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This Article explores the similarities between the law and other craft traditions, such as carpentry, pottery, and quilting. Its thesis is that law—and in particular adjudication—combine elements of what Aristotle described as practical wisdom, or phronesis, *and craft, or* techne.

Craft knowledge is learned practically through experience and demonstrated through practice, and is contrasted with other concepts, including art, science, mass production, craftiness, and hobby. Crafts are characterized by four simultaneous identities. First, crafts are made by hand—one at a time—and require not only talent and skill, but also experience and what Karl Llewellyn called "situation sense." Second, crafts are medium specific and are always identified with a material and the technologies invented to manipulate that material. Third, crafts are characterized by the use and usefulness of craft objects. Fourth, crafts are defined by their past. The Article also considers how one becomes a craftsperson, focusing upon the role of rules and theory, the dialectic of certainty and uncertainty, tough love and exploitation in apprenticeship, and the necessity of failure and disillusionment.

The author concludes that although the craft ideal is "old-fashioned, even quaint and mildly embarrassing," it nevertheless provides a paradigm for understanding lawyerly work that holds the promise of both enabling lawyers to be better at their jobs, and of finding greater meaning and fulfillment in their professional lives.

Law as Craft

Brett G. Scharffs[*]

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INTRODUCTION

The Challenge is to build a life in the here and now—one worthy of ourselves, our fellow citizens and the law itself. Easier said than done. And many of us will fail in the attempt. Many will settle for a self-trivializing conception of lawyering.

–Bruce Ackerman[1]

Judge Learned Hand . . . once speculated whether he might have accomplished more by constructing a boat or building a house.

–Judge Robert Satter[2]

No matter how many choices the rules leave open, a judge whose task is to apply the law will be guided in his deliberations by what might be called the ethos of his office, by a certain ideal of judicial craftsmanship, and by the habits that a devotion to this ideal and long experience in attempting to achieve it tend to instill.

–Anthony T. Kronman[3]

Law is neither an art nor a science.[4] It is a craft.[5] In studying particular craft traditions, such as carpentry, pottery, angling, and quiltmaking, we can learn important lessons about the craft of

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1. James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1070 (1994) (reviewing ANTHONY T. KRONMAN, THE LOST LAWYER (1993)) (quoting Bruce A. Ackerman, *Commencement Remarks*, YALE L. REP., Spring/Summer 1982, at 6).

2. Robert Satter, *Tools of the Trade: Judging, Like Carpentry, Requires Craftsmanship*, A.B.A. J., Sept. 1992, at 104, 104 (1992) (reflecting upon his "surprise [about] what carpentry taught me about judging," and concluding that while "Judge Hand's urge to construct something he could see and touch was understandable after a lifetime of working with his mind," in reality "the carpenter and the judge both build edifices—only the materials they use are different").

3. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 295 (1993).

4. My emphasis in this Article will often be upon adjudication, especially in the appellate context. As will be apparent throughout, however, I believe conceiving of the lawyer's work as a craft is applicable in other aspects of legal practice and culture as well. For a discussion of the distinction between craft, art, and science, see *infra* Part I.B.1-2.

5. For my definition of "craft," see *infra* Part I.A.

the law, and especially adjudication.[6] Perhaps more importantly, for those grown weary of a life in the law, the craft ideals implicit in the law may re-ignite the spark of idealistic enthusiasm that drew them to the law in the first place.

This is not an original idea.[7] Professor Karl Llewellyn, for example, in response to the controversy between formalists and realists, described appellate judging as a craft of law.[8] The craft that Llewellyn had in mind centered around "the existence of some significant body of working knowhow," which is "in some material degree transmissible and transmitted to the incomer."[9] Craft is "in some material degree conscious, it is to some degree articulate in principles and rules of art or of thumb, in practices and dodges or contrivances which can be noticed and learned for the easing and the furtherance of the work."[10] Llewellyn also maintained that "[a] healthy craft . . . elicits ideals, pride, and responsibility in its craftsmen."[11] Craft cannot be reduced to a set of rules: "[T]he rules

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6. The craft virtues discussed in this Article are in no way gender specific, and I have drawn upon craft traditions, some of which have been traditionally male pursuits, some of which have been traditionally female pursuits, and some of which have no gender inclinations. I am sensitive to the difficulty of not creating misimpressions about gender neutrality given the inherited terms "craftsman" and "craftsmanship." When I use these terms, no gender message is intended; in order to emphasize this, I will often use the less familiar elocution, "craftsperson."

7. *See, e.g.*, JAMES E. BOND, THE ART OF JUDGING (1987) (contrasting favorably judicial craftsmen who look backward for guidance with judicial statesmen who look forward for inspiration); William A. Bablitch, *Reflections on the Art and Craft of Judging*, 37 JUDGES' J., Winter 1998, at 40, 40 (1998) (advocating fundamental importance of "principled decision making" for judges, and identifying (i) an understanding of the role of judges in a democratic society, (ii) intellectual humility, and (iii) an awareness of one's own value judgments as three qualities of good judges); Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUMAN. 353, 357 (1994) (basing view of adjudication as a "craft-bound excellence [with] objective conditions of mastery reflective of the internal demands of [its] practice" upon later philosophy of Wittgenstein); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 652 (1998) (arguing that Heidegger's understanding of thinking as handiwork, perception, and silence helps illuminate the problem of practical legal reasoning). *See generally* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995) (offering a model of judicial behavior based upon "craft" and "outcome" components of judicial decisionmaking).

8. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 213-35 (1960). Formalism saw adjudication as an intellectualizable process that subjected judges to the control of the law, whereas realists questioned whether there were any right answers to legal questions, and sought to unmask formalism as false and deceptive. *Id.* Both sides of this controversy, Llewellyn believed, ignored "everywhere . . . the concept of *craft*, of *craft*-tradition, of *craft*-responsibility, and of craftsmanship not as meaning merely the high artistry of God's gifted, but as including the uninspired but reliable work of the plain and ordinary citizen of the craft." *Id.* at 214.

9. *Id.*

10. *Id.*

11. *Id.* For a discussion of how the legal profession is suffering from the disintegration of ideals that elicit pride in its members, see generally MARY ANN GLENDON, A NATION UNDER

not only fail to tell the full tale, taken literally they tell much of it wrong; and while words can set forth such facts and needs as ideals, craft-conscience, and morale, these things are bodied forth, they live and work, primarily in ways and attitudes which are much more and better felt and done than they are said."[12] Craft does not usually generate absolute "certainty," but rather "reasonable regularity."[13] Llewellyn had planned on writing a major work about the "crafts of the law," but he died before such a work was completed.[14]

Taking his cue from Llewellyn, Yale Law School Dean Anthony T. Kronman has defended the once widely held, now largely forgotten "idea that the law is a craft demanding a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill, and which therefore justifies a sort of pride that the possession of such a trait affords."[15]

The law is a craft in other ways as well. The craftsperson's gaze invariably combines both a backward and forward looking dimension. Whether carpenter, quilter or judge, he or she looks to the past with faithfulness, seeking inspiration, guidance, and foundation. But the lover of craft—or, more precisely, of a particular craft—has another eye unflinchingly focused on the future, endeavoring to create something useful, comely, and lasting, something perhaps that will survive and be cherished by generations not yet born. Rooted in the past and concerned for the future, the craftsperson lives and thrives in the tension, limits, and opportunities created by these mutual devotions. But this is not all. The craftsperson is also rooted in a profound and moving way in the precarious present—unhurried, often alone, or shoulder to shoulder with a mas-

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LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994) and KRONMAN, *supra* note 3. Not coincidentally, the idea of the law as a craft, echoing and building upon Llewellyn, is a theme sounded by both Kronman and Glendon.

12. LLEWELLYN, *supra* note 8, at 214.

13. *Id.* at 215-17.

14. Views differ as to the role of craft and craftsmanship in Llewellyn's thought and its relationship to legal realism. Morton Horwitz has suggested that conceptualizing adjudication as a craft was an attempt by Llewellyn to remedy the "destabilizing consequences of Realism" by "offer[ing] a new basis for belief in professional craft as the source of stability and predictability in law." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 250 (1992). According to Horwitz, Llewellyn retreated to a form of conservatism after a youth of critical radicalism. *See id.* at 247-50. However, William Twining points out that "Llewellyn's interest in method . . . [and his] fascination with 'how' questions was a constant theme throughout his life and that there is an essential continuity in his thought and his emphasis on tradition and craft as stabilizing factors." William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 124 (1993). Twining rejects Horwitz's view of "Llewellyn's emphasis on craft and method as being a late, conservative, even reactionary sell-out on the critical thrust of his earlier Realism." *Id.*

15. KRONMAN, *supra* note 3, at 295.

ter, apprentice, or colleague, working on a single, particular project or problem, one at a time.

The creative tension experienced by the craftsperson, from the possibilities and constraints inherited from her forebearers, the opportunities and contingencies imposed by the present, and the prospects and perils of the future—this is the very tension that is experienced by a judge. With this tripartite gaze, the judge looks to the precedents and patterns bequeathed by her predecessors for guidance, is concerned about the consequences of her decision on the parties before her who stand to lose life, liberty, or property, and must think about how today's decision or opinion will be construed, used, and misused by her posterity.

As a defender of the opinion that the work of lawyers and judges should be treated as a craft, I must acknowledge that, in William Twining's words, this reflects a view which is "not just quaint, but dubious and outdated."[16] In a tribute to Llewellyn, Twining states that the ideals of craft and craftsmanship are "old-fashioned, even quaint and mildly embarrassing."[17] As one Japanese commentator shrewdly observed, "Llewellyn's emphasis on craftsmanship conjures up a nostalgic image of legal practice as a kind of tradition-bound cottage industry at a time when it was moving into an era of factory mass production."[18]

Nevertheless, craft may be an ideal that is inspiring or consoling for those who are dissatisfied with their professional lives as lawyers, those who find themselves skeptical or even cynical about the possibility of living a meaningful life in the law. Especially for those drawn to craft ideals in other areas of life, understanding the craft values and virtues implicit in the practice of law may open a door for understanding a way to conceptualize their professional life in a way that will be similarly inspiring.

OUTLINE

Part I of this Article addresses the question: What is craft? It first defines the term[19] and then contrasts it with a number of other ideas and ideals,[20] commenting upon the link between craft and

16. Twining, *supra* note 14, at 150.

17. *Id.* at 148. Twining observes that the idea of craft is viewed as an "uncritical form of romanticism." *Id.* at 150.

18. *Id.* at 148 (citing Takeo Hayakawa, *Karl N. Llewellyn as a Lawman from Japan Sees Him*, 18 RUTGERS L. REV. 717, 732 (1964)).

19. *See infra* Part I.A.

20. *See infra* Part I.B.

practical wisdom.[21] Part II takes a closer look at what it means for a social practice to be a craft, and addresses the question: Is law a craft? Part II focuses on several defining attributes of craft, including that crafts are made substantially by hand,[22] medium-specific,[23] and defined both by their use[24] of and by their relationship with the past.[25] Part II ends with a discussion of the importance of good judgment in being a craftsperson, and in particular for the craft of the law.[26] Part III addresses the question: How does one become a craftsperson? I discuss the role of rules and theory,[27] the specter of uncertainty,[28] how craft skills are learned and transmitted,[29] and the craftsperson's attitude towards money.[30] In conclusion, I reflect upon what we can learn about the practice of law from the study of a variety of craft traditions.

