocating, and defending against alternatives.

3. Freedoms to Emphasize or Conceal in Legal Analysis

When exploring conceptual and categorical freedoms, the lawyer should also note that concepts and categories work by both emphasizing and de-emphasizing or concealing certain properties. For example, a person wishing to defame John might refer to his same apartment visit by quite different statements:

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[41] PEIRCE, *supra* note 13, § 7.647. Many thanks to Ashley Oldfield for drawing this version of such stairs.

[42] *Id.*

(A) John went to an apartment last night with a woman who was not his wife.

(B) John visited his daughter in her apartment last night.[43]

Both statements may be true, but they of course convey quite different senses by virtue of what they highlight and conceal. Thus, again, we can begin to see the necessity of certain traits in the person doing analysis in order to avoid being misled. For example, the person who has virtues and attendant skills of process that recognize the need to inquire further would be less likely to be deceived by the phrase "John went to an apartment last night with a woman who was not his wife." Both objective and persuasive analyses need to recognize this in order to predict or sway relevant audience behavior.

4. Properness and Deconstruction Insights for Legal Analysis

Jacques Derrida also gives useful Properness insights as to how concepts and categories highlight and conceal. He believes meaning is relational so any concepts or categories always involve other concepts or categories.[44] Building on this, he uses the French "différer" (to differ), which means both "different" and "deferred."[45] Recognizing both such meanings, he cleverly creates the term "différance"[46] to embrace both "difference" (which he understands to be "distinction, inequality, or discernability") and the "deferred" (which he understands to be "the interposition of delay, the interval of a *spacing* and *temporalizing* that puts off until 'later' what is presently denied, [or] the possible that is presently impossible.").[47]

The notion of différance also underscores the need for certain character traits in the person performing objective analysis. Thus, the lawyer who has virtues and attendant skills of process that recognize the need to explore différance will give a better performance than one lacking such virtues and skills. For example, the lawyer objectively analyzing a piece of legislation who has such virtues and skills will explore not only what the chosen terms provide, but will also explore what is unaddressed and thus "deferred" and what predictions and recommendations should be given in light of this more complete picture. Again, both objective and persuasive analysis benefit from such traits in the attempt to predict or sway relevant audience behavior.

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[43] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 163 (2003). The formalist who simply relies on the common meanings of these terms when reaching conclusions is of course guilty of Frank's observation: "He 'perceives with a dictionary instead of with his retina.'" FRANK, *supra* note 2, at 68.

[44] *See* DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY & LAW 88 (1997) (explaining Derrida extends insights of structuralists including Saussure who "held that social and psychological phenomena were best understood as a struggle or tension between component structures which derive their meaning in relation to other components" thus, "the sound 'bat' and the concept 'dog' have no meaning in isolation, but they make sense when understood relationally, as parts within a structural system of sounds and concepts.").

[45] Jacques Derrida, *Différance*, *in* FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY 225 (Lawrence Cahoone ed., 2d ed. 2003).

[46] In French, "différant" sounds like the standard word "différent" thus ignoring by ear and deferring difference that the eye discerns. *See id.* n.ii.

[47] *Id.* at 225.

THE NARROW NEEDLE OF LEGAL ANALYSIS

Although we have the theoretical freedoms of concept and category construction, interpretation, emphasis, and de-emphasis discussed above, the Proper requires that we acknowledge many restraints as well. Legal analysis, therefore, requires traits and skills in the person performing analysis that recognize and address such restraints. These restraints should not only console formalists fearing slippery slopes of change but should also undermine common claims that lawyers are "successful" sophists who can simply have their way with words.

1. The Pre-semantic and Legal Analysis

Despite the freedoms discussed above, the Proper recognizes that pure experience that has not yet been categorized (which I shall call the "pre-semantic") pushes back. Good lawyers attune themselves to this possibility. For example, humans were infected by HIV many years before we had created such a concept and related term.[48] Although these people and their physicians lacked such a term, they could nonetheless feel[49] the pushback of the pre-semantic here. In Gadamer's words, they felt the pushback of "something in common" not yet verbalized "but which looks to an ever-possible verbalization."[50]

The Proper thus recognizes that feelings can "pick up on something" that may not be addressed by "a conventional rational category" available at the time.[51] Feeling, in other words, can often detect pushback that language has not sufficiently addressed. Lawyers who would perform good legal analysis thus need traits such as open-mindedness that recognize the possibility of such feelings and do not suppress them.

A classic example from fiction addressing this point is the "Huck Finn Problem." Huck Finn helps Jim, a slave, escape despite Huck's linguistic (including moral) categories that categorize such action as evil.[52] As Sabine Döring points out, "It is his sympathy for Jim which causes Huck to act . . . though he does not endorse his emotion but castigates himself for his weakness."[53] This example also suggests how virtues such as empathy for the enslaved can assist correct analysis. Persuasive analysis, for example, might evoke such empathy in the audience while objective analysis might take into account the possibility of such empathy when making its predictions.

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[48] Humans may have been infected by HIV as early as around 1920. *Origin of HIV & AIDS*, AVERT https://www.avert.org/professionals/history-hiv-aids/origin [https://perma.cc/RM89-T46X].

[49] I have discussed feeling and distinguished it from emotion elsewhere. *See generally* Harold Anthony Lloyd, *Cognitive Emotion and the Law*, 41 L. & PSYCH. REV. 53 (2016-2017). Also, Peirce's definition of "feeling" may be of use here: "an instance of that sort of element of consciousness which is all that it is positively, in itself, regardless of anything else." PEIRCE, *supra* note 13, § 1.306.

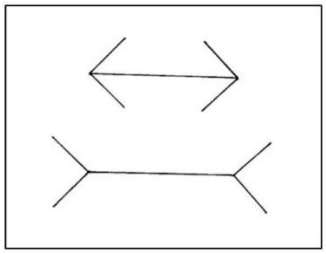
[50] *See* HANS-GEORG GADAMER, TRUTH AND METHOD 551 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004). This "something in common" is pre-semantic objective experience.

[51] *See* Patricia Greenspan, *Reasons to Feel*, *in* WHAT IS AN EMOTION?: CLASSIC AND CONTEMPORARY READINGS 265, 267 (Cheshire Calhoun & Robert C. Solomon eds., 2d ed. 2003).

[52] Sabine A. Döring, *Why Be Emotional?*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 283, 285 (Peter Goldie ed., 2013).

[53] *Id.*

As Döring also notes, although in our "default" mode we usually "take the representational content of our perceptions at face value," they may be wrong.[54] Similar to the Müller-Lyer illusion pictured below[55] (where the lines are of equal length but refuse to appear so), Huck's feelings push back against his "straightforward" concepts and categories holding that theft of property (a term then including human beings) is morally wrong.[56]



Huck's feelings push back against the "illusion" of moral error in assisting in the escape. No matter how impossible it was for Huck to *see* the error in his self-condemnation, Huck's feelings have Properly pushed back against concepts and categories that do not work Properly. Consistent with such pushback, I believe pre-semantic pushback can require change in moral as well as non-moral concepts; the embrace of such refined moral concepts must thus be recognized as a part of the Proper. Thus, again, good objective and persuasive legal analysis also requires character traits that do not suppress but permit feeling the pushback of all such experiences.

2. The Role of Semantic Lifeworlds in the Meaningful and in Legal Analysis

a. General Overview and Restraints

Continuing with other forms of pushback and assuming that experience is shaped by language,[57] the Proper also recognizes that our semantic lifeworlds are created by such language and pushback. Such lifeworlds consist of interpretive groups "nested" within others so that, for example, the American community of lawyers "is surrounded by the political community, social community, and ultimately the entire interpretive community of

[54] *Id.* at 293.

[55] Many thanks to Ashley Oldfield for this drawing.

[56] *See id.* Huck's such initial perception is undoubtedly warped by commonly-accepted legal and moral notions of the time that the pushback of his experience subsequently informs him are not Proper. *See also* ZAGZEBSKI, *supra* note 18, at 82 (discussing how to determine whether motivations are good). One way of determining whether motivations are good, and to my mind a forceful one, is to appeal to experience. We often do this as an appeal to conscience which is "[t]he consciousness humans have that an action is morally required or forbidden." *Conscience*, OXFORD DICTIONARY OF PHILOSOPHY 99 (3d ed. 2016). In my view, such appeal involves the interpretation of the pushback of experience.

[57] If we understand "world" to mean experience, I agree with Rorty that: "The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot." RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989). This fits with Gadamer's claims that language is "the all-embracing form of the constitution of the world" and on language "depends the fact that man has a *world* at all." GADAMER, *supra* note 50, at 440.