My primary aim in this Article is to give voice to a varied cast of master craftspersons from an assortment of well-established craft traditions, such as pottery, carpentry, embroidery, bookbinding, and quilt making, as well as spokesmen of activities that may less frequently be thought of as crafts, such as angling and baseball. In listening to master craftsmen and teachers of these crafts—some contemporary, some historic—we not only learn about these crafts, but we begin to see how the insights and attitudes of these craftsmen towards their crafts may have implications for the law and, in particular, for adjudication.

As I read these accounts of craftspersons reflecting upon their crafts, I feel competing emotions. On the one hand, I feel hopeful that in coming to view their professional vocation as a craft, lawyers and judges can come to share in the passion, care, and love for their craft that these craftspersons have for their crafts. On the other hand, I feel a sadness and concern, for viewing the law as a craft truly does seem anachronistic, and I have considerable doubt that there will be much change in our collective vision of the practice of law, which increasingly seems to be viewed as a business, as opposed to a profession, much less a craft. Perhaps the most I can hope for is a modest, subversive influence, that a few individuals

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21. *See infra* Part I.C.
22. *See infra* Part II.A.
23. *See infra* Part II.B.
24. *See infra* Part II.C.
25. *See infra* Part II.D.
26. *See infra* Part II.E.
27. *See infra* Part III.A.
28. *See infra* Part III.B.
29. *See infra* Part III.C.
30. *See infra* Part III.D.

will find it worthwhile to conceive of their work as lawyers and judges as a craft, and in so doing will find their professional lives more meaningful and fulfilling than they otherwise would.

I. BEGINNING: WHAT IS CRAFT?

People seem to think carpentry is a big mystery. Smart as they are in their daily occupations, their brains brake when confronted with a carpentry problem. It doesn't need to be that way.

–The Carpenter's Manifesto[31]

A. Defining Craft

In its broadest sense craft refers to the creation of original objects through an artist's disciplined manipulation of material. Historically craft was identified with producing objects that were necessary for life.

–Paul J. Smith[32]

The term "craft" has many meanings and connotations.[33] Thus it is helpful to speak with some precision about what I mean when I suggest that law is a craft, rather than an art, science, or something else.

Black's Law Dictionary defines craft as "[a] trade or occupation of the sort requiring skill and training, particularly manual skill combined with a knowledge of the principles of the art."[34] Thus craft combines both practical and theoretical knowledge. *The Oxford English Dictionary* ("OED") notes that the word "craft" originally connoted "strength, power, might, force,"[35] suggesting that a craftsperson has an extraordinary degree of skill and ability with respect to his or her craft. Craft is also defined by the OED as meaning "[i]ntellectual power; skill; art."[36] Related definitions in-

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31. JEFFREY EHRLICH & MARC MANNHEIMER, THE CARPENTER'S MANIFESTO: A TOTAL GUIDE THAT TAKES ALL THE MYSTERY OUT OF CARPENTRY FOR EVERYBODY 8 (1990).

32. PAUL J. SMITH, CRAFT TODAY: POETRY OF THE PHYSICAL 11 (1986).

33. Potter and teacher Seonaid Mairi Robertson notes that "[a]ny word like 'craft' used by different groups of people in the overall senses in which they have encountered an aspect of craftsmanship tends to become a vague, amorphous term of indefinite extent. It is necessary to try to define the term craft in order to clarify these different meanings." SEONAID MAIRI ROBERTSON, CRAFT AND CONTEMPORARY CULTURE 27 (1961) (emphasis omitted).

34. BLACK'S LAW DICTIONARY 330 (5th ed. 1979). The *Black's Law Dictionary* definition also includes the idea of a group of people in professional association ("Also the body of persons pursuing such a calling; a guild."), as well as the related concepts of craftiness ("Guile, artful cunning, trickiness."). *Id.*

35. 2 THE OXFORD ENGLISH DICTIONARY 1128 (1978).

36. *Id.*

clude, "[s]kill, skilfulness, art; ability in planning or performing, ingenuity in constructing, dexterity."[37] The OED also defines craft as "[a] branch of skilled work . . . [a]n art, trade or profession requiring special skill and knowledge."[38] The term "craft" is also used to describe "[a] trade or profession as embodied in its practitioners collectively; the members of a trade or handicraft as a body . . . ."[39] Peter Dormer has defined "craft knowledge" as the kind of "knowledge that is learned practically through experience and that is demonstrated through practice."[40]

As used in this Article, the distinguishing characteristics of craft are as follows:

- a craft is a socially situated practice combining both practical and theoretical knowledge, and requiring both skill and training;[41]
- tradition must be understood, valued, and followed—although innovation is accepted, and even valued, it is bounded;
- craft is a body of knowledge that is extensive and has come down over generations, and yet cannot be reduced to a catalogue or hierarchy of rules;[42]
- craft knowledge is often "tacit,"[43] difficult to articulate, and described under rubrics such as "know-how" and "experience";[44]
- expert craftsmen often practice their craft without consciously reflecting upon what it is they are doing;[45]

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37. *Id.*

38. *Id.*

39. *Id.*

40. PETER DORMER, THE ART OF THE MAKER: SKILL AND ITS MEANING IN ART, CRAFT AND DESIGN 7 (1994).

41. "Craft knowledge is harder to acquire through books than it is face to face with a skilled practitioner and teacher." *Id.* at 11. Seonaid Mairi Robertson contrasts craft with "handwork," noting that "handwork" implies "the idea of manual dexterity, of manipulation, and usually of hand or hand-and-eye training, almost as opposed to the training of the mind." ROBERTSON, *supra* note 33, at 27. In contrast, craftsmanship involves the whole body and mind, "involved in an expressive rhythm relating mind and material for a specific purpose in the world of men." *Id.*

42. *See* DORMER, *supra* note 40, at 11.

43. According to Peter Dormer, "Tacit knowledge is the preferred phrase for craft knowledge among academics." *Id.* at 13.

44.

> Craft knowledge is not easily described by language, and in many cases resists a complete description. Writing about an action, talking about an action, and reflecting upon the nature of an action are not the same thing as the action itself, nor do they provide much insight into how it feels to act and how it feels to know for oneself how to act.

Id. at 11.

- craftsmanship can be taught, but learning takes place slowly, in apprenticeship;[46] and
- a commitment to a craft places certain constraints upon the craftsperson, though those constraints may feel liberating rather than constraining.

B. Contrasting Craft

In furthering our appreciation of what craft is, it is helpful to contrast it with several other ideas and ideals, such as art, science, mass production, craftiness, and hobby.

1. Art

> *Inspiration is the only factor that cannot be copied.*
>
> –Clement Greenberg[47]

> *The separation of craft from art and design is one of the phenomena of late-twentieth-century Western culture. The consequences of this split have been quite startling. It has led to the separation of 'having ideas' from 'making objects.' It has also led to the idea that there exists some sort of mental attribute known as 'creativity' that precedes or can be divorced from a knowledge of how to make things. This has led to art without craft.*
>
> –Peter Dormer[48]

According to the OED, in earlier times, the term "craft" was sometimes used synonymously with "art," although "they diverge in their leading modern senses."[49] In the way I am using the term, craft is distinct from art. Edward Lucie-Smith maintains that, at

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45. "Craft knowledge is not something you think about if you are an expert in it: as an expert you do not think about the exercise of your craft. You do, however, think about extending your expertise and about the goals to which you are applying it." *Id.*

46. "Craft knowledge is harder to acquire through books than it is face to face with a skilled practitioner and teacher." *Id.* "The particular 'touch' of a violinist, pianist, draughtsman, surgeon, nurse or vet cannot be described, but it can be demonstrated and, to a degree, be imitated or even learned wholly by someone else." *Id.* at 14.

47. *Id.* at 7 (quoting Clement Greenberg, *After Abstract Expressionism*, ART INT'L, 1962, at 24-32).

48. Peter Dormer, *The Status of Craft*, *in* THE CULTURE OF CRAFT: STATUS AND FUTURE 18, 18 (Peter Dormer ed., 1997).

49. 2 THE OXFORD ENGLISH DICTIONARY 1128 (1978); *see also* D.M. Dooling, *Introduction* to A WAY OF WORKING, at viii (D.M. Dooling ed., 1979) ("[I]n medieval society, painters and sculptors as well as potters and weavers were members of craft guilds. A man was a carpenter, a painter, or a stonemason; his work, his way of life, was central to his identity and recognized as his means of centering and discovering himself. It was whole; it was his religion, his relinking with his divine source."); Helen Rees, *Patterns of Making: Thinking and Making in Industrial Design*, *in* THE CULTURE OF CRAFT: STATUS AND FUTURE 128 (Peter Dormer ed., 1997).

least in Europe, from the Renaissance onwards, "[t]here was an intellectual separation between the idea of craft and that of fine art, which eventually came to be regarded as superior."[50] Art is much more likely to value innovation, originality, and creativity than will craft, although each of these elements is present in craft.[51] Art is also often interested in shocking, educating, and challenging settled understandings.[52] Moreover, art is not concerned with the relationship of form and function.[53] The visual arts focus on how an object looks, whereas crafts are also interested in how the objects feel to the touch.[54] Great art is often a radical departure from what has gone before, and indeed, it is often only after the passage of a significant amount of time that art is recognized, or evaluated, as being great. In contrast to art, craft is more rooted in and respectful of tradition, and places less value upon repudiating the past.

Crafts often aspire to the status of art.[55] Peter Dormer has observed that "[c]onsidering the postwar urgency for self-expression

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50. EDWARD LUCIE-SMITH, THE STORY OF CRAFT: THE CRAFTSMAN'S ROLE IN SOCIETY 11 (1981). This development, Lucie-Smith maintains, "is one of the distinguishing marks of the European Renaissance." *Id.*

51. *See* DORMER, *supra* note 40, at 7 ("In the West a high value is placed on individuality and self-expression. . . . This emphasis on individuality has encouraged artists and studio craftspeople to search for unique forms, images and approaches to art. There is almost a degree of neurosis about being (and being seen to be) unique; about having something or being something inimitable.").

52.

> The commitment of the First Amendment, then, is to encourage vigorous public debate, given that few, if any, ideas in society are settled. The NEA furthers this goal because art often shocks or disturbs mainstream society. In short, the government should fund art because artistic expression is speech that adds to public debate. Conversely, a government program that funds only 'decent and respectful' art will add nothing but surplusage to public debate; such a program acts merely as an echo . . . .

Neil C. Patten, Note, *The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in* National Endowment for the Arts v. Finley, 37 HOUS. L. REV. 559, 592-93 (2000) (footnote omitted).

53. *See infra* Part II.C.2.a.

54. Howard Risatti, *Metaphysical Implications of Function, Material, and Technique in Craft, in* SKILLED WORK: AMERICAN CRAFT IN THE RENWICK GALLERY 31, 40 (Janet Wilson ed., 1998). Risatti explains:

> [F]ine art students hone their abilities to capture optical sensations by looking at things—the model, the still life, the landscape. Their chief concern is with 'seeing' the thing to be rendered. Although many students may use the same model, each produces a different image because each sees the model from a different position in space. This would not be the case if the same model was used to make a piece of furniture.

Id. at 41-42.

55.