American and perhaps international culture."[58] Such semantic lifeworlds thus make up complicated webs that push back; thus, appropriate members must usually consent to change.[59] For example, a competent lawyer taking her place as a member of such complex webs would be cautious about accepting claims that one should always ignore the text when interpreting statutes.

b. Semantic Lifeworlds and Internal Realism in Legal Analysis

Consistent with this notion of semantic lifeworlds and useful when exploring pushback we encounter "in the world," Hilary Putnam proposes a form of "internal realism" in which our category and concept creation and usage operate. As Putnam notes:

> We can and should insist that some facts are there to be discovered and not legislated by us. But this is something to be said when one has adopted a way of speaking, a language, a "conceptual scheme." To talk of "facts" without specifying the language to be used is to talk of nothing; the word "fact" no more has its use fixed by Reality Itself than does the word "exist" or the word "object."[60]

Thus, Putnam tells us, "There are 'external facts[,]' and we can *say what they are*. What we *cannot* say—because it makes no sense—is what the facts are *independent of all conceptual choices*."[61] That is, "[t]he world does not speak. Only we do. The world can, once we have programmed ourselves with the language, cause us to hold beliefs. But it cannot propose language for us to speak. Only other human beings can do that."[62] Thus, "the internal realist . . . is willing to think of reference as internal to [theories], *provided* we recognize that there are better and worse [theories]. 'Better' and 'worse' may themselves depend on our historical situation and our purposes; there is no notion of a God's-Eye View of Truth here."[63]

Instead, "better" or "worse" would turn upon the Proper, and ethical lawyers would want to engage in Proper objective or persuasive analysis. And to do this type of analysis, they need to cultivate traits that recognize

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[58] ROBERT BENSON, THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW 74 (2008). Benson also reviews Stanley Fish and his notion "that we all live in 'interpretive communities' which are made up of a 'political, social and institutional . . . mix' of constraints on acceptable interpretations." *Id. See also* CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 513 (John Wilkinson & Purcell Weaver trans., 1969):

> All language is the language of a community, be this a community bound by biological ties, or by the practice of a common discipline or technique. The terms used, their meaning, their definition, can only be understood in the context of the habits, ways of thought, methods, external circumstances, and traditions known to the users of those terms.

[59] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 58, at 513 ("A deviation from usage requires justification.").

[60] HILARY PUTNAM, THE MANY FACES OF REALISM 36 (1987) [hereinafter PUTNAM, MANY FACES].

[61] *Id.* at 33.

[62] RORTY, *supra* note 57, at 6. Thus, Gadamer notes: "Each science, as a science, has in advance projected a field of objects such that to know them is to govern them." GADAMER, *supra* note 50, at 449. And Putnam cleverly claims: "the mind and the world jointly make up the mind and the world." HILARY PUTNAM, REALISM WITH A HUMAN FACE 262 (James Conant ed., 1990) [hereinafter PUTNAM, HUMAN FACE].

[63] *See* PUTNAM, HUMAN FACE, *supra* note 62, at 114.

the pushback (and other aspects) of such semantic lifeworlds and internal realism.

And in recognizing the pushback of such semantic lifeworlds and internal realism, analysis recognizes the pushback **within** "conceptual schemes" or semantic lifeworlds of such claims as:

> There ***are*** tables and chairs and ice cubes. There are also electrons and space-time regions and prime numbers and people who are a menace to world peace and moments of beauty and transcendence and many other things.[64]

Through the lens of the "conceptual scheme" or semantic lifeworld, analysis must recognize the pushback of "our familiar commonsense scheme, as well as our scientific and artistic and other schemes"[65] as well as things described by and existing in the "conceptual schemes" or semantic lifeworlds.[66] Therefore, meaningful legal analyses occur within a conceptual scheme or semantic lifeworld, and "what is and is not physically possible" within a semantic lifeworld or conceptual scheme would be "a distinction internal to the physical theory itself."[67] Such lifeworlds and conceptual schemes thus push back in an internal manner. This includes the pushback of "common sense" further discussed in Section IV.B.2.d.[68]

Proper legal analysis should also note that such internal pushback does not only apply to the internal physical tables, chairs, and ice cubes that push back. Internal pushback also applies to the logic embraced by such internal realism. For example, the logic of stasis (or issue) theory recognizes (unless we take care to stipulate otherwise) a progressive and straightforward presuppositional issue line: (1) *Sitne*? ("Does the thing exist?"); (2) *Quid sit*? ("What is the thing?"); and (3) *Quale sit*? ("What [quality] of thing is it?").[69] Thus, to ask what something is (such as a notary seal lying on the table) without more concedes the seals' existence. To ask without more whether that type of seal is typical in one's jurisdiction concedes that the thing is a seal and that it exists. By asking a "*Quale sit*?" question without more, the speaker has thus effectively conceded the "*Sitne*?" and the "*Quid sit*?" questions—that is, whether the thing exists and whether it is a seal.[70] We could, of course interfere with such presuppositional pushback by hedging our questions: Assuming for the sake of argument that that thing exists, is it a seal? Assuming that thing exists and is a seal, is it typical in one's jurisdiction?

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[64] *See* PUTNAM, MANY FACES, *supra* note 60, at 25.

[65] *See id.* at 17.

[66] *See id.* at 43 (The " 'makers-true' . . . of our beliefs lie *within* and not *outside* our conceptual system."). However, once more, pre-semantic pushback also plays its role in the evaluation of the Workability of any such "makers-true" internalized in any semantic lifeworld or conceptual scheme.

[67] *See* PUTNAM, HUMAN FACE, *supra* note 62, at 71. Gadamer also helps us understand internal realism when he notes that "Play fulfills its purpose only if the player loses himself in play," and that "Someone who doesn't take the game seriously is a spoilsport." GADAMER, *supra* note 50, at 103. That is, a "spoilsport" does not experience "the game as a reality that surpasses him," that "draws him into its dominion and fills him with its spirit." *See id.* at 109.

[68] Semantic lifeworlds and common sense are further discussed in Section IV.B.2.d.

[69] *See* RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 93 (2d ed. 1991).

[70] *Id.*

As to such internal pushback, Putnam reminds us that conceptual schemes internally provide truth and verification requirements[71] that science and other inquiry must meet. In evaluating these internal requirements, we also usually heavily rely upon our five senses as framed by such conceptual schemes. Such senses help verify to us, for example, that Putnam's tables, ice cubes, and chairs exist. Thus, one cannot persuasively obliterate existing tables, ice cubes, and chairs by simply denying their existence when our senses (as framed by our conceptual schemes) indicate otherwise. Hence, good legal analysis recognizes such pushback and benefits from traits (such as the tendency to carefully review one's surroundings) that encourage such recognition.

c. Legal Analysis and Gadamer's "Fore-understandings" and "Linguistic Constitutions of the World"

Consistent with such internal realism, lawyers performing legal analysis can also learn much from Gadamer's claim that language is "a limitless medium that carries *everything* within it" and his related discussion of a "linguistic constitution of the world" that is "effected by history," and that provides "an initial schematization for all our possibilities of knowing."[72] Using this metaphor, however, one should note that there can be competing "constitutions" in complex society. Thus, each member of a lifeworld "always [has] a world already interpreted, already organized in its basic relations"[73] and therefore "we are always already encompassed by the language that is our own."[74] What Gadamer calls prejudices or "fore-understandings" in such "linguistic constitutions" are often unnoticed unless we bring them "before" us and reflect upon what in the "pre-understanding may be justified and what unjustifiable."[75] Good lawyers must of course grasp such "fore-understandings" because they could impact the prediction or persuasion sought and should thus value traits (such as sobriety discussed later) that promote such grasping and thus Proper legal analysis.

Additionally, as discussed further in Section IV.B.2.d on common sense, "basic prejudices" in such "linguistic constitutions of the world" can put up fierce resistance "by claiming self-evident certainty."[76] Gadamer cautions us that "one who calls the self-evident into doubt will find the resistance of all

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[71] *See* PUTNAM, MANY FACES, *supra* note 60, at 43.

[72] HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 13 (David E. Linge ed. & trans., 1976). Gadamer refers to Johannes Lohmann in regard to the phrase "linguistic constitution of the world." *Id.*

[73] *See id.* at 15. Within the context of legal lifeworlds, Llewellyn suggests a number of restraints such as the following fourteen:

> Law-conditioned Officials; Legal Doctrine; Known Doctrinal Techniques; Responsibility for Justice; The Tradition of One Single Right Answer; An Opinion of the Court; A Frozen Record from Below; Issues Limited, Sharpened, Phrased; Adversary Argument by Counsel; Group Decision; Judicial Security and Honesty; A Known Bench; The General Period-Style and Its Promise; Professional Judicial Office.

LLEWELLYN, *supra* note 2, at 19 (semicolons added and enumeration omitted).

[74] GADAMER, *supra* note 72*,* at 64.

[75] *See id.* at 38; *see also* GADAMER, *supra* note 50, at 559 ("[A] hermeneutic fore-understanding is always in play and . . . therefore requires reflexive enlightenment"); PERELMAN & OLBRECHTS-TYTECA, *supra* note 58, at 105 ("In most cases, . . . a speaker has no firmer support for his presumptions than psychical and social inertia which are the equivalents in consciousness and society of the inertia of physics.").

[76] GADAMER, *supra* note 72, at 92.

practical evidence marshaled against him."[77] Gadamer also cautions us that the realm of the "self-evident" can be extensive: "Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live."[78] Traits such as courage and tenacity are essential when facing such fierce resistance. With such a warning, we can now turn to the pushback of "common sense."

d. "Common Sense" and Semantic Lifeworlds in Legal Analysis

"Common sense" can provide considerable pushback across semantic lifeworlds and character traits and skills that recognize such pushback, thus no doubt providing advantage in objective and persuasive analysis. Such "common sense" can be generally recognized as "a series of beliefs which are accepted within a particular society and which the members of that society suppose to be shared by every reasonable being."[79] One must thus use considerable persuasion when running counter such "common sense" because one is opposing beliefs presumed to be "shared by every reasonable being."[80] As for objective legal analysis, one can gauge one's predictions based upon the force of such "common sense"; in persuasive legal analysis, however, one may need to find ways to counter such "common sense." Thus, in addition to courage and tenacity noted above, character traits and attendant skills that can empathize with and thus better understand such common views can also assist one engaged in objective or persuasive legal analysis.

Of course, this is not to say that Proper legal analysis should always defer to such pushback. Common sense should be challenged when it is wrong. In prior times, those who thought the world was round and not flat or that the earth orbits around the sun rather than the reverse, of course, should have stood up to then-prevailing contrary "common sense." However, in taking such action, it would have been naïve not to expect strong pushback. It would thus, again, require such traits as courage and tenacity to prevail in such corrective analysis.

V. RECONCEIVING THE MEAN IN VIRTUOUS LEGAL ANALYSIS

In light of the foregoing brief survey of the categorical and conceptual freedoms and restraints available to objective and persuasive legal analysis, we can now refine Aristotle's commonly cited notion of the "mean between two extremes" (mesotēs) into a more Proper notion for virtue and objective and persuasive legal analysis.[81]

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[77] *Id.* at 93.

[78] GADAMER, *supra* note 50, at 278. Thus, in the case of the law, Llewellyn notes:

> [T]hat the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine; and that where there is no room for doubt, that body is to control the deciding; that where there is real room for doubt, that body of doctrine is nonetheless to guide the deciding.

LLEWELLYN, *supra* note 2, at 20. As Llewellyn also notes, "The work of the job in hand, and even more the work of the job at large, must fit and fit into the body and flavor of The Law." *Id.* at 222.

[79] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 58, at 99.

[80] *Id.*

[81] ARISTOTLE, ARISTOTLE'S NICOMACHEAN ETHICS 312 (Robert C. Bartlett & Susan D. Collins trans., 2011).

Aristotle would present the virtue of "courage" as the mean between the extremes (and thus vices) of "recklessness" on the one hand and "cowardice" on the other.[82] Thus, we must somehow determine the extremes of "recklessness" and "courage" in individual cases so that we can then plot "courage" as the mean in such individual cases.

However, in the case of legal analysis, rather than using the notion of the "mean between extremes" (mesotēs) and attempting to plot these extremes peculiar to each virtue in particular cases, I would suggest the notion of balancing the other extremes in play here, which are the freedoms and restraints that are always applicable when we construct and apply our categories and concepts.

Navigating such freedoms and restraints, we can broadly divide a number of virtues into those of freedom and those of restraint. Virtues of freedom Properly recognize the logically possible freedoms involved in category and concept formation and usage and in highlighting and concealing ("Applicable Freedoms"). Virtues of restraint, on the other hand, Properly recognize that logically-possible freedoms can be countered by such pushback by the claim that the pre-semantic life worlds and their internal realism include common sense as discussed above ("Applicable Restraints"). Virtues of freedom thus exercise the Proper balance of freedom while those of restraint exercise the Proper balance of restraint.

All that noted, we can thus refine our definition of virtue as follows: "**Virtue" is "a deep and lasting disposition (i) that is Properly motivated, (ii) that Properly balances between Applicable Freedoms and Applicable Restraints in particular situations, (iii) that Properly develops the Proper skills necessary to Properly achieve the Proper results of such disposition, and (iv) that is generally successful in Properly achieving the Proper results of such disposition."**

"Virtuous action" or acts of virtue can still follow Zagzebski's definition. Something may be called

> an act of virtue A if and only if it arises from the motivational component of A, it is something a person with virtue A would (probably) do in the circumstances and it is successful in bringing about the end (if any) of virtue A because of these features of the act.[83]

Again, since such virtue requires a deep and lasting disposition, we also need such a definition of "virtuous action" or "acts of virtue" to help us get off the ground with those initially lacking such a disposition. Again, we must remember that virtue likely "requires some time to develop and mature in an agent, and yet it is likely that such agents can [act virtuously] long before they are fully virtuous."[84]

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[82] Robert C. Bartlett & Susan Collins, *Overview of the Moral Virtues and Vices*, in ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 81, at 303–04.

[83] ZAGZEBSKI, *supra* note 18, at 248 (bolding and italics omitted).

[84] *Id.* at 276 (discussing intellectual courage and intellectual virtues).

VI. SURVEYS OF SPECIFIC VIRTUES NECESSARY FOR OBJECTIVE AND PERSUASIVE LEGAL ANALYSIS

In light of the multiple semantic and pre-semantic restraints on objective and persuasive analysis discussed above, we are now in a position to discuss the various virtues and virtuous actions required to navigate such freedoms and restraints. Again, since nature (apart from any linguistic or semiotic notions of "nature" that we employ) does not generate or impose our concepts and categories, it follows that nature (apart from any linguistic or semiotic notions of "nature" that we employ) does not impose how those concepts and categories interrelate and therefore does not impose any attendant analysis to be used on such concepts and categories. Instead, we and our linguistic and semiotic systems are left to perform that function as well as possible, and we must be concerned with the Properness of such analyses. Thus, we must be concerned with the character traits that advance such Properness.

I shall arrange the virtues discussed in groupings related to their motivational components, their role in striking the proper course as refined in light of the categorical and conceptual freedoms and restraints applicable in certain situations, and the requirement of Properness previously discussed. Of course, some virtues can fall under multiple classifications, and I choose those classifications that seem most logical to me.

In setting out these individual virtues, as so grouped, I hope to provide a useful list for the person who would engage in her own self-education into and acquisition of such virtues. I would also hope the list would prove useful for law schools that hope to teach and impart such virtues and thereby promote both better legal analysis and a better bar. Consistent with grouping the virtues by their motivation, I thus began with three virtues of motivation.

A. VIRTUES OF MOTIVATION

In common terminology, a motive is "something (such as a need or desire) that causes a person to act"[85] or, as Zagzebski puts it, "A motive is a force acting within us to initiate and direct action." I agree with Zagzebski that we must be careful not to identify motive with "the mere aim to produce some state of affairs."[86] For example, one "may know that Booth aimed at the death of Lincoln without knowing his motive in assassinating the president."[87]

All that said, there is still "a fundamental division between philosophers" (David Hume, for example) who, on the one hand, think that "all motivation exists only in a perspective given by desire and aversion" and those philosophers (Plato or Kant, for example) who, on the other hand, "believe

[85] *Motive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/motive [https://perma.cc/XRJ6-RST7].

[86] ZAGZEBSKI, *supra* note 18, at 130.

[87] *Id.* Zagzebski also claims that "it is problematic to identify a motive with a desire, since I do not know any more about Booth's motive if I know only that he *desires* Lincoln's death." *Id.* She does, however, concede: "A motive does have an aspect of desire, but it includes something about why a state of affairs is desired, and that includes something about the way my emotions are tied to my aim." *Id.* at 131. I agree with her on all points set out in this footnote.

that reason is an independent source of motivation."[88] For purposes of this Article, I shall assume what seems most straightforward to me: one can be motivated, without limitation, by the intellect; by desire driven by a certain perspective(s); by aversion driven by certain perspective(s); by emotion; by feeling; by curiosity; and by imagination. That said, I shall therefore investigate several primary (but not all) virtues involved in legal analysis navigating between Applicable Freedoms and Applicable Restraints.