> The search for a 'fulfilling life' through practical activity has become a major concern in the West this century. For example, the search is at the heart of the sprawling arts and crafts movement where men and women have built their lives around commercially obsolete technologies such as hand dyeing and weav-

and individuality, it is possible to see why craft knowledge has become disdained."[56] When art is compared with craft, the comparison usually involves a belittling of craft.[57] Still, not all craftspersons wish to be viewed as artists, and some have expressed feelings of despair at the prospect of their craft devolving into the "unfortunate limbo of 'art.' "[58] As the potter Carla Needleman explains, "There is a common misconception that craft slides into art when the object made is no longer useful for anything. The things I make are useful, but if I don't use them, don't need to use them, does that rob what I do of meaning?"[59]

While some lawyers and judges liken their work to that of an artist,[60] others—such as Llewellyn and Kronman—are drawn to the craft analogy.[61] According to William Twining, Karl Llewellyn explicitly saw the craftsperson as occupying a "middle brow position between the technician and tradesman on the one hand and the scientist, statesman, or artist on the other."[62] Llewellyn's self-image of

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ing, pottery, furniture making, glass blowing and the like. The 'fulfillment' appears to be dependent upon their having turned their craft into an art.

DORMER, *supra* note 40, at 13.

56. *Id.* at 7 ("There is a view that craft knowledge, because it is communal (it has been created by many people), conflicts with originality. The prejudice against craft tends to be crude: craft, it is thought, is bound by rules, and it is assumed that rules necessarily conflict with freedom of thought, imagination, and expression.").

57. Peter Dormer identifies a number of prejudices about craft knowledge, and argues that each of these prejudices is mistaken. These prejudices include: (i) "[c]raft knowledge is merely mechanical," (ii) "[c]raft knowledge can be learned as and when you need it," (iii) "[c]raft knowledge and 'having ideas' or 'being creative' are separate activities," (iv) "[c]raft knowledge is separable from making aesthetic judgments," (v) "[c]raft knowledge is rule-based and rules conflict with personal creativity," (vi) "[c]raft knowledge is about forming habits, and habits also conflict with or inhibit creativity." *Id.* at 8. Although Dormer writes about the "plastic arts"—i.e., "painting, sculpture and studio craft whose content is substantially dependent on practical skill, and whose intention is discovered through the process of making the object"—similar prejudices exist with respect to the craft of the law. *Id.* at 7. John Ashbery has suggested, "Somebody should tell craftsmen right away that they are artists so they can stop worrying and we can go on enjoying their work as art." *Five Decades: American Craft Council*, AM. CRAFT, Aug.-Sept. 1993, at 77, 90 (quoting John Ashbery (1970)).

58. CARLA NEEDLEMAN, THE WORK OF CRAFT: AN INQUIRY INTO THE NATURE OF CRAFTS AND CRAFTSMANSHIP 25 (1979).

59. *Id.*

60. *See generally* Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591 (1996). While noting that the analogy between artists and judges, "as with any other analogy," at some point "collapses," Justice Pollock of the New Jersey Supreme Court argues that "the analogy provides a useful metaphor to illuminate the judicial process, particularly the work of state appellate judges." *Id.* at 592-93. Justice Pollock notes that "[j]udges, like artists, are products of their time. Like judges, artists may follow the work of their predecessors. They also may reject the past and anticipate the future." *Id.* at 596. Justice Pollock also maintains that "[g]reat judicial opinions resemble 'high art,' and some are of museum quality." *Id.*

61. *See supra* text accompanying notes 7-15.

62. Twining, *supra* note 14, at 148.

the lawyer, Twining notes, is as a "half-way artist."[63] It may be that aspiring to be an artist is inappropriate for a lawyer or judge, although his work, if it lasts and becomes revered, may rise through time to the status of art. Speaking of the status of craft, Rose Slivka has observed: "Throughout their long history, crafts have produced useful objects which are later considered fine art. Time has a way of overwhelming the functional values of an object that outlives the men who made and used it, with the power of its own objective presence—that life-invested quality of being that transcends and energizes. When this happens, such objects are forever honored for their own sakes—they are art."[64]

2. Science

[I]f law be not a science, a university will best consult its own dignity in declining to teach it.

-Christopher Columbus Langdell[65]

Craft can also be distinguished from science. Law has often aspired to the status of science—in the nineteenth-century sense of "science as rational ordering based on observation."[66] Pierre Schlag notes that "[i]n the early 1800s, law was often viewed not so much as a discipline, but as a kind of handicraft."[67] As law sought a place in the curriculum of universities, it aspired to the status of science as a way of legitimating its claim that it belonged in the university.[68] Thus, in the late nineteenth century, Harvard Law School Dean Christopher Columbus Langdell advocated the view that the law was only a legitimate subject of university study if it was a sci-

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63. *Id.* (quoting KARL LLEWELLYN, THE BRAMBLE BUSH 126 (1930)). Twining maintains that

> [t]he craftsman is neither a plumber nor Pericles; he is more than just a technician but only exceptionally aspires to greatness. The distinguishing mark of the craftsman is pride in a job well-done for its own sake. Money and fame are secondary. Craftsmanship is more akin to a form of love.

Id. at 149.

64. Rose Slivka, *The Persistent Object*, *in* THE CRAFTS OF THE MODERN WORLD 12, 20 (Rose Slivka ed., 1968).

65. Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 897 (1997) (quoting Christopher Columbus Langdell, A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 85 (1887)).

66. *Id.*

67. *Id.* at 896. Schlag's interesting essay compares the efforts of phrenology and law to cast themselves as forms of science.

68. *See id.* "Not only did universities have to be convinced that law was somehow an appropriate and reputable discipline worthy of study in its own right, but the profession of lawyers and judges also had to be convinced that university training in law was helpful and necessary for practice." *Id.*

ence. "If it be not a science," Langdell asserted, "it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it."[69] Schlag notes that "Langdell was so convinced that law was a science—not a craft—that, in what has become an entrenched and pervasive practice, he favored hiring young teachers who had little or no experience in the practice of law."[70] In describing law as a craft, Llewellyn was in large measure reacting against the Langdellian conception of law as a science.[71]

3. Mass Production

> *The evils of heartless and unloving production, under the grind of an unnecessary greed, are patent enough to lead us to reflect that we have after all in these matters a choice.*
>
> –Edward S. Prior[72]

Craft can also be distinguished from mass production or assembly of prefabricated parts.[73] While traditionally craft referred to

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69. *Id.* at 897 (quoting Christopher Columbus Langdell, A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 85 (1887)). Schlag notes that Langdell was "brought to the law school by a chemist, President Eliot of Harvard University, who was already prepared to embrace" a conception of law as a science. *Id.*

70. *Id.*

71. *See* C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS (1871); C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (Boston, Little, Brown & Co., 2d ed. 1880); LLEWELLYN, *supra* note 8, at 38-45 (criticizing the "Formal Style" of adjudication and identifying "Langdell's dazzling contract-construct [as] the American archetype of such a set of principles . . . ."). Langdell sought to make law scientific by borrowing the scientific method of careful observation (e.g., of the cases); to employ inductive inferences from the observed particulars to the general principles that "explain" them; and then to systematize the general principles into a deductive system from which all the particulars (i.e., the decision in any case) can be decided. This was meant to mirror the practice in the empirical sciences of observing particular instances; inferring from those particulars the general law of nature that explains their occurrence; and then testing and refining that law against subsequent particular experiences for its predictive adequacy.

72. Edward S. Prior, *Furniture and the Room*, *in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 261, 272 (William Morris ed., photo. reprint 1996) (1893).

73. *See id.* Faulkner notes in his retrospective introduction, that the Arts and Crafts Movement was a reaction "against the excesses of industrial capitalism." *See* Peter Faulkner, *Introduction* to ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY, at v (William Morris ed., photo. reprint 1996) (1893).

> The rapid and unplanned industrialization of Britain in the nineteenth century had destroyed many traditional crafts and produced an unprecedented type of society, with more and more workers passing long hours in grim factories, working in harsh conditions to produce goods in greater profusion than ever before. But the quality of both the goods and the workers' lives was disturbing to those not carried away . . . by the excitement of this extraordinary transformation.

everything made, whether utilitarian, ritual, or merely decorative, with the industrial revolution "there arrived a separation between a craft object and the thing made by a machine—an industrial product."[74]

Distinguishing mass production and craft does not imply an "essential antagonism between the acceptance of the machine age and acceptance of craftsmanship."[75] Mass production is a good thing, and it is here to stay.[76] Advantages of mass production include a decline in cost and an increase in uniformity of production.[77] But a move towards mass production makes it more difficult to sustain craft traditions.[78] The result of mass production "is a heterogenous work force, no member of which much resembles the traditional craftsman. The importance of instilling traditional craft values in the work force therefore diminishes; so too the value of protracted training as under a system of apprenticeship."[79] Viollet le

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Id. Striking a similar note, potter and educator Seonaid Mairi Robertson observes that with industrialization,

> [i]n the excitement of new power, in the demands of the insatiable machines, not only were human beings set to live and work in conditions of inhuman degradation, but certain values were lost. The worst of the industrial cities of Western Europe still struggle to rise above a century of slums, but new towns and new types of factories are spreading fast. Material things can be knocked down and replaced by better, but it is more difficult to recapture a squandered virtue. There were lost to the great majority of people certain spiritual values which were inherent in craftsmanship, in the responsibility of making good things well for one's family or one's neighbour, and the deep inward contentment of their use.

ROBERTSON, *supra* note 33, at 15.

74. LUCIE-SMITH, *supra* note 50, at 11.

75. ROBERTSON, *supra* note 33, at 17.

76. Seonaid Mairi Robertson notes that "[t]here will be the personal choice for each of us at some time between something mass-produced by a machine or something made by a craftsman, and sometimes one will be more appropriate for us, sometimes the other." *Id.*

77. *Id.* In defending craft and craftsmanship, it is important to clarify that I am not calling for a return to hand production of all goods and materials. In explaining why he should write about, or teach, crafts in our day and age, potter and educator Seonaid Mairi Robertson begins by noting

> that this is no plea for a general return to hand-production. I believe that mass-production by machines is the potential agent which will make possible a lessening of labour, and a duplication of things worth having—good houses, sufficient clothing, better tools for agriculture, for water-conservation, better modes of travel. These are not ends in themselves, but conditions of a good life, and in getting them we dare not lose sight of what a good life is.

Id. at 16.

78. Seonaid Mairi Robertson notes that even as industrialization spreads, "[t]here will still be the opportunity for the man who likes constructing or mending with his hands to work in that way, and the choice for the exceptional individual to live by creative craftsmanship." *Id.* at 17.

79. *Id.* Judge Posner notes, "The workers are more like the different parts of a machine, or the different cells of an organism, than they are like handicraftsmen, for they do not individually produce an entire product." Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 12 (1993).

Duc, speaking of the goldsmith's work, laments that "[m]echanism has destroyed the habit of intelligent personal effort on the part of the worker, and his energies are now directed to the imitation of the cold and arid regularity of the machine."[80]

In comparing the legal profession to medieval craft guilds, Judge Richard Posner suggests that the legal profession is following a path similar to the decline of medieval craft guilds, with an attendant change from craft production to mass production: "Mass production involves a change in the process of production from the handcrafting of small quantities of individualized, high-quality goods by highly trained specialists to the machine production of large quantities of goods of average quality, often by unskilled workers performing simple, repetitive operations under the direction of supervisors and ultimately by executives."[81]

As the legal profession becomes increasingly based upon a model of mass production as opposed to craft, certain repercussions should be expected. The French philosopher Simone Weil described her experience working in a Renault car factory in 1936 as follows: "In front of his machine, the worker has to annihilate his soul, his thought, his feelings, and everything, for eight hours a day. If he is irritated, or sad, or disgusted, he must swallow and completely suppress his irritation, sadness, or disgust; they could slow down his output."[82] I have heard young associates describe their feelings towards their work in almost identical terms, although most can only dream of eight-hour workdays.