1. Fidelity to Client, the Law, and Justice

Since we are discussing Proper legal analysis, I first examine the lawyer's motivating virtues of fidelity to the client, the law, and justice (though curiosity, natural doubt, and other desires or needs may also motivate). I take this approach because the Model Rules of Professional Conduct begin with this first duty and thus motivation for lawyers: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[89]

When considering such a virtue of fidelity, lawyers must remember that they are fiduciaries[90] who should act with "utmost good faith and devotion" to their clients without permitting the lawyers' own "personal interests or the interests of others to interfere with those duties."[91] Lawyers who act out of such fidelity to their clients act in such ways by, without limitation, avoiding conflicts of interest that might divide their loyalty to clients[92]; otherwise, they act in ways "prescribed in the Rules of Professional Conduct, as well as substantive and procedural law," and also remain "guided by personal conscience and the approbation of professional peers."[93] Such fidelity is learned by performing such acts of virtue and by observing exemplars who demonstrate such virtue. Such a motivating virtue requires a lawyer to carefully explore and balance freedoms and restraints applicable to her client, thus refining the legal analysis performed.

Additionally, when a lawyer shows fidelity to the law and justice, the lawyer "is faithful to and upholds the law and institutions of the law."[94] Such a lawyer remembers that

> [a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer

[88] *Motivation*, OXFORD DICTIONARY OF PHILOSOPHY 318 (3d ed. 2016).

[89] MODEL RULES OF PRO. CONDUCT: PREAMBLE § 1 (AM. BAR ASS'N 2020). As Llewellyn also notes, "There exists, and guides and shapes the deciding, an ingrained deep-felt need, duty, and responsibility for bringing out a result which is just." LLEWELLYN, *supra* note 2, at 23.

[90] PATRICK EMERY LONGAN, DAISY HURST FLOYD & TIMOTHY W. FLOYD, THE FORMATION OF PROFESSIONAL IDENTITY 44 (2020).

[91] *Id.* at 6.

[92] *Id.* at 45.

[93] MODEL RULES OF PRO. CONDUCT: PREAMBLE § 7 (AM. BAR ASS'N 2020).

[94] LONGAN ET AL., *supra* note 90, at 6.

> should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.[95]

In addition, such a lawyer remembers that

> [a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.[96]

Such a motivating virtue requires a lawyer to carefully explore and balance freedoms and restraints applicable to the administration of justice, thus refining the legal analysis performed.

Consistent with the foregoing, one can define such virtue of fidelity to clients, the law, and justice as follows: **"a deep and lasting disposition (i) to be Properly steadfast in allegiance and duty to the client, the law, and justice, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in particular situations, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."** The virtuous lawyer Properly engaged in either objective or persuasive legal analysis will thus always have such a foundational motivational virtue. Other lawyers who have not yet achieved such virtue but who are Properly engaged in either objective or persuasive legal analysis will thus always attempt to act in ways modeled by those with such actual virtue. Hopefully, through such continued modeled action, such other lawyers will develop the virtue themselves. And, once more, such a motivating virtue requires a lawyer to carefully explore and balance freedoms and restraints applicable to her client, the law, and the administration of justice, thus refining the legal analysis performed.

2. Curiosity

In addition to the above fiduciary motivations, good lawyers should (as should others as well) be motivated by a Proper curiosity about the world. By "curiosity," here, I mean an "interest leading to inquiry."[97] Thus, curiosity involves "[t]aking an interest in ongoing experience for its own sake; finding subjects and topics fascinating; exploring and discovering."[98]

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[95] MODEL RULES OF PRO. CONDUCT: PREAMBLE § 5 (AM. BAR ASS'N 2020).
[96] MODEL RULES OF PRO. CONDUCT: PREAMBLE § 6 (AM. BAR ASS'N 2020).
[97] *Curiosity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/curiosity [https://perma.cc/332Q-AGTW].
[98] CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES 29 (2004).

A lawyer lacking such curiosity risks not only failing to encounter or devise yet-unknown Proper legal theories or other ways to improve analysis, but also risks never encountering or devising Proper views or objects that might benefit the lawyer herself as well as perhaps the law and society at large. Such a lawyer even risks failing to pursue the most basic analysis of a case. In objective legal analysis, a lawyer lacking curiosity risks not pursuing basic avenues essential to prediction, and in persuasive legal analysis a lawyer lacking curiosity risks not pursuing basic avenues, for example, required for audience understanding and thus jeopardizes the likelihood of persuasion. As Baehr notes:

> [A]n intellectually lazy or unreflective inquirer is unlikely to enjoy much success, since he is unlikely to get the process started in the first place. Accordingly, intellectual virtues like inquisitiveness, reflectiveness, contemplative nests, curiosity, and wonder can be essential to a successful pursuit of truth.[99]

Baehr also helpfully describes such curiosity in action:

> An inquisitive person, for instance, is quick to ask why-questions, which in turn are likely to inspire inquiry. A person with the virtue of curiosity, or whose mental life is characterized by wonder, is quick to notice and be inclined to investigate issues or subject matters of significance.[100]

And, as John Dewey also usefully tells us, curiosity "is the basic factor in enlargement of experience and therefore a prime ingredient in the germs that are to be developed into reflective thinking."[101]

Taking these points into account, one might define the virtue of curiosity as follows: **"a deep and lasting disposition (i) to be Properly interested in matters leading to Proper inquiry, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such Proper inquiry, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

Thus, the virtuous lawyer Properly engaged in either objective or persuasive legal analysis will have such virtue. Other lawyers who have not yet achieved such virtue but who are Properly engaged in either objective or persuasive legal analysis will thus attempt to act in ways modeled by those with such actual virtue. Hopefully, through such continued modeled action, such other lawyers will develop the virtue themselves. Additionally, law professors and others seeking to instill curiosity in their students will avoid techniques that discourage the development of Proper curiosity. For example, such a professor would "avoid all dogmatism in instruction, for such a course gradually but surely creates the impression that everything

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[99] BAEHR, *supra* note 24, at 19.

[100] *Id.*

[101] JOHN DEWEY, THE LATER WORKS, 1925–1953: VOL. 8: 1933: ESSAYS AND HOW WE THINK, REVISED EDITION 141–42 (Jo Ann Boydston ed., S. Ill. Univ. Press 2008) (1933).

important is already settled and nothing remains to be found out."[102] If nothing important remains to be found, how then stress the importance of Proper curiosity to the student? Instead, such a professor conducts her class in ways that stress the importance and intrigue of the yet-to-be-found and thus stresses the importance of curiosity.

3. Openness to Proper Doubt

Openness to Proper doubt recognizes the importance that such doubt serves in the process of both initiating and refining thought and analysis. As Dewey notes, thinking often "involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity."[103]

One engaged in objective legal analysis often finds such an analysis generated by the doubt involved in a client's legal situation, in which such doubt calls for a predictive analysis of how such a situation will likely be resolved. One engaged in persuasive legal analysis, on the other hand, will not only often need to predict doubtful audience responses, but may well need to raise doubts in order to lead the audience toward the desired matter for persuasion. For example, a lawyer seeking to persuade an audience of the need for a new homeowner safety ordinance may need to raise legitimate doubts as to the safety of homeowners in order to persuade homeowners of the need to pass such an ordinance.

This is not, however, to embrace Cartesianism, which, in Peirce's words, holds that "philosophy must begin with universal doubt" because, as Peirce points out (in a manner similar to Gadamer):

> We cannot begin with complete doubt. We must begin with all the prejudices which we actually have when we enter upon the study of philosophy. These prejudices are not to be dispelled by a maxim, for they are things which it does not occur to us *can* be questioned. Hence this initial skepticism will be a mere self-deception, and not real doubt; and no one who follows the Cartesian method will ever be satisfied until he has formally recovered all those beliefs which in form he has given up . . . . Let us not to pretend to doubt in philosophy what we do not doubt in our hearts.[104]

Additionally, it would, of course, be a foolish waste of time to try to doubt simply for the sake of doubting that which is Properly working. However, Proper doubt, again, not only motivates but refines analysis. Therefore, "if disciplined and candid minds carefully examine a theory and refuse to accept it, this ought to create doubts in the mind of the author of the theory himself."[105] Thus, again, the "community" pushes back.[106]

One could thus define the virtue of openness to Proper doubt in the case of legal analysis as follows: **"a deep and lasting disposition (i) to doubt in**

[102] *Id.* at 144.
[103] *Id.* at 120–21.
[104] PEIRCE, *supra* note 13, § 5.265.1.
[105] *Id.* § 5.265.2.
[106] *See id.*

a Proper manner useful to or required by particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition." This virtue also ties into the virtues of open-mindedness and humility discussed below.

B. VIRTUES OF FREEDOM

Virtues of freedom include those that permit one to consider conclusions, points of view, or actions that might otherwise be unavailable due to dispositions that either close the mind to, or those that distract or limit the mind from, Proper opportunities otherwise available. Such virtues of freedom take advantage of the logical freedoms discussed above in conceptual and categorical construction and interpretation as well as the logical freedoms discussed above to emphasize or conceal. I shall discuss two such virtues of freedom: open-mindedness and creativity.

1. Open-mindedness

Open-mindedness involves "[t]hinking things through and examining them from all sides; *not* jumping to conclusions; being able to change one's mind in light of evidence; weighing all evidence fairly."[107]

Thus, in exploring open-mindedness, John Dewey focuses on such core notions as "freedom from prejudice, partisanship, and other habits as close the mind and make it unwilling to consider new problems and entertain new ideas."[108] Refining the notion further, he notes that it "includes an active desire to listen to more sides than one; to give heed to facts from whatever source they come; to give full attention to alternative possibilities; [and] to recognize the possibility of error even in the beliefs that are dearest to us."[109]

Further refining the concept by including a success component, Zagzebski considers the open-minded person as one who is "motivated to consider the ideas of others without prejudice, including those that conflict with her own, and is reliably successful in doing so."[110]

Recognizing that one should not "be so open-minded that [one's] brains fall out," Baehr proposes additional useful language for defining an open-minded person: "An open-minded person is characteristically (a) willing and (within limits) able (b) to transcend a default cognitive standpoint (c) in order to take up or take seriously the merits of (d) a distinct cognitive standpoint."[111] Baehr's "within limits" qualification recognizes that suspension of intellectual restraint must be Proper and should thus not occur where, for example, counter to experience. Additionally, Baehr also recognizes the need for a success component here and formulates that need

[107] PETERSON & SELIGMAN, *supra* note 98, at 29.

[108] DEWEY, *supra* note 101, at 136. Gadamer, again, also reminds us of our "fore-understandings" that can go unnoticed without reflection. *See* GADAMER, *supra* note 50, at 559 ("[A] hermeneutic fore-understanding is always in play and . . . therefore requires reflexive enlightenment.").

[109] *Id.*

[110] ZAGZEBSKI, *supra* note 18, at 185.

[111] BAEHR, *supra* note 24, at 152.

differently than does Zagzebski: "[W]here open-mindedness involves rational assessment or evaluation, it also necessarily involves adjusting one's beliefs or confidence levels according to the outcome of this assessment."[112] If one is persuaded by the Properness of other beliefs as a result of one's open-mindedness, one should, of course, adjust one's analysis accordingly.

In light of the foregoing, one might define the virtue of open-mindedness in the case of legal analysis as follows: **"a deep and lasting disposition (i) to be Properly free 'from prejudice, partisanship, and other habits that close the mind' where such freedom is useful to or required by particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

The open-minded lawyer engaged in objective legal analysis will thus keep an open mind as to other possible Proper ways of viewing the matter at hand when making her probability analyses. The open-minded lawyer engaged in persuasive legal writing will similarly consider such other Proper ways of viewing the matter at hand for the purpose of persuading the applicable audience. In either case, if the lawyer concludes alternative views are the Proper views, the lawyer will adjust her own analyses accordingly.

2. Imagination

John Dewey insightfully notes:

> The proper function of imagination is vision of realities and possibilities that cannot be exhibited under existing conditions of sense perception. Clear insight into the remote, the absent, the obscure is its aim. History, literature, and geography, the principles of science, nay, even geometry and arithmetic, are full of matters that must be imaginatively realized if they are realized at all. Imagination supplements and deepens observation; only when it turns into the fanciful does it become a substitute for observation and lose logical force.[113]

Thus, we might speak of imagination as "the ability to create and rehearse possible situations, to combine knowledge in unusual ways or to invent thought experiments . . . . Imagination is involved in any flexible rehearsal of different approaches to a problem, and it is wrongly thought of as opposed to reason."[114]

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[112] *Id.* at 154 (italics omitted).

[113] DEWEY, *supra* note 101, at 351.

[114] *Imagination*, OXFORD DICTIONARY OF PHILOSOPHY 237 (3d ed. 2016). Similarly, Kronman notes:

> [T]he person who is deliberating about incomparably different options . . . needs imagination . . . to construct a concrete mental image of the choices he might make. For only by exploring in imagination their different implications and effects can he acquire an adequate understanding of what each option means and so choose with open eyes even when the choice itself is groundless [because of the incommensurability].

KRONMAN, *supra* note 2, at 69.

Similarly, Richard Rorty tells us that imagination drives "intellectual and moral progress."[115] In his view, imagination is "the ability to redescribe the familiar in unfamiliar terms," is "the source both of new scientific pictures of the physical universe and the new conceptions of possible communities," is the "power" that can "make the human future richer than the human past,"[116] and drives on the "poetry of justice" required to "break up 'bad coherence' " of prior bad precedent. *Brown* effectively proclaimed that "like it or not, black children are children too."[117] Thus, lawyers no doubt perform better analysis when they can do so in "flexible rehearsals of different approaches to a problem.[118]

In light of the foregoing, one might define the virtue of imagination in the case of legal analysis as follows: **"a deep and lasting disposition (i) to Properly engage in various novel as well as traditional comparative approaches to analysis where such action is useful to or required by particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

The imaginative lawyer engaged will thus consider various possible Proper ways of viewing the matter at hand for purposes of making her probability analyses for objective legal analysis and for purposes of persuading the applicable audience for persuasive legal analysis. In either case, if the lawyer concludes alternative views are the Proper views, the lawyer will adjust her own positions accordingly.

3. Creativity

Creativity involves two elements. First, creativity requires action or idea production that is "recognizably original," where the creative person "must be capable of generating ideas or behaviors that are novel, surprising, or unusual."[119] Creativity thus shares in the imagination. Second, the ideas or behaviors must be "adaptive" in the sense that an "individual's originality must make a positive contribution to that person's life or to the lives of others." This second element is required to address the fact that, for example, novel "hallucinations and delusions like those that characterize

[115] RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 87 (1999).

[116] *Id.* Hookway makes a similar point in the case of Peirce: "It was a mark of the great men of science that their guesses were particularly inspired; there are endless passages where [Peirce] describes the abductive skills of Kepler and other heroes." CHRISTOPHER HOOKWAY, PEIRCE 225 (1992).

[117] *See* RORTY, *supra* note 115, at 99; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[118] *Imagination*, OXFORD DICTIONARY OF PHILOSOPHY 237 (3d ed. 2016). When stumped in such rehearsals, we can recall the words of Blake inspiring us to imagine: "Nature has no Outline: but Imagination has. Nature has no Tune: but Imagination has!" WILLIAM BLAKE, *The Ghost of Abel*, *in* THE COMPLETE POETRY & PROSE OF WILLIAM BLAKE 270, 270 (David V. Erdman ed., rev. ed. 2008). I would of course change "Nature" to "the Pre-semantic." We should also join Blake in rejecting the Age of Reason's belief that imagination is "a degenerative malady of the intellect." S. FOSTER DAMON, A BLAKE DICTIONARY: THE IDEAS AND SYMBOLS OF WILLIAM BLAKE 195 (rev. ed. 1988).

[119] PETERSON & SELIGMAN, *supra* note 98, at 110.

schizophrenia" disrupt life rather than improve it and could thus hardly be seen as virtuous.[120]

In light of the foregoing, one might define the virtue of creativity in the case of legal analysis as follows: **"a deep and lasting disposition (i) to Properly engage in acts (or conceive of ideas) that are "novel, surprising, or unusual" in ways that are useful to or required by particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

The creative lawyer engaged in objective legal analysis will thus consider "novel, surprising, or unusual" ways of viewing the matter at hand when making her probability analyses. The creative lawyer engaged in persuasive legal analysis will similarly consider such Proper ways of viewing the matter at hand for the purpose of persuading the applicable audience. In either case, if the lawyer concludes alternative views are the Proper views, the lawyer will adjust her own analyses accordingly.

Additionally, lawyers and law schools wishing to promote creativity recognize that "creativity is facilitated by environments that are supportive, reinforcing, open, and informal."[121] To the extent the traditional law firms or law-school classrooms are inconsistent with this approach, we should of course be concerned with the effect on Proper legal analysis.

4. Fidelity (again)

The virtue of fidelity was discussed above as a virtue of motivation for lawyers. However, it is also a virtue of freedom to the extent it frees the lawyer to act and speak up on behalf of clients, the law, and justice. Thus, again, the virtue of fidelity to clients, the law, and justice is: **"a deep and lasting disposition (i) to be Properly steadfast in allegiance and duty to the client, the law, and justice, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in particular situations, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

C. VIRTUES OF RESTRAINT

Having discussed virtues of freedom made possible by the logical freedoms in concept and category construction and interpretation as well as logical freedoms in highlighting and concealing discussed above, we must balance such virtues with virtues of restraint that Properly recognize Applicable Restraints.