Judicial opinions, we might think, are the antithesis of mass production, focused as they are upon the resolution of a unique and discrete case or controversy. Judicial opinions are individual and unique, and must be worked on carefully, one at a time. But, Judge Posner warns, even the vaunted judicial opinion has become subject to the pressures of mass production.[83] Posner suggests that an evolution has occurred in opinion writing, away from a craft ideal (today represented by a "tiny and shrinking minority of old-fashioned

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80. H. WILSON, SILVERWORK AND JEWELRY 5 (2d ed. 1912) (quoting VIOLLET LE DUC, ON MEDIEVAL GOLD AND SILVER WORK).

81. Posner, *supra* note 79, at 12.

82. SIMONE WEIL, SEVENTY LETTERS 22 (Richard Rees trans., 1965).

83. Posner, *supra* note 79, at 29; *see also* Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153, 161 (1983) (" 'In this go-go era of machine produced instant products, craftsmanship in all fields is fading. A religious-like calling seems required to stay at that desk, to keep probing the texts, to keep seeking the words through which facts are perceived and accounts rendered.' ") (quoting John D. Maguire, Address at Investiture at the District Court of Appeal, First District, Tallahassee, Fla. (Aug. 1, 1975)).

appellate judges who continue to write their own opinions") to a mass production ideal ("[t]oday . . . the vast majority of judicial opinions at all appellate levels are drafted by law clerks, most of whom are only a year or two out of law school," and the judge performs a "supervisory" role).[84] This transformation, Posner maintains, has "enable[d] the judiciary to dispose of a vastly larger number of cases with no marked (perhaps no) diminution of average quality."[85]

4. Craftiness

[T]hat Crooked Wisdome, which is called CRAFT.

–Thomas Hobbes[86]

The term "craft" has a darker, more sinister side as well, evidenced by such related terms as "crafty," "craftily," and "craftiness."[87] Craft may connote an "occult art," "magic," or a "skillful contrivance, a device, artifice, or expedient . . . a magical device; a spell or enchantment."[88] Other negative connotations apply to craft, including "[s]kill or art applied to deceive or overreach; deceit, guile, fraud, cunning" and "[a]n application of deceit; a trick, fraud, artifice."[89] On a related note, craftsmanship may be perverted by an

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84. Posner, *supra* note 79, at 29.

85. *Id.*

86. THOMAS HOBBES, LEVIATHAN bk. I, at 48 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

87. *The Oxford English Dictionary* notes that "craft" is the second element in many compounds, such as "handicraft" (which is close to what I mean by craft), "kingcraft," "priestcraft," "statecraft," "watercraft," and "witchcraft" (which are not). 2 THE OXFORD ENGLISH DICTIONARY 1128-29 (1978).

88. *Id.*

89. *Id.* Law and lawyers are also sometimes characterized as being "crafty," suggesting one way that the skills of the craftsperson can be directed towards dark or sinister ends. *See* Paul Butler, *Racially Based Jury Nullifaction: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995) (encouraging jury nullification for the purpose of black self-help, and observing: "Americans seem reluctant to have an open conversation about the relationship between race and crime. Lawmakers ignore the issue, judges run from it, and crafty defense lawyers exploit it."); Ira H. Leesfield, *Ex Parte Communications by Government Lawyers with Represented Parties*, FLA. B.J., Dec. 1998, at 18, 20 ("Crafty lawyers are able to find loopholes in even the most tightly worded statutes and holdings."); Tom H. Matheny, *My Faith and My Law*, 27 TEX. TECH L. REV. 1211, 1215 (1996) ("When I first started practicing law, practically all of the other lawyers in the area warned me about one particular man. They said he was one of the best lawyers in the State but that he was crafty, that he would not do the right thing, that he would lie, that he would take advantage of you."). Concern about crafty lawyers is not merely of recent vintage. *See* Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345, 352 n.31 (1998) (observing that lawyers engage "in unlawful shifts and devises so cunningly contrived . . . in deceit of the King's Courts, as oftentimes the Judges of the same were by such crafty and sinister shifts and practices invegled and beguiled"

obsession with techniques and strategies, what we sometimes call "tricks of the trade." James Elkins notes that "[a]lthough these strategies and tricks are contained in the notion of craftsmanship . . . they are not the container itself—they are not craft."[90]

Llewellyn recognized the possibility that craft could degenerate into mere craftiness. "Crafty," Llewellyn observes, "reflects abuse by the craftsman unless, as in negotiation or war, manoeuvers and even deception are part of the craft."[91] William Twining notes a certain ambivalence in Llewellyn's attitude toward craftiness: "Llewellyn regularly proclaimed the importance of ideals and ethics, the quest for beauty, and the quest for justice, but in his course on advocacy he was not above teaching the tricks of the trade, including some that might be thought to be ethically dubious."[92]

5. Hobby

Craft is also distinguishable from hobby. The OED defines a hobby as "a favourite occupation or topic, pursued merely for the amusement or interest that it affords, and which is compared to the riding of a toy horse."[93] A craftsperson, in contrast with a hobbyist, displays a depth of commitment, perhaps even devotion, to his craft. A hobbyist's commitment to his hobby is more likely to be reserved for his leisure time, whereas a craftsperson's avocation may be his vocation.[94] Crafts tend to take a long time to learn, and becoming proficient in a craft may take many years. Teachers of craft discourage students from jumping from one craft to another before

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(citing EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 212 (William S. Hein Co. 1986) (1642))); 1 AULUS GELLIUS, THE ATTIC NIGHTS 33 (John C. Rolfe trans., 1927) (quoting Titus Castricius: "It is the orator's [or trial lawyer's] privilege to make statements that are untrue, daring, crafty, deceptive and sophistical, provided they have some semblance of truth and can by any artifice be made to insinuate themselves into the minds of the persons who are to be influenced."). This connotation of craft is found, for example, in the Book of Mark in the Bible, which describes those plotting to kill Jesus Christ as having "sought how they might take him by craft, and put him to death." *Mark* 14:1 (King James).

90. James R. Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 KY. L.J. 937, 965 (1985).

91. Twining, *supra* note 14, at 150 (citing Karl Llewellyn, Law in Our Society: A Horse-sense Theory of the Institution of Law 505 (1950 ed., parts updated 1950-58) (unpublished course materials, on file with the University of Chicago Law School)).

92. *Id.* at 149-50.

93. 5 THE OXFORD ENGLISH DICTIONARY 317 (1978).

94. The *Merriam Webster's Collegiate Dictionary* defines "hobby" as "a pursuit outside one's regular occupation engaged in esp[ecially] for relaxation." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 551 (10th ed. 1996).

developing a depth of skill, which may make it easier for the craftsperson to learn the skills of a different craft.

C. Craft and Practical Wisdom

Crafts are a perilous sort of bridge between action and contemplation. . . .

–Carla Needleman[95]

1. Aristotle's Distinction Between Making and Acting

A central distinction in Aristotle's practical philosophy is between practical wisdom, or *phronesis*, and craft, or *techne*.[96] Practical wisdom and craft are each a subset of what Aristotle calls practical knowledge, or *praktikos*,[97] and both stand in contrast to theoretical wisdom, or *sophia*.[98] There is much that can be said about

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95. NEEDLEMAN, *supra* note 58, at 33.

96. *See* ARISTOTLE, *Nicomachean Ethics*, *in* A NEW ARISTOTLE READER, at VI.5 (J.L. Ackrill ed., Princeton Univ. Press 1987).

97. At times Aristotle uses the term *praktikos* broadly, meaning everything that is "nontheoretical." At other times he restricts it to *phronesis* and refers to *techne* as "productive" (*poietike*) knowledge. For a helpful introduction to the distinctions and relations between theory, practical wisdom, and craft in Aristotle's thought, see JOSEPH DUNNE, BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND ARISTOTLE 237-63 (1993). Sarah Broadie notes that for Aristotle, "as for Socrates and Plato, the craftsman is a favourite paradigm of practical rationality. But what makes the carpenter a carpenter, as distinct from someone who happens to get something right, is the former's knowledge of *what* he is doing and *why* he takes each step." SARAH BROADIE, ETHICS WITH ARISTOTLE 181 (1991).

98. Sarah Broadie explains that for Aristotle, theoretical wisdom includes both scientific understanding (*episteme*) and comprehension or intelligence (*nous*). BROADIE, *supra* note 97, at 187. Dunne observes, that following Plato, Aristotle used *episteme* not simply as a generic term for knowledge, but in an honored sense denoting *real* knowledge as against mere opinion (*doxa*). *See* DUNNE, *supra* note 97, at 237. "This logical ideal reached its highest fulfillment in philosophical wisdom (*sophia*), which combined the power of apprehending first principles and causes (*nous*) with the demonstrative power of tracing other knowledge back to them." *Id.* at 238. So conceived, theoretical knowledge for Aristotle "was emphatically distinguished from any knowledge which might have a practical import." *Id.* According to Dunne, Aristotle believed that

> [t]hrough theory we do not acquire a knowledge-content which can then be exploited in the practical business of life; the spheres of theory and of practice are incommensurable. Through theory, we are made receptive to being—which is beyond time—and to an order and harmony which are quite beyond our own powers of construction or interference. So little is it at the service of human life, and so little is this of any consequence to Aristotle, that he can complacently remark of the knowledge of Anaxagoras and Thales (preeminent *sophoi*) that its object is "remarkable, admirable, difficult, and divine, but *useless*."

Id. (quoting ARISTOTLE, *supra* note 96, at VI.7.1141b6-7). Scientific knowledge, or *episteme*, involves only universals (first principles which do not admit of being otherwise), whereas *phronesis* is concerned with both universals and particulars. *See* ARISTOTLE, *Metaphysics*, *in* THE BASIC WORKS OF ARISTOTLE, at II.1.993b19-23 (Richard McKeon ed., 1941); ARISTOTLE, *supra* note 96, at VI.1.1139a6-14. The relationship between the pursuit of theory, on the one hand, and practical

Aristotle's threefold distinction between *phronesis*, *techne*, and *sophia*, most of which is beyond the scope of this Article.[99] It is worth pausing briefly to consider this distinction, however, because the law, and in particular adjudication, combines elements of both practical wisdom and craft.

According to Aristotle, practical wisdom is concerned with deliberation (*bouleusis*), choice (*proairesis*), and action (*praxis*); it is a virtue of both intellect and character that enables its possessor to make good choices with respect to practical matters.[100] Craft, in contrast, is a virtue of one skilled in making or production (*poiesis*).[101] As Aristotle puts it in the *Nicomachean Ethics*, "The state involving reason and concerned with action is different from the state involving reason and concerned with production. Nor is one included in the other; for action is not production and production is not action."[102] Moral virtue, but not craft, is a state that issues in rational choice (a *hexis prohairetike*).[103] Thus, Aristotle maintains, while practical wisdom is a virtue of both intellect and character, craft is a virtue of intellect only.[104]

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involvement in the affairs of one's community, is "one of the most notorious conundrums facing Aristotelian scholars." DUNNE, *supra* note 97, at 240 (citing extensive literature). Dunne concludes that it is beyond dispute that Aristotle placed "a higher value on the exercise of the theoretic faculty than on the exercise of phronesis." *Id.* at 241.

99. Among many interesting titles that address this topic, see, for example, J.L. ACKRILL, ARISTOTLE THE PHILOSOPHER (1981); JONATHAN BARNES, ARISTOTLE (1982); BROADIE, *supra* note 97; DUNNE, *supra* note 97; W.F.R. HARDIE, ARISTOTLE'S ETHICAL THEORY (2d ed. 1980); ANTHONY KENNY, THE ARISTOTELIAN ETHICS (1978); JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND (1988); C.D.C. REEVE, PRACTICES OF REASON: ARISTOTLE'S NICOMACHEAN ETHICS (1992); W.D. ROSS, ARISTOTLE (1966); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE (1989); DAVID WIGGINS, *Deliberation and Practical Reason*, *in* NEEDS, VALUES, TRUTH: ESSAYS IN THE PHILOSOPHY OF VALUE 215, 215-37 (1987); J.L. Ackrill, *Aristotle on* Eudaimonia, *in* ESSAYS ON ARISTOTLE'S ETHICS 15 (Amélie Oksenberg Rorty ed., 1980).

100. Book six of the *Nicomachean Ethics* is in large measure devoted to explaining the difference between the activity of craft and action governed by rational choice. For a helpful introduction to book six, see BROADIE, *supra* note 97, at 186-98. Aristotelian *phronesis*, according to Dunne, involves *praxis*, and "has to do with the conduct of one's life and affairs primarily as a citizen of the *polis*; it is activity which may leave no separately identifiable outcome behind it and whose end, therefore, is realized in the very doing of the activity itself." DUNNE, *supra* note 97, at 244; *see also id.* at 275-79 (discussing role of virtue of character (*aretai ethikai*) and virtue of intellect (*aretai dianoetikai*) in *phronesis*).

101. ARISTOTLE, *supra* note 96, at VI.5.1140b6-7; *see also id.* at III.3.1112b32-3, X.7.1177b2-4, 12-18. For Aristotle, *techne* is concerned with production (*poiesis*), and involves "making or fabrication; it is activity which is designed to bring about, and which terminates in, a product or outcome that is separable from it and provides it with its end or *telos*." DUNNE, *supra* note 97, at 244.

102. ARISTOTLE, *supra* note 96, at VI.4.1140a1-5.

103. *See* BROADIE, *supra* note 97, at 78-90, 181.

104. For my assessment of this assertion, see *infra* Part I.C.3.

Action and making are further distinguishable according to Aristotle, because "while making has an end other than itself, action cannot, for good action (*eupraxia*) itself is its end."[105] Aristotle also observes that "[a] craft is not concerned with things that are or come to be by necessity; or with things that are by nature, since these things have their origin in themselves."[106]

a. Phronesis

Phronesis involves both rational choice and the process of reflective deliberation by which a rational choice is formed. Practical wisdom is also a primary virtue of good citizenship,[107] and is par-

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105. ARISTOTLE, *supra* note 96, at VI.5.1140b6-7. Dunne argues that *phronesis*, unlike *techne*, does not fit readily within the means-end framework familiar in practical reasoning, because the agent is

> invested in his action more completely than the producer is in his product. Whereas the latter can stand outside his materials and allow the productive process to be shaped by the impersonal form which he has objectively conceived, the agent on the other hand is constituted through the actions which disclose him both to others and to himself as the person that he is. He can never possess an idea of himself in the way that the craftsman possesses the form of his product; rather than his having any definite 'what' as blueprint for his actions or his life, he becomes and discovers 'who' he is through these actions.

DUNNE, *supra* note 97, at 263. Broadie makes a similar point: "The defining end of medicine [a paradigmatic Aristotelian craft] is health, and for every recognised craft the defining end is some departmental good. Now so far as they operate as physicians, the good and the inferior physician aim at the one end, health, but differ in their effectiveness." BROADIE, *supra* note 97, at 192. In contrast, the person of practical wisdom, as well as a wicked person, are both deliberators. The difference between the wicked man and the man of practical wisdom is not that the wicked man is "less effective in deliberation or action, but that he has a different aim, and a wrong one." *Id.* This distinction underlies the importance of moral virtue for the exercise of practical wisdom, because according to Aristotle, whether the aim is good or bad depends on the agent's moral qualities. *See* ARISTOTLE, *Eudemian Ethics*, *in* MICHAEL WOODS, ARISTOTLE'S EUDEMIAN ETHICS I, II AND VIII, at II.11.1227b20-1228a2 (1982); ARISTOTLE, *supra* note 96, at VI.12.1144a8, VI.13.1145a5-6. Aristotle states bluntly: "[Moral] virtue makes the aim right." ARISTOTLE, *supra* note 96, at VI.12.1144a8. For another discussion of the distinction between instrumental (craft) and intrinsic (*praxis*) goods in Aristotle's thought, see ROGER J. SULLIVAN, MORALITY AND THE GOOD LIFE: A COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS 50-54 (1977).

106. ARISTOTLE, *supra* note 96, at VI.4.1140a14-15.

107. *Id.* at bk. VI; *see also* Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851, 862-63 (1992). Aristotle's retrograde views regarding sex and race are evident in his discussion of good citizenship. Kronman explains that Aristotle thought some human beings are

> unqualified for participation in political affairs on account of their age or sex, and others—whom he called natural slaves—because of their native incapacity for self-government. In fact Aristotle ascribed the capacity for citizenship to only one small group of human beings: the adult male heads of households. All others, he felt, were incapable of the self-rule that politics implies and so had to be ruled despotically, outside the realm of politics, by others.

KRONMAN, *supra* note 3, at 37. Kronman notes that we have every reason to reject Aristotle's "biological elitism," because "there is no reason to believe that men are any more capable of self-rule than women." *Id.* at 42. But, Kronman notes, this still leaves Aristotle's "character-based elitism" in place. *See id.* "[Aristotle] also assumed, more reasonably, that a person's capacity for

ticularly important in a legal context.[108] The link between good citizenship, practical wisdom, and the law was even stronger in the Greek city-state than in our constitutional democracy, since citizens participated as judges, and there was no distinction in Greek law between judges and juries.[109] In carrying out their duties as judges, citizens were performing one of their paradigmatic duties.

Another important characteristic of practical wisdom is that it is not primarily concerned with rules.[110] In this sense, practical wisdom is antifoundationalist.[111] Practical reason does not propose to provide an axiom system for making choices or deciding cases.[112] Practical wisdom may also involve difficult deliberative questions that require mediation between values which may place very different claims upon our allegiances, perhaps even values that are incommensurable.[113] Nevertheless, practical wisdom is deeply concerned with reason-giving. Aristotle discusses at length the importance of deliberation in practical reason and choice: "We enlist partners in deliberation on large issues when we distrust our own ability to discern [the right answer]."[114] Richard Posner has emphasized the role of reasonableness, common sense, and coherence in

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self-rule depends on the character traits that he or she possesses, traits some possess to a greater degree or in a more developed form than others." *Id.*; *see also* Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 137-38 n.27 (1998) (surveying literature about Aristotle's attitudes towards women and minorities).

108. *See generally* KRONMAN, *supra* note 3, at 109-25; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (comparing practical reason and formalism); Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253 (1996); Meyer, *supra* note 7, at 647.

109. *See* GEORGE A. KENNEDY, ARISTOTLE ON RHETORIC: A THEORY OF CIVIC DISCOURSE, at vii-ix (George A. Kennedy trans., 1991); GEORGE A. KENNEDY, THE ART OF PERSUASION IN GREECE 27-28 (1963).

110. *See* ARISTOTLE, *supra* note 96, at VI.8.1142a23-30, VI.11.1143a26-1143b16; *see also* LEAR, *supra* note 99, at 171 (observing that Aristotelian practical wisdom is not a set of rules); WIGGINS, *supra* note 99, at 215-37.

111. *See* WIGGINS, *supra* note 99, at 234-36; *see also* Eskridge & Frickey, *supra* note 108, at 321; Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); Leiter, *supra* note 108, at 253; Meyer, *supra* note 7, at 647.

112. *See* WIGGINS, *supra* note 99, at 234-36; *see also* Eskridge & Frickey, *supra* note 108, at 321; Kronman, *supra* note 111; Leiter, *supra* note 108, at 253; Meyer, *supra* note 7, at 647.

113. *See, e.g.*, INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367 (2001); Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998) (collecting eighteen articles and comments about the problems of incommensurability).

114. ARISTOTLE, *supra* note 96, at III.3.1112b10-12.

his description of adjudication as involving practical reason.[115] A generation earlier, Karl Llewellyn emphasized the importance of reckonability or predictability in the law.[116]

b. Techne

Aristotle defines craft, or *techne*, as a "reasoned state of capacity to make."[117] The efficient cause of a craft is its maker; the material (*hule*), such as the stone from which a sculpture is carved or the wood from which a house is built, "gives the maker something to work on and gives the product the solidity and durability to exist as an artefact in the world"; the form (*eidos*), the idea of plan held by the maker, is "realized in the material and gives the finished product its specific character"; and the end (*telos*) of the making, its purpose, "may be looked on either as the realized form itself or, beyond that, as the use it serves in people's lives."[118] Thus, a craftsperson's skill can be evaluated according to his or her ability to realize purposes by taking ideas and transforming them into artifacts through the skillful use of the appropriate materials. According to Aristotle, being a skilled craftsman involves the habitual ability (*dunamis*) of the maker to produce reliably the desired products. At times it appears that Aristotle treats *techne* as a subordinate concept to *phronesis*—for example, when Aristotle suggests that one cannot exercise practical wisdom without having a sufficient level of technical competence. Seen in this way, *techne* is a necessary, but not sufficient, condition for the exercise of *phronesis*.[119]

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115. *See generally* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999); POSNER, *supra* note 108.

116. *See* LLEWELLYN, *supra* note 8, at 200-12 (discussing "reckonability" of result and situation sense).

117. *See* ARISTOTLE, *supra* note 96, at bk. VI. Dunne notes that *techne* "is thus quite straightforwardly linked to making (*poiesis*), i.e., the generation of 'things whose source (*arche*) is in the producer and not in the product.' " DUNNE, *supra* note 97, at 249. Thus, objects produced by craftsmen are distinguishable from natural things (*phusika*), which have the source of their generation in themselves, and from necessary things, the objects of *sophia*, which are ungenerated. *See id.*

118. *Id.*

119. ARISTOTLE, *supra* note 96, at VI.12.1144a28-30.

c. Commonalities

At times Aristotle draws a strong distinction between *phronesis* and *techne*,[120] but at other times he lumps the two concepts together, often using craft examples to elucidate practical wisdom.[121] It is beyond dispute that Aristotle saw certain important similarities between craft and practical wisdom. For example, the doctrine of the mean was relevant to his understandings of both craft and practical wisdom. With respect to craft, Aristotle observes that "people regularly comment on well-made products that nothing could be added or subtracted, since they assume that excess or deficiency ruins a good [result] while the mean preserves it."[122] The idea of the mean is also important in Aristotle's analysis of virtue and practical wisdom.[123] It also appears that rules play a similar role in craft and practical wisdom; the craftsperson seeks to "discover rules to be followed by the more mechanical exercise of craft," and the person of practical wisdom seeks to "articulate substantial conceptions of the good of man, and such a conception, once developed, might indeed serve as a standard to guide behaviour, even if not a rule to be applied mechanically."[124] Nevertheless, "even if crafts have rules, in general they also involve much more than

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120. For example, Aristotle says, "[M]aking and acting are different . . . so that the reasoned state of capacity to act [i.e., *phronesis*] is different from the reasoned state of capacity to make [i.e., *techne*]." *Id.* at VI.4.1140a2-5. "*Phronesis* cannot be . . . *techne* . . . because action and making are different kinds of thing." *Id.* at VI.5.1140b1-4. Dunne summarizes Aristotle's distinction between *techne* and *phronesis* as follows:

> Techne provides the kind of knowledge possessed by an expert in one of the specialized crafts, a person who understands the principles (*logoi, aitiai*) underlying the production of an object or state of affairs, e.g., a house, a table, a safe journey, or a state of being healthy. Phronesis, on the other hand, characterizes a person who knows how to live well (*eu zen*). It is acquired and deployed not in the making of any product separate from oneself but rather in one's actions with one's fellows. It is personal knowledge in that, in the living of one's life, it characterizes and expresses the kind of person that one is.