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[120] *Id.* Thus, according to Llewellyn: "The necessity and duty of creative choice demands an open accounting to the authorities, to the situation, and to reason; with an eye always on the basic need for wiser and for clearer guidance for tomorrow." LLEWELLYN, *supra* note 2, at 402. Similarly, one must not "chase fireflies into the marshes of absurdity." *Id.* at 185; *see also id.* at 190.

[121] PETERSON & SELIGMAN, *supra* note 98, at 119.

1. Moderation

For want of a better term in English, I shall use the term "moderation" to address the virtue of recognizing Applicable Restraints and acting and thinking accordingly. I therefore use this term more broadly than simply as a synonym for "temperance," which can be understood more narrowly as "the control of one's appetites and desires" or "the control of bodily appetites."[122] I use this term more in the sense of "observing reasonable limits."[123] Such Proper moderation refines legal analysis.

Thus, one might define the virtue of moderation in the case of legal analysis as follows: **"a deep and lasting disposition (i) to Properly recognize Applicable Restraints in particular legal analysis, (ii) to Properly balance between such Applicable Restraints and Applicable Freedoms relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

The moderate lawyer engaged in objective legal analysis will thus recognize and consider Applicable Restraints relating to the matter at hand when making her probability analyses. The moderate lawyer engaged in persuasive legal analysis will similarly recognize and consider Applicable Restraints relating to the matter at hand for the purpose of persuading the applicable audience. In either case, if the lawyer concludes that Applicable Restraints result in certain Proper views, the lawyer will refine her own analysis accordingly.

2. Fidelity (again)

The virtue of fidelity was discussed above as a virtue of both motivation and freedom for lawyers. However, it is also a virtue of restraint that limits the range of actions available to lawyers. For example, devotion to a client's interest is a consideration that pushes back. Thus, again, the virtue of fidelity to clients, the law, and justice is: **"a deep and lasting disposition (i) to be Properly steadfast in allegiance and duty to the client, the law, and justice, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in particular situations, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."** Given the central role that fidelity plays to the very essence of being a lawyer, it is not surprising that this virtue should appear under three separate headings in the case of legal analysis.

3. Open-mindedness (again)

Open-mindedness is not only a virtue of freedom but also of restraint: it pushes back against narrow-minded analyses. Thus, again, open-mindedness

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[122] *Temperance*, PENGUIN DICTIONARY OF PHILOSOPHY 612–13 (2d ed. 2005).

[123] *Moderation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/moderation [https://perma.cc/DG5Y-GJK7].

is **"a deep and lasting disposition (i) to be Properly free 'from prejudice, partisanship, and other habits that close the mind' where such freedom is useful to or required by particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

D. VIRTUES OF PERSPECTIVE

When performing legal analysis, a lawyer needs Proper perspective in multiple senses. First, when performing either objective or persuasive analysis, a lawyer needs to understand how the relevant parties perceive the matter. For example, how does the judge, whose actions are to be predicted, perceive the matter? How does the audience to be persuaded perceive the matter? Second, the lawyer must understand ways that she herself perceives the matter that may affect the objective or persuasive analysis. For example, if she lacks necessary empathy, necessary humility, necessary confidence, or a sense of responsibility for her actions, her objective or predictive analysis may suffer. Such questions of perspective also overlap with various virtues of process that are separately discussed in this Article.

1. Whole-heartedness

John Dewey describes the virtue of whole-heartedness as follows:

> When anyone is thoroughly interested in some object and cause, he throws himself into it; he does so as we say, "heartily," or with a whole heart . . . . There is no greater enemy of effective thinking than divided interest . . . . When a person is absorbed, the subject carries him on. Questions occur to him spontaneously; a flood of suggestions pour in on him; further inquiries and readings are indicated and followed; instead of having to use his energy to hold his mind to the subject (thereby lessening that which is available for the subject, itself, and creating a divided state of mind), the material holds and buoys his mind up and gives an onward impetus to thinking. A genuine enthusiasm is an attitude that operates as an intellectual force. A teacher who arouses such an enthusiasm in his pupils has done something that no amount of formalized method, no matter how correct, can accomplish.[124]

When considering Dewey's words, one cannot help but think how the sterile Langdellian classroom interferes with such whole-heartedness, and one interested in legal education reform should keep the cultivation of such whole-heartedness at the forefront of one's mind. In any case, a "whole-hearted" approach to legal analysis no doubt approves such analysis.

Consistent with Dewey's insights, one might therefore define the virtue of whole-heartedness as follows: **"a deep and lasting disposition (i) to become undividedly absorbed in performing legal analyses, (ii) to**

[124] DEWEY, *supra* note 101, at 137.

Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."

2. Empathy

Empathy involves both "the ability to perceive the situation as it is perceived by another" and "the capacity to understand what another is feeling."[125] Put another way, "empathy is more than just a feeling. In order to be able to feel what another person is feeling, you need to be able to see the world as that other person sees it."[126]

The need for such perspective in legal analysis seems obvious. How, for example, can one analytically persuade an audience if one does not understand how the audience sees and feels about the matter to be analyzed? Similarly, does one not increase the odds of accurate prediction when one understands how the decider sees and feels about the case to be analyzed?

That said, however, one must also recognize that "empathy has its dark side: too much understanding and sensitivity, too much seeing things from the other's perspective, can cloud judgment and paralyze choice."[127] For example, if a lawyer becomes too clouded by the client's view, the lawyer may lack the necessary detachment or objectivity to provide good objective analyses.

Recognizing all this, one might define the virtue of empathy in the case of legal analysis as follows: **"a deep and lasting disposition (i) to Properly see and feel situations as others do in ways applicable to particular legal analysis but in ways that do not Improperly distort such analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition."**

The empathetic lawyer engaged in objective legal analysis will thus recognize and consider the relevance of how others see and feel about matters in ways that might affect her probability analyses. For example, she might try to see and feel the case as the arbitrator would when doing a predictability analysis of an arbitration. On the other hand, the empathetic lawyer engaged in persuasive legal analysis will try to see and feel the case as the audience would when trying to perform a persuasive legal analysis for that audience. In all such cases, the lawyer will not let such empathy cloud her judgment in ways that are not Proper.

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[125] BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING 23 (2010).

[126] *Id.* at 71. Thus, Kronman similarly claims, "[A] lawyer must be able to lose himself in that other person's situation, to see it from within in a way that makes it possible for him not just to name but to appreciate the interests, values, and ambitions that inform [that other person's situation]." KRONMAN, *supra* note 2, at 299. Or put more colorfully in Llewellyn's poetic prose, one should not be insensitive, and should not sport "an anteater-hide stuffed with either egotism or naïve bigotry or both." LLEWELLYN, *supra* note 2, at 50.

[127] SCHWARTZ & SHARPE, *supra* note 125, at 110.

With all that said, it is again troubling to observe Langdellian classrooms focused on redacted appellate cases and individual student recitation of cases when we read instead that "[c]lassrooms that emphasize community and foster concern for others increase empathy" in students.[128] Since we should be modeling empathy at such an early stage in legal development, we should consider alternative classroom formats that emphasize community and foster concerns for others. Alternative classroom formats can be created by reframing the nature of the class itself.

For example, I have tried to emphasize in much detail the better nature of a communal class and the benefits of classmates helping rather than simply competing against one another. This is especially effective on the first day of first-year class. Additionally, when we must use redacted appellate cases in the class (which is very rare for me), we can stress that much is missing, including not only parts of the case the editor(s) redacted, but the record on appeal, all discovery, full transcripts of the hearing(s) below, the tactical and other decisions made below (often made with much feeling) that impacted the course of the case, and introduction to the actual parties themselves. In stressing what is missing, we can also encourage students to see and feel as the parties likely did.

3. Intellectual Clarity

Although one might attempt to subsume this virtue at least in part under empathy, it merits its own mention. When encountering the positions of others, we should at least initially give such positions the benefit of the doubt and interpret them in the most favorable light if circumstances permit.

We often make mistakes in the words that we use or otherwise unintentionally use words that can be taken unfavorably. Failure to explore the possibility of such error or confusion can generate controversy that otherwise would not exist. Creating such controversy may make work for the lawyer but hardly serves duties to clients or justice.

Additionally, if we at least initially fail to interpret opposing positions in a most favorable light where circumstances permit, we run the risk of losing a case where the judge takes such positions more favorably than we do. That is, we run the risk of hoisting ourselves with our own overconfident petard.

Even worse, if we affirmatively misrepresent the opponent's position, we not only sully and potentially defame ourselves, but we also risk dour results from an undeceived judge.