DUNNE, *supra* note 97, at 244.

121. Thus in book six of the *Nicomachean Ethics*, Aristotle's primary account of practical wisdom, "we find that when Aristotle is analyzing ethical reasoning, the only actual example he gives is medical—and therefore frankly technical." DUNNE, *supra* note 97, at 246. Dunne queries:

> The fact that Aristotle not only continually and quite casually invokes the model of techne in his discourse about the virtues but also shuns the opportunity to introduce phronesis on the one occasion in the early books of the [*Nicomachean Ethics*] when he is careful to reject techne as an appropriate model in the ethical sphere raises the question of just how significant or well-founded the distinction between techne and phronesis was in his thought.

Id. at 247.

122. ARISTOTLE, *supra* note 96, at II.6.1106b7-16.

123. *See id.* at I.13.1102b28-1103a1, II.6.1107a1-2, III.12.1119b15-18, VI.1.1138b21-23.

124. BROADIE, *supra* note 97, at 204.

rules . . . ."[125] Practical wisdom, like craft, cannot be reduced to a system of rules. Perhaps most importantly, and on a related note, both craft and practical wisdom have a strong experiential component. The expert, whether craftsperson or *phronimos*, is not bound up by rules, but rather develops a feel for what needs to be done in a given situation. It is not so much that rules are irrelevant to his endeavours, but his work and activity cannot be reduced to or explained by an appeal to rules. Through long practice and experience, the craftsperson, like the person of practical wisdom, develops a feel for how to respond to situations, each of which is unique and different, but each of which reflects patterns found in earlier experiences.[126]

The distinction between ends and means is also important in Aristotle's discussion of both practical wisdom and craft. Aristotle observes that in crafts "[t]he subject of investigation is sometimes the instruments, sometimes the use of them; and similarly in the other cases—sometimes the means, sometimes the mode of using it or the means of bringing it about."[127] Aristotle's statement that practical reason is sometimes about means has been widely misinterpreted as a claim that practical reasoning is limited to a consideration of means, rather than of ends (which it is argued, are determined arationally or irrationally).[128]

2. Status of the Craftsperson

In suggesting that law is craft, an important qualification must be made about the status of craft and craftsmen for Aristotle and in ancient Greek thought in general. There is a deep ambivalence in the work of Aristotle and Plato—perhaps reflective of a tension existing in Greek society as a whole—between, on the one hand, admiration for the work and skill of the craftsperson, but on

125. *Id.* at 203. Broadie elaborates: "Some crafts and skills are virtually mechanical once acquired (e.g., spelling . . .), but others demand ingenuity and intelligence for the effective application of their rules. And some skills . . . seem to depend on no rules at all." *Id.*

126. *See* DUNNE, *supra* note 97, at 275-314 (discussing *phronesis* as a form of experience).

127. ARISTOTLE, *supra* note 96, at III.3.1112b27-30.

128. Aristotle states: "Again, the function of man is achieved only in accordance with practical wisdom as well as with moral excellence; for excellence makes the aim right, and practical wisdom the things leading to it." *Id.* at VI.12.1144a6-8. David Wiggins persuasively refutes the view that this passage reflects Aristotle's position that reason pertains to means only. *See* WIGGINS, *supra* note 99; *cf.* LEAR, *supra* note 99, at 173-74 (suggesting that Aristotle's position can be reconciled because "[t]he same action can be viewed both as a means and as an end").

the other, contempt for the craftsperson as a social inferior.[129] One bids for the services of craftspersons, but would never associate with them. One admires their knowledge and skill, but one somehow does not admire them as people. This is not to say there are no positive references to craft and craftsmen in the work of Plato and Aristotle. For example, the creator of the world in Plato's *Timaeus* is a "Demiurge," or divine craftsman, who "order[s] and arrange[s] the physical world and bring[s] it as far as possible into conformity with the best and most rational pattern."[130] Plato also analogizes the exercise and development of virtue as a craft,[131] and there are favorable references to craft in *The Republic*.[132] Nevertheless, in the *Phaedrus*, the craftsman ranks seventh on the scale of reincarnated souls.[133] For Aristotle, too, craftsmanship is an inferior virtue to practical wisdom. As Reeve puts it, for Aristotle, "craft-knowledge and *phronesis* are not simply separate endeavours having nothing to do with one another; craft knowledge is subordinate to *phronesis*."[134]

The status of craftsmen is complicated by two additional factors. First, most craftsmen in Athens were foreigners, and as we might expect, they were viewed as somehow inferior. Second, while professing to be a democracy, Athens was basically an aristocratic society; people that worked for a living and got their hands dirty were snubbed by the wealthy elite who lived free from manual la-

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129. I wish to acknowledge Dr. Daniel Graham from the Brigham Young University Philosophy Department for his assistance in understanding the nature and status of craft in both the writings of Plato and Aristotle and in Greek society at large.

130. Renford Bambrough, *Demiurge, in* 2 THE ENCYCLOPEDIA OF PHILOSOPHY 337 (Paul Edwards ed., 1967).

131. *See generally* RICHARD D. PARRY, PLATO'S CRAFT OF JUSTICE (1996) (arguing that becoming a good person means becoming a craftsman of virtue); TERENCE IRWIN, PLATO'S MORAL THEORY (1977). *But see* DAVID ROOCHNIK, OF ART AND WISDOM: PLATO'S UNDERSTANDING OF TECHNE (1996) (critiquing this view). According to Parry,

> [T]he analogy between craft and virtue [is] the key to understanding what Plato was trying to tell us. The moral life was, just as Socrates had said, a kind of craft performance. The craftsman of the moral life knows the materials with which he works; he knows how to put these materials together so that the result—his life—is not only useful but even elegant. Such a life is happy—prosperous, fortunate, flourishing—because it is the conscious construct of someone with a craftlike knowledge.

PARRY, *supra*, at 1.

132. *See* PLATO, *The Republic, in* PLATO: THE COLLECTED DIALOGUES bk. I, at 340d & bk. II, at 370d (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1985).

133. *See* PLATO, *Phaedrus, in* PLATO: THE COLLECTED DIALOGUES 248a-d (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1985). As we might expect, the philosopher is ranked highest, but the craftsman ranks only above the sophist and tyrant whom Plato holds in the greatest of contempt.

134. ARISTOTLE, *supra* note 96, at VI.2.1139a35-b3, *quoted in* REEVE, *supra* note 99, at 75.

bor. The mixed feelings towards craft and craftsmanship in Greek society presages the ambivalence that is often expressed in contemporary analyses of craft, and in particular comparisons of craft with loftier ideals. In many ways, craft continues to be the ugly stepsister of practical wisdom, theory, and art.[135]

3. The Judicial Craft

One of my primary claims is that being a good lawyer, and in particular a good judge, requires that one be both a person of practical wisdom and a craftsperson.[136] The most obvious or straightforward way to defend such a claim, it might seem, is to bifurcate, on the one hand, the judge's deliberation, choice, and action in deciding a case (and identifying that with practical wisdom), and on the other hand, her writing an opinion to explain and justify that choice (and identifying the artifact of the judicial opinion with craft). While such a division gets it partly right, it is at the very least an oversimplification, because judges do not make decisions divorced from the reasons underlying them, and the opinion is often written tentatively, before a final decision has been reached. The dialectic between practical wisdom and craft occurs reciprocally throughout the process of deciding a case and writing an opinion justifying the outcome. For example, an appellate judge reads the written briefs submitted by contending parties (which might be viewed as the craft artifacts of the attorney advocates, but which have as their primary purpose convincing the judge how she should choose and act), prepares for and engages in oral arguments and conference deliberations with other judges, and engages in a process of drafting, editing, and building a consensus around an opinion that will garner support of a majority of the judges on a panel. Each step along the way involves both practical wisdom and craft.

There is an additional reason why both practical reason and craft are necessary traits or dispositions of the good judge, as well as others involved with the law. Although Aristotle was not entirely correct in maintaining that craftsmanship does not involve habits of

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135. This is not to say that craft and craftsmanship are without their defenders. The American Craft Council (the ACC) is a national, nonprofit educational organization with a self-described mission of "fostering an environment in which craft is understood and valued." The Council, American Craft Council Online, *at* http://www.craftcouncil.org.

136. I argue for the centrality of practical wisdom in Scharffs, *supra* note 107, at 135-48. This Article makes the second half of the argument.

character, but only intellectual dispositions,[137] there is a kernel of truth in Aristotle's claim. Craftsmanship involves dispositions such as patience, a love of deliberation, care in the use of materials and tools, and a respectful attitude towards the past, which can accurately be characterized as virtues of character.[138] But in spite of this, there is a sense in which craftsmanship is an amoral ideal.[139] Craft skills and craft dispositions can be used in the furtherance of worthwhile as well as objectionable ends.[140] Practical wisdom, in contrast, depends explicitly and categorically upon virtue of character.[141] Practical wisdom helps ensure that the craftsperson's ends will be right. This will be of particular importance when lawyers act as advocates, in which case they have an obligation to weigh the "worth of the ends to which they bend their strength."[142]

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137. Compare Aristotle's discussion of craft, *see, e.g.*, ARISTOTLE, *supra* note 96, at VI.4.1140a1-22, VI.6.1141a9-16, with his discussion of practical wisdom, *see, e.g., id.* at VI.2.1139a21-35, VI.13.1144b14-1145a6, VI.8.1178a16-25.

138. *See infra* Part II.A.2.a (discussing patience), Part II.E.1 (discussing deliberation), Part II.B (discussing materials and tools), Part II.D (discussing a craftsperson's attitude towards the past).

139. For example, Rob Atkinson, in a commentary on John Barth's novel, *The Floating Opera*, notes that the novel's lawyer-protagonist is "quite clearly indifferent to justice: 'I don't know what you mean, sir, when you speak of justice.' For many real lawyers, delight in craft seems a substitute for meaningful participation in the production of justice." Rob Atkinson, *Nihilism Need Not Apply: Law and Literature in Barth's* The Floating Opera, 32 ARIZ. ST. L.J. 747, 770 (2000). The pursuit of justice and craft are not "inevitable correlates; instead, they turn to craft when they despair of justice." *Id.* Atkinson notes that Robert Gordon's study of elite New York lawyers at the turn of the twentieth century found evidence of this. *Id.* "According to Gordon, a common recourse for lawyers disturbed by the divorce of their work from substantive justice was to retreat into craft values. There they could take uncomfortable refuge in technique as they saw the public harm their work on behalf of the wealthy wrought." *Id.* (citing Robert Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York Lawyers, 1870-1970, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (G. Gawald ed., 1984)); *see also* Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 737 (2000) ("Popular morality . . . views the lawyer's craft-oriented and client-oriented perspective as an abandonment of the lawyer's duty to justice. But the popular view is simplistic. It fails to recognize the unpleasant reality that our society is not neatly ordered by a spontaneous and coherent system of values. Ours is a wildly pluralistic culture in which individuals and groups struggle to achieve recognition for their private perspectives. As lawyers, we have no answers to these larger social conflicts, rather we can only speak for specific sides of these struggles.").