Of course, if after appropriate reflection we find another's position truly and intentionally defective, hostile, or otherwise unfavorable, we should respond as the actual situation requires. Additionally, some situations simply may not sensibly permit such initial charity. For example, when faced with a drawn firearm, one should fear for safety first.

All that said, one might define the virtue of intellectual charity in the case of legal analysis as follows: "a deep and lasting disposition (i) to Properly view the positions of others in a most favorable light, (ii) to Properly balance between Applicable Freedoms and Applicable

[128] *Id.* at 72.

Restraints in viewing and responding to such positions, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the Proper results of such disposition." (I would consider the "Proper" qualifications, especially in subsection (i), to address the gun situation noted above.)

4. Humility

I understand humility to be a Proper recognition of one's own limitations and thus a critical virtue for legal analysis. For example, if one lacks the knowledge or endurance to perform a complex analysis, it is of course critical to recuse oneself. In less drastic cases, in which one may simply need additional preparation time or another's assistance, it is critical to seek these accommodations for proper legal analysis. Thus, we can define humility here as **"a deep and lasting disposition (i) to Properly recognize one's limitations with respect to particular legal analysis and to Properly seek assistance where needed, (ii) with assistance as Properly required, to Properly balance between Applicable Freedoms and Applicable Restraints, (iii) to Properly develop the Proper skills necessary for Properly recognizing such limitations and seeking such assistance, and (iv) to be generally successful in doing the foregoing."**

5. Confidence

In contrast to humility, I understand the virtue of confidence as Properly recognizing one's actual ability to perform a particular legal analysis. Thus, we can define confidence in the case of legal analysis as **"a deep and lasting disposition (i) to Properly recognize one's actual ability to perform a particular legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in performing such legal analysis, (iii) to Properly develop the Proper skills necessary for recognizing such actual ability to perform, and (iv) to be generally successful in doing the foregoing."**

Although it might seem more obvious to need the virtue of humility than that of confidence, the need for both virtues should be equally obvious. If one can perform a particular analysis but lacks the confidence to do so, proper legal analysis is no less likely to go unperformed than where ability is lacking.

6. Integrity

Integrity is "an unimpaired condition" and thus "the quality or state of being complete or undivided."[129] To assure this in oneself requires "self-awareness and self-scrutiny," "calls for honesty and transparency concerning

[129] *Integrity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/integrity [https://perma.cc/8F9V-Q6ZQ].

what this awareness or scrutiny reveals,"[130] and requires "being true to oneself."[131]

If propounding a particular objective or persuasive analysis divides oneself or proves untrue to oneself, one must consider whether one can Properly proceed. In addition to the danger to the self, there is the danger that a divided self cannot perform Properly for the client. This ties into "responsibility" in the sense used by Dewey:

> To be intellectually responsible is to consider the consequences of a projected step; it means to be willing to adopt these consequences when they follow reasonably from any position already taken. Intellectual responsibility secures integrity; that is to say, consistency and harmony in belief. It is not uncommon to see persons continue to accept beliefs whose logical consequences they refuse to acknowledge . . . . The "split" inevitably reacts upon the mind to blur its insight and weaken its firmness of grasp; no one can use two inconsistent mental standards without losing some of his mental grip.[132]

This, of course, is not to say that one cannot advance on behalf of a client analyses with which one disagrees but that are within the realm of the lawful and reasonable. However, if analyses strain truth to oneself, one must, again, reconsider both out of protection to the self and out of the risk that a divided self will not provide proper representation.

All that said, one might define the virtue of integrity in the case of legal analysis as **"a deep and lasting disposition (i) to remain true to oneself in performing legal analyses, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so remaining true to oneself, (iii) to Properly develop the Proper skills necessary for remaining so true to oneself, and (iv) to be generally successful in doing the foregoing."**

D. VIRTUES OF PROCESS

In performing objective or persuasive legal analysis, one must assure that the mental processes involved are consistent with generating Proper results. A number of virtues address this concern, some of which fit in multiple categories and have already been addressed above. Some such additional virtues include:

1. Sobriety

One common definition of "sober" is "marked by sedate or gravely or earnestly thoughtful character or demeanor."[133] Consistent with this, "intellectual sobriety" recognizes that "unless one starts from the unlikely

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[130] BAEHR, *supra* note 24, at 20. Such honesty and transparency also involve the previously discussed virtue of humility. As Llewellyn rightly remarks, "snobbery blinds the eyes to things and to work which the legal scholar needs to see, and snobbery dulls sensitivity to needs and above all to processes which the legal scholar needs to feel." LLEWELLYN, *supra* note 2, at 354.

[131] ZAGZEBSKI, *supra* note 18, at 162.

[132] DEWEY, *supra* note 101, at 138.

[133] *Sober*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sober [https://perma.cc/G9ZF-3FAH].

presumption that one's immediate reactions and unchecked inferences are so highly reliable as not to be improved by any tendency to withhold full assent until they are further investigated, the virtue of sobriety will have to be acknowledged."[134]

Consistent with this, the careful lawyer performing both objective and persuasive legal analysis will carefully review such analysis even if it at first seems correct. In fact, the careful lawyer will take such action with regard to all her activities. For example, I read my "to" line on emails at least three times before sending even if the addresses initially are correct.

Of course, there must be a Proper limit on the extent of such review, or a never-ending review will never be accomplished.

Thus, one might define the virtue of sobriety in the case of legal analysis as follows: **"a deep and lasting disposition (i) to Properly proof and reconsider legal analysis, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints relating to such legal analysis, (iii) to Properly develop the Proper skills necessary for Properly achieving the Proper results of such disposition, and (iv) to be generally successful in Properly achieving the foregoing."**

2. Fairness

A common definition of fairness includes "conforming with the established rules" and being "consonant" with merit or importance.[135] One performing objective legal analysis will of course wish to comply with applicable rules and to address matters in accordance with their import or merit in order to obtain acceptance of such analysis. One evaluating persuasive legal analysis will also wish to consider compliance with applicable rules and accord with import or merit when evaluating the persuasiveness of analysis.

Thus, for one performing legal analysis, one might describe the virtue of fairness as follows: **"a deep and lasting disposition (i) to Properly comply with applicable rules and consider the import or merit of matters addressed, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."**

3. Coherence

Coherence can be defined as having "systematic or logical connection or consistency"[136] as well as "having clarity or intelligibility."[137] One performing either objective or persuasive legal analysis will want to have coherence in both such senses. The Proper performers of both objective and

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[134] ZAGZEBSKI, *supra* note 18, at 175 (quoting Montmarquet).

[135] *Fair*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fair [https://perma.cc/MLP3-32WT].

[136] *Coherence*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/coherence (last visited Apr. 12, 2022).

[137] *Coherent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/coherent (last visit ed Apr. 12, 2022).

persuasive legal analysis will want to be intelligible and will want their analysis to flow in a logical manner that does not invite critique.[138]

That said, one might define the virtue of coherence as follows: **"a deep and lasting disposition (i) to Properly seek consistence and intelligibility, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."** Such a virtue of consistency is of course a cousin to that of integrity.

4. Thoroughness

Thorough analysis is "careful about detail" and thus "marked by full detail."[139] Thus, one who is thorough will "exhaustively investigate the evidence pertaining to a particular belief or set of questions."[140] The performers of objective and persuasive legal argument will want to be thorough in such senses in order to leave no stone unturned when structuring their analysis. Consistent with this, one might define the virtue of thoroughness as follows: **"a deep and lasting disposition (i) to Properly attend to and demonstrate detail, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."**

E. VIRTUES OF STRENGTH

In addition to the virtues described above, performance of Proper legal analysis requires certain virtues of strength—two of which I shall describe below.

1. Courage

Engaging in legal analysis may, in certain cases, involve actual or potential harm. In such cases, pursuit of analysis can properly require action "despite the fact that doing so involves an [actual] or apparent threat to one's own well-being."[141] In that case, one may or may not experience fear,[142] so the definition of courage need not involve the notion of fear.

The notion of courage, however, does require a further balancing act that weighs "(1) the comparative normative weight or significance of the [analytic] good and potential harm at issue, as well as (2) the apparent

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[138] As I have noted elsewhere, due to the complexity of life itself, use of metaphor can be an important exception to the consistency requirement as where, for example, metaphors can treat "up" as both undesirable ("that unfortunately went over head") and as desirable ("she has a high, elevated reputation"). *See* Harold Anthony Lloyd, *Law as Trope: Framing and Evaluating Conceptual Metaphors*, 37 PACE L. REV. 89, 99–100 (2017). Thus, also in science, quantum mechanics speaks of light as both a particle and a wave. *Id.*

[139] *See Thoroughness*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/thoroughness [https://www.merriam-webster.com/dictionary/thoroughnes].

[140] ZAGZEBSKI, *supra* note 18, at 269.

[141] *See* BAEHR, *supra* note 24, at 177.

[142] *Id.* at 169. For Aristotle, for example, "courage is not the absence of fear (which may be a vice), but the ability to feel the appropriate amount of fear; courage is a mean between timidity and overconfidence." *Courage*, OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016).

likelihood that the good and harm will actually obtain."[143] If the resulting good is likely "minimal" while the "potential harm is great," it is likely foolish and thus not virtuous (and thus not courageous in the virtuous sense) to proceed.[144]

Taking these various points into account, one might thus define the virtue of courage as follows: **"a deep and lasting disposition (i) to Properly weigh the good to be achieved against any resulting harm to be suffered in acting and to Properly act accordingly, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."**

2. Tenacity

The tenacious person is one who is "persistent in maintaining, adhering to, or seeking something valued or desired." Tenacity can no doubt be a necessary virtue of strength when the construction or advancement of both an objective or persuasive legal analysis can be quite consuming in terms of time or other resources. Such a virtue also requires an additional balancing act similar to that of courage. If the cost or harm of such activity outweighs the benefits, the Proper action may be to abandon the line of analysis.

Consistent with this balancing requirement, one might define the virtue of tenacity as follows: **"a deep and lasting disposition (i) to Properly weigh the good to be achieved against any resulting harm to be suffered in persisting and to Properly respond accordingly, (ii) to Properly balance between Applicable Freedoms and Applicable Restraints in so doing, (iii) to Properly develop the Proper skills necessary for so doing, and (iv) to be generally successful in doing the foregoing."**

G. PHRONESIS

Finally, in the case of legal analysis, one must note the role of the crowning virtue of phronesis or practical wisdom. The person with such wisdom, the phronimos, when struggling with legal analysis or other matters will "figure out the right way to do the right [analysis] in a particular circumstance, with a particular person at a particular time."[145] Thus, phronesis or practical wisdom allows one "always to choose [a] correct [analysis] in a given circumstance and to perform it well and for the right reason."[146]

As generally noted, phronesis cannot be taught; instead it must be learned over time through practice such as the "actual practices of being a

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[143] *See* BAEHR, *supra* note 24, at 188 (changing quote "epistemic" to "analytic").

[144] *See id.* at 187–88. Thus, for Aristotle, "courage is dependent on sound judgement, for it needs to be known whether the end justifies the risks incurred." *Courage*, *supra* note 142.

[145] SCHWARTZ & SHARPE, *supra* note 125, at 5–6 (changing quote "thing" to "analysis").

[146] *See* Robert C. Bartlett & Susan Collins, *Glossary*, *in* ARISTOTLE, *supra* note 81, at 313–14 (noting I changed "the" to "a" since Schroeder's stairs, for example, shows us there can be more than one "right" answer in certain cases, and I changed "action" to "analysis"). Llewellyn uses the metaphor of "horse sense" here by which he means "that extraordinary and uncommon kind of experience, sense, and intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders." LLEWELLYN, *supra* note 2, at 201.

lawyer."[147] As Schwartz and Sharpe point out, "Building institutions that pay attention to creating communities of learners with a commitment to do right by those they serve is what will cause [phronesis] to be developed."[148] Again, those wishing to reform legal education should compare this requirement with the stale and formalistic setting of a Langdellian law-school classroom.

The need to reform legal education to advance this crowning virtue of phronesis along with the other virtues discussed that help us balance Applicable Freedoms and Applicable Restraints in legal analysis, is well expressed in Schwartz and Sharpe's summary of some "key characteristics" of phronesis:

> 1. A wise person knows the proper aims of the activity she is engaged in. She wants to do the right thing to achieve these aims—wants to meet the needs of the people she is serving.
> 2. A wise person knows how to improvise, balancing conflicting aims and interpreting rules and principles in light of the particularities of each context.
> 3. A wise person is perceptive, knows how to read a social context, and knows how to move beyond the black and white of rules and see the gray in a situation.
> 4. A wise person knows how to take on the perspective of another—to see the situation as the other person does and thus to understand how the other person feels this perspective is what enables a wise person to feel empathy for others and to make decisions that serve the client's . . . needs.
> 5. A wise person knows how to make emotion an ally of reason, to rely on emotion to signal what a situation calls for, and to inform judgment without distorting it. He can feel, intuit, or "just know" what the right thing to do is, enabling him to act quickly when timing matters. His emotions and intuitions are well educated.
> 6. A wise person is an experienced person . . . . People learn how to be [virtuous], said Aristotle, by doing [virtuous] things.[149]

On its face, this crowning virtue of phronesis[150] elevates the performance of legal analysis.

VII. CONCLUSION

Developing appropriate virtues for balancing Proper freedoms and Proper restraints in legal analysis is absolutely critical for the lawyer who would perform legal analysis in Proper ways. Schwartz and Sharpe help summarize this well in their contrast of "Rules Talk" and "Wisdom Talk"

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[147] *See* SCHWARTZ & SHARPE, *supra* note 125, at 271. Similarly, Kronman notes, "Prudence or practical wisdom is a trait of character that can be acquired . . . only through the experience of having to make the sorts of decisions that demand it—only through an extended apprenticeship in judgment." KRONMAN, *supra* note 2, at 290.

[148] SCHWARTZ & SHARPE, *supra* note 125, at 274.

[149] *Id.* at 25–26 (changing quote "brave" to "virtuous").

[150] For precision's sake, I feel strongly that we should consistently adopt the term "phronesis" in English rather than using such translations as "prudence" or "practical wisdom" or just "wisdom" which do not carry the full freight of the Greek term.

where the latter refers to phronesis and by extension virtuous action as opposed to the unreflective following of rules:

> Rules Talk asks: What are the universal principles that should guide our moral choices? Wisdom Talk asks: what are the proper aims of this activity? Do they conflict in this circumstance? How should they be interpreted or balanced?
>
> Rules Talk marginalizes the importance of character traits like courage, patience, determination, self-control, and kindness. Wisdom Talk puts them at the center.
>
> Rules Talk urges us to consult a text or a code. Wisdom Talk urges us to learn from others who are practically wise.
>
> ***Rules Talk is taught by teachers in the classroom. Wisdom Talk is taught by mentors and coaches who are practicing alongside us.***[151]

For those who would perform Proper legal analysis, rule books alone do not suffice. Instead, for all the reasons discussed above, virtue and its attendant skills must lend a necessary and intertwined[152] hand.

Thus, one must hope that law schools grasp the urgency of both addressing how freedoms and restraints "really" play out in legal analysis and how the virtues discussed above (crowned by phronesis) are necessary for such Proper legal analysis. As Kronman powerfully pleads:

> For whatever those in law teaching think, practicing lawyers still need the intellectual and affective powers whose combination constitutes the virtue of practical wisdom [phronesis]. Later in their professional lives, many lawyers come to appreciate the value of practical wisdom and to understand that it is not just a skill but a trait of character . . . . It is in the classroom that lawyers are introduced to the culture of the profession and here their professional self-conception first takes shape. If the claims of practical wisdom are repudiated here—which the penetration into the classroom of a neo-Langdellian ideal of scholarship makes increasingly likely—it will be harder to retrieve them later and hence more difficult to understand, let alone embrace, any ideal of professionalism in which the virtue of prudence [phronesis] occupies a central place.[153]

Finally, one must not forget that trinity of formalists described in note three. First, one hopes the uninformed formalist has become at least somewhat more informed as to the actual mechanics of legal analysis. (I use the term "mechanics" here because I know the uninformed formalist is mechanically inclined.) Second, one hopes the metathesiophobic formalist has been at least somewhat soothed and assuaged. Finally, one hopes to have outed the sham-shaman formalist whose deductive spells she might otherwise conjure at will. Let us be always clear that valid deductive arguments can conjure anything. For example, I might cast this entirely valid

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[151] *Id.* at 44–45 (emphasis and italics added).
[152] For, again, virtue without skill can be helpless while skill without virtue vile.
[153] KRONMAN, *supra* note 2, at 269 (references to "phronesis" added).

deductive "spell": 1) If the earth is round, Lloyd is King of France; 2) the earth is round; (3) therefore, Lloyd is King of France. Of course, I am not foolish enough to parade the title since the first premise (at least) of this valid modus ponens is false. The "spell" is unsound.[154] In declining the crown of France, despite the valid "sorcery" that conveys it, I close by reminding the reader that the search for soundness is a critical part of "real" and Proper analysis.

[154] A "sound" argument is "logically valid and ha[s] true premises." *Sound*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sound [https://perma.cc/DN8T-LS5H].