140. *See, e.g.*, John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 909 (1997) (criticizing traditional view of lawyers as "craft-oriented, amoral technicians . . . who are equally adept at arguing both sides" of a legal dispute); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 21-23 (1951-52) (embracing detached view of advocacy as a game or craft); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614-15 (justifying the amoral role of lawyers).

141. *See supra* Part I.C.1.a.

142. *See* Leon S. Lipson, Yale Law School Commencement Address (1979), *in* YALE L. REP., Fall 1979, at 3, 4.

A commitment to craftsmanship does not imply that one will be a conservative or a liberal, either politically or in one's legal or judicial philosophy. In fact, craftsmanship is not an ideal likely to appeal to either extreme of the ideological spectrum. A conservative critic might object that craftsmanship is too free-wheeling and unpredictable.[143] After all, the craftsperson understands herself to be involved in a creative activity, and advocates of a conservative judicial approach wish to contrast their philosophy, which they style "interpreting the law," with a liberal approach, which they style "creating law."[144] A conservative might object that Llewellyn was a legal realist, and his late life emphasis on craftsmanship was just another manifestation of the realist tendency to believe that what the law is depends exclusively upon what the judge happens to say it is. An advocate of a liberal judicial approach might likewise be critical of the ideal of craftsmanship because of the limits it places upon creativity and the deference it gives to the past. Liberal critics of Llewellyn, for example, found his emphasis on craft near the end of his life as an abandonment or retreat from his full-bodied realism.[145]

Not only is such criticism of the craft ideal by both liberals and conservatives to be expected, it is, to my mind, evidence of the need for lawyers and judges to embrace the mores and values of craftsmanship. Craftsmanship, as I will argue, involves certain dispositions and attitudes towards one's work, as well as certain skills and capabilities. But it does not commit one to a particular ideological or jurisprudential theory. Approaching one's work with the craft ideal as an animating aspiration does not make one a liberal or a conservative; rather, it will incline one to be a different kind of liberal or a different kind of conservative. For example, the conser-

143. *See, e.g.*, Timothy L. Alger, Comment, *Promises Not to Be Kept: The Illusory Newsgatherer's Privilege in California*, 25 LOY. L.A. L. REV. 155, 224 (1991) ("The great variety of state shield laws and the absence of a federal statutory privilege have caused the nation's courts to craft an assortment of bewildering and unpredictable balancing tests."); *Recent Cases*, 112 HARV. L. REV. 731, 736 (1999) ("The Sixth Circuit crafted an opinion unconstrained by the Supreme Court's 'cardinal principle' or any other standard of statutory interpretation.").

144. *See, e.g.*, Edwin Meese III, Address Before the D.C. Chapter of the Federalist Society Lawyers Division, *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 31, 38-40 (1986).

145. *See, e.g.*, HORWITZ, *supra* note 14, at 249-50 (discussing Llewellyn's retreat "from the critical tradition of Realism" to a form of conservatism); Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 262-63 (1961); *cf.* Twining, *supra* note 14, at 124 ("Llewellyn's interest in method . . . [and his] fascination [ ] with 'how' questions was a constant theme throughout his life and . . . there is an essential continuity in his thought and his emphasis on tradition and craft as stabilizing factors.").

vative judicial craftsperson will be less likely to oversimplify and misrepresent the complexities and ambiguities involved in judging. On the other hand, the liberal judicial craftsperson will be less inclined to replace the collective wisdom of precedent and history with his own vision of the right or good. Thus, in a Burkean sense of the term, the craft ideal will be conservative in that the past cannot be ignored and does (or should) constitute an ineliminable constraint on future decision. In this respect—from the concept of constitutionalism, to the doctrine of precedent—law is ineluctably conservative.

II. THE CHARACTER AND CHARACTERISTICS OF CRAFT: IS LAW A CRAFT?

It is not necessary, inevitable, or mandated by reason that we view our professional life as lawyers as a kind of craft. But, I believe, we will stand a better chance of finding meaning and fulfillment in our professional lives as lawyers if we view ourselves as participants in a craft tradition, and if we seek to cultivate, develop, and exhibit the attitudes and virtues of a craftsperson.

If we are to come to view the work of a lawyer as a craft, it is unlikely to be as a result of an analytical argument that is sufficiently convincing. Rather, it is likely to come from a moment of recognition or insight, based upon a familiarity with other crafts and their traditions. When we become familiar with actual craft traditions and what it means to be a craftsperson within those traditions, when we examine craftsmen's attitudes toward their work, when we consider the materials and tools and the way they are used by workers skilled in their craft, when we consider the role of rules and theory in particular crafts, and when we reflect upon the craft virtues characteristic of master craftsmen—it is in doing these things that we may have an experience, perhaps somewhat akin to a conversion experience, inspiring us to see our work and our professional lives in a new way.

There is at least some evidence that lawyers and judges view their work as a kind of craft. For example, a study of the Second, Fifth, and District of Columbia Circuit Courts of Appeal concluded that the professional standing of judges is based in large part on craft notions, including thorough preparation for oral arguments and the production of intellectually satisfying opinions.[146] Paul E.

146. *See generally* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS (1981).

McGreal has argued that when the U.S. Constitution was drafted and ratified, the Framers envisioned a craft role for judges: "Federal judges were to be learned in the law, chosen for their knowledge of substantive law, their skill in applying legal method, and their personal integrity. Integrity was the ability to subordinate personal, selfish interests (the causes of faction) to the dictates of judicial craft."[147] In a 1921 review of Benjamin N. Cardozo's book, *The Nature of the Judicial Process*, Learned Hand states flatly that "the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests. The test of his success is the measure in which his craftsman's skill meets with general acceptance."[148] It is probably less frequent that lawyers, certainly those practicing in a traditional law firm, view themselves as craftspersons.[149]

When we examine thriving craft traditions from the inside, seeking sympathetically to understand the craftsperson's attitudes towards his own work, we begin to identify some common characteristics of craftsmen. These traits or characteristics are imperfectly realized in the lives of individual craftspersons. As ideals, they become points of striving, rather than points of description that will be accurate across-the-board representations of groups of people or even particular individuals. Nevertheless, in examining a broad array of craft traditions, we find a number of common elements.

What are the particular features of the lawyer or judge that resemble those of the craftsperson in other crafts? What is distinctive about being a craftsperson? Bruce Metcalf has argued that craft is defined by four simultaneous identities. Each of these elements is also characteristic of the craft of adjudication, as well as of the broader work of lawyers. "First, [a craft] must be made substan-

147. Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1173 (2000). This is seen, McGreal argues, in Hamilton's comparison of legislators, who will be mere creatures of political will, with judges, who will be guided by judgment. *Id.*

148. Learned Hand, *The Nature of the Judicial Process, by Benjamin N. Cardozo*, 35 HARV. L. REV. 479, 479 (1921) (book review).

149. *But see* KRONMAN, *supra* note 3, at 209-25; LLEWELLYN, *supra* note 8, at 213-35; Mary A. McLaughlin, *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 VAND. L. REV. 1003, 1009 (1999) ("To this day, I advise young lawyers not to go right into a prosecutor's office—even if they could get the job—but instead to apprentice at a big firm. One does not know how to be a lawyer when one gets out of law school. I believe that an apprenticeship of approximately three years is necessary. For me, the best training was observing excellent lawyers practice their craft."); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 38-39 (1999) (identifying "craft autonomy" along with devotion to client and preservation of independent judgment as elements of a lawyer's professionalism).

tially by hand. This is the primary root of all craft, the wellspring and reference point for everything else in the field."[150] Much the same can be said of the judicial opinion; cases are decided one at a time, by a judge or small panel of judges, working by hand, to craft an outcome and a justification for the outcome for that particular case.[151] This idea of adjudication being done "by hand," one case at a time, is central to our idea of justice, and we criticize the law or our system of justice when they fall short of this ideal.[152]

Second, "[c]raft is medium-specific: it is always identified with a material and the technologies invented to manipulate it."[153] Using appropriate materials and tools in appropriate ways is required in craft. Carpentry is inseparable from wood, pottery is inseparable from clay, and quilting is inseparable from fabric, and each of these crafts is closely identified with the tools apropos to the craft. Similarly, lawyers and judges are expected to be skilled in the use of materials and tools in ways appropriate to unique situations. The materials with which lawyers and judges work—including sources of law such as constitutions, statutes, regulations, and precedents; principles and ideals such as justice, mercy, fairness, due process, and equal protection; and rules such as those governing civil procedure and evidence—cannot be separated from the legal arguments of lawyers or the opinions of judges. More fundamentally, the raw materials and tools used by lawyers and judges include words, skills of argument, logic, rhetoric, and persuasion. Indeed, it is impossible to imagine lawyers or judges acting apart from these materials and tools.

Third, "[c]raft is defined by use."[154] One way in which craft is distinguished from fine art is that crafts have functional uses be-

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150. Bruce Metcalf, *Replacing the Myth of Modernism*, AM. CRAFT, Feb.-Mar. 1993, at 40, 40.

151. *See supra* Part I.B.3 (distinguishing craft and mass production); *infra* Part II.A.2 (discussing volume and pace in craft).

152. For example, we decry what is sometimes described as "assembly line justice," or "one size fits all" justice. Judge Ruggero Aldisert vividly describes the dilemma:

> The national average for terminations on the merits for each active U.S. Circuit judge is 449 cases. Divide 449 by 255 working days a year and the message becomes clear. The one-a-day brand was a great name for vitamins, it is not great in describing the caseload for U.S. Circuit judges. The case you file moves along an assembly line of more than one case every 4.9 hours. . . . Think about it. That's the time allotted to each case. . . . Today there is no quiet library time. The circuit judge is on a treadmill, and each case comes to him or her in the midst of a gallop. With this fast food menu, are these cases receiving justice, or a kind of jurisprudential indigestion?

Ruggero J. Aldisert, *Then and Now: Danger in the Courts*, FED. LAW., Jan. 1997, at 41, 41.

153. Metcalf, *supra* note 150, at 40.

154. *Id.*

yond the aesthetic appreciation of the object.[155] The craftsmanship of a lawyer or judge can never be separated from the effects of her craft. This is particularly true in the case of a judge, whose judgments carry the overwhelming coercive power of the state. The violence inherent in judicial choice is never far from the surface.[156] Thus, we make a mistake when we divorce the judge's actions and craft from the violence inherent in the judge's work.[157]

Fourth, "[c]raft is also defined by its past. Each of the craft disciplines has a multicultural history that is documented mostly by objects, many from societies that have long since disappeared."[158] The craft of law is always a backwards-looking discipline. And although lawyers and judges are not solely concerned with the past, fidelity with the past, especially by judges, must always be a felt obligation.[159] Laws and judicial opinions similarly outlast the societies whose lives they seek to order, and from these artifacts it is possible to learn much about the civilization in question.

The following four parts of this Article discuss each of these aspects of craftsmanship.[160] My intent is not so much to provide an analytical argument to convince the reader that the law, and in particular adjudication, is a craft. Rather, my hope is that by giving voice to a large variety of craftspersons, speaking of their own craft traditions, a lawyer or judge will begin to see similarities and connections between those craft activities and his or her own.

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155. *See infra* Part I.B.1 (discussing difference between craft and art), Part II.C.2.a (discussing role of form and function in craft).

156. Cecile Francis-Lewis, speaking of the craft of leatherwork, makes a somewhat related point about the seriousness with which a leatherworker should approach his work.

> The fact that once leather was the skin of a living animal whose life was sacrificed should make us treat it with a certain respect, and fire us with the desire to make of it a permanent memorial, by putting all our energy into the work, and our mind to back up that energy.

CECILE FRANCIS-LEWIS, THE ART AND CRAFT OF LEATHERWORK 6 (1928).

157. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (observing that legal interpretation "takes place in a field of pain and death").

158. Metcalf, *supra* note 150, at 40.

159. *See infra* Part II.D.4 (discussing law's tripartite gaze).

160. *See infra* Part II.A (handmade quality of craft), Part II.B (use of materials and tools), Part II.C. (use and usefulness of craft objects), Part II.D (relationship of crafts to the past).

A. Making by Hand

> *[A craft] must be made substantially by hand.*
>
> -Bruce Metcalf[161]

> *[T]here is an inherent pleasure in making. We might call this joie de faire (like joie de vivre) to indicate that there is something important, even urgent, to be said about the sheer enjoyment of making something exist that didn't exist before . . . .*
>
> -Ellen Dissanayake[162]

> *Here we show how all the knowledge and techniques of the previous . . . parts go together to complete actual projects . . . .*
>
> *-The Carpenter's Manifesto*[163]

The first defining characteristic of crafts identified by Bruce Metcalf is that crafts involve making objects by hand.[164] The handmade quality of craft objects is "the primary root of all craft, the wellspring and reference point for everything else in the field."[165] Thus, craft is distinguishable from both action (which may not involve making)[166] and mass production (which may not be by hand).[167] This feature of craft has a number of implications, including for the role of talent and skill in creating craft objects,[168] constraints upon the pace of work and volume of output in crafts,[169] the role of experience in developing craft skills,[170] and the difficulties craftspersons have in articulating what they are doing when engaged in their craft activity.[171]

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161. Metcalf, *supra* note 150, at 40.

162. Ellen Dissanayake, *The Pleasure and Meaning of Making*, AM. CRAFT, Apr.-May 1995, at 40, 40-41.

163. EHRLICH & MANNHEIMER, *supra* note 31, at 9.

164. Metcalf, *supra* note 150, at 40.

165. *Id.*

166. For Aristotle's discussion of the distinction between acting and making, see *supra* Part I.C.1.

167. *See supra* Part I.B.3 (contrasting craft with mass production).

168. *See infra* Part II.A.1.

169. *See infra* Part II.A.2.

170. *See infra* Part II.A.3.

171. *See infra* Part II.A.4.

1. Talent and Skill

An ethics of craft begins with the idea of skill, of knowing how to do something.

–James Elkins[172]

O Sir, doubt not but that angling is an art, and an art worth your learning: the Question is rather, whether you be capable of learning it? for angling is somewhat like poetry, men are to be born so: I mean with inclinations to it, though both may be heightened by practice and experience: but he that hopes to be a good Angler must not only bring an inquiring, searching, observing wit, but he must bring a large measure of hope and patience, and a love and a propensity to the Art itself. . . .

–Izaak Walton[173]

One implication of crafts being made by hand is that talent and skill are necessary conditions of becoming a craftsperson. James Elkins notes that "[i]n each discipline there develops an array of skills, abilities and competencies that become associated with the craft."[174] One reason some people are better at a particular craft than others is that they have more natural talent. As Peter Dormer observes, "Unfashionable though it is to say, some people have a natural disposition towards practical work that the rest of us lack."[175] But natural, or raw, talent is not sufficient for one to be or become a craftsperson. We think of a craft as something that is learned over a long period of time, sometimes over a period of many years, involving hard work, discipline, and even immersion in the craft.

Of particular importance is the skill of problem solving. James Elkins argues that "[f]rom the craft perspective, professional competence lies in the skilled ways in which talents, knowledge and skills are employed to resolve particular problems . . . ."[176] John Glick observes of his work as a potter, "You must keep on trying until the fear of failure is forgotten. Now I try anything, and I consider temporary frustration a small price to pay for the sense of elation I receive from tackling the problems directly."[177]

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172. Elkins, *supra* note 90, at 955.

173. IZAAK WALTON, THE COMPLEAT ANGLER 53 (Modern Library ed., Random House 1939) (1653).

174. Elkins, *supra* note 90, at 955.

175. DORMER, *supra* note 40, at 58. Elsewhere, Dormer notes, "It is not universally true that everyone finds the acquisition of such skills a battle. Different people have different aptitudes." *Id.* at 46.

176. Elkins, *supra* note 90, at 955.

177. John Glick, *Toward Humanism in Apprenticeships*, *in* APPRENTICESHIP IN CRAFT 25, 31 (Gerry Williams ed., 1981).

2. Volume and Pace

No good work was ever done in a hurry . . . .

–Stephen Webb[178]

The fact that craft objects are made by hand affects the pace and volume of production. Speaking of the craft of furniture making, Stephen Webb observes, "No good work was ever done in a hurry: the craftsman may be rapid, but his rapidity is the result of very deliberate thought, and not of hurry."[179] By their nature, craft objects are created one at a time, and each object is individual and will reflect its own unique flaws and characteristics. T.J. Cobden-Sanderson, speaking of the craft of book binding, notes that "[a] well-bound beautiful book is neither of one type, nor finished so that its highest praise is that 'had it been made by a machine it could not have been made better.' It is individual; it is instinct with the hand of him who made it; it is pleasant to feel, to handle, and to see; it is the original work of an original mind working in freedom simultaneously with hand and heart and brain to produce a thing of use, which all time shall agree ever more and more also to call 'a thing of beauty.' "[180]

Potter and teacher Seonaid Mairi Robertson emphasizes that, ideally, crafts are created by a single individual who takes responsibility for the craft object: "In craftsmanship, in its fullest form, the craftsman creates the object from its inception to its finished shape, responsibly controlling the work at every point, holding the final purpose, the nature of the raw material, and the traditions of its use balanced, as it were, within the magnetic field of his own personality. The peculiar alchemy of this evades definition."[181]

The decline of craft skills in the law may be a reflection of a larger trend in industry and modern technology, where mass production and specialization prevail.[182] Indeed, the decline of craft values carries benefits. Consider the design and engineering of motor cars. Peter Dormer has observed that "[t]he craft knowledge in-

178. Stephen Webb, *Furniture, in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 89, 90 (William Morris ed., photo. reprint 1996) (1893).

179. *Id.*

180. T.J. Cobden-Sanderson, *Book Binding, in* ARTS AND CRAFT ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 134, 147-48 (William Morris ed., photo. reprint 1996) (1893).

181. ROBERTSON, *supra* note 33, at 30. Again, an analogy to the law and in particular to a judge deciding a case and crafting an opinion begs to be made.

182. *Cf.* DORMER, *supra* note 40, at 28 (making a similar observation with respect to the decline of craft knowledge and its status in the arts).

volved in the various stages of design and production may be progressively lost to individual workers whose skills are replaced by machines which may achieve the same results to a higher standard. Craft knowledge becomes distributed among the hardware and software of machines and computers. However, in one form or another a body of knowledge—the making of motor cars—is held intact. Indeed, it may be enhanced and deepened."[183]

Nevertheless, mass production poses a real threat to craft values. One implication may be an increasing fragmentation and specialization of craft skills.[184] Writing in the nineteenth century, Fred Miller observed that "[t]he tendency to specialisation which comes of the subdivision of work in these days is very detrimental to the development of a craftsman."[185] John Ruskin argued passionately in the late 1800s that specialization and the division of labor had the effect of turning workers from human beings into mere tools.[186]

a. Patience

When we are silent, we are listening, remembering, paying attention to the world.

–Linda Ross Meyer[187]

Closely related to constraints upon volume and pace when making by hand is the importance of patience. Peter Dormer argues that art has "moved away from handicraft because craft knowledge is difficult to learn and too slow to acquire for the contemporary student or artist who wants to establish a personal style quickly in order to respond to a fast-changing art world."[188] Much the same might be said of scholars, critics, and theorists who bring an array of literary, sociological, and critical perspectives to their analyses of the law.

Aristotle noted that true craftsmen must be patient.[189] The reality is that craft work cannot be rushed, and while skilled practitioners are often swift, their swiftness of motion is not to be confused with hurry. In fact, when we picture a craftsperson in our minds, it is hard to imagine her rushing. Craftspersons' descrip-

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183. *Id.* at 29.

184. *See id.* at 30-39.

185. FRED MILLER, THE TRAINING OF A CRAFTSMAN 33 (New York, Truslove & Comba 1898).

186. JOHN RUSKIN, *The Stones of Venice, in* THE NATURE OF GOTHIC 21 (Boston, Estes & Lauriat 1892).

187. Meyer, *supra* note 7, at 661.

188. DORMER, *supra* note 40, at 26.

189. ARISTOTLE, *supra* note 96, at X.4.1174a20.

tions of their work often reflect the expenditure of time and the painstaking attention to detail that is required. In her discussion of Heidegger's view of thinking as a kind of craft, Linda Ross Meyer makes a related point about the role of silence in thinking: "When we are silent," Meyer observes, "we are listening, remembering, paying attention to the world."[190] The potter Carla Needleman is particularly poignant on this point: "I painted a design on [a piece of pottery]. It took me hours and I worked with a great deal of care and concentration. Nevertheless, what I call 'impatience,' the need to get on with it, kept the design ordinary."[191] Speaking of another craft, Needleman notes that "[t]he great pure vehicle of the knotted rug requires of the craftsman a patience he, as a modern man, is unlikely to have."[192] Needleman maintains that the craft requires not the "patience of waiting," but the "patience of doing, the manifestation of patience in activity . . . ."[193] We have difficulty making psychological peace with the demands of craft because we are "influenced more than we know by fast-food chains and the philosophy of immediate gratification."[194]

b. Quality and Mindfulness

> *We forget what good work is like sometimes and end up accepting automobiles and department-store furniture that self-destruct in a few years.*
>
> *–The Carpenter's Manifesto*[195]

> *Mindfulness reflects an aesthetic sensibility (good taste) and an awareness of the consequences of doing work well; it makes quality the guiding force not only in the work, but in one's life.*
>
> –James Elkins[196]

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190. Meyer, *supra* note 7, at 661. Meyer continues,

> We remain silent to show respect, to await words of wisdom from the wise. We are silent, too, to show respect for the dead, calling a halt to all our frantic and distracted activity to focus our attention. We are silent in prayer. We are silent in the company of those who are dearest to us, with whom we need not 'make conversation.' On the other hand, when we 'use' language in chatter or 'small talk,' we are often not paying attention to what we are saying. And we are not thinking. Silence, by contrast, creates the space within which we can receive—comfort, love, memory, ideas, awe.

Id. at 661-62.

191. NEEDLEMAN, *supra* note 58, at 5.

192. *Id.* at 65.

193. *Id.* at 66.

194. *Id.*

195. EHRLICH & MANNHEIMER, *supra* note 31, at 12.

196. Elkins, *supra* note 90, at 956.

James Elkins has argued that "mindfulness is at the heart of an ethics of craft."[197] "Mindfulness," he explains, "is reflected in craft as the skill of getting something done right and doing it well, as opposed to the mere act of completion or just getting it done."[198]

In law, Elkins observes, "Mindfulness means care, awareness and thoughtfulness, but it is not the same thing as purpose or competence. Purpose and competence suggest a linear dimension of work and life, purpose helps us to get from one place to another, from one case and one client to another. Mindfulness gives feeling and depth to the client and case at hand."[199]

There is a sense in which the craftsperson's mindfulness and attention to quality may, in our day and age, result in craft becoming, or being perceived as, an elitist value. In an age of mass production, which carries attendant benefits of uniformity and cost efficiency, objects which have been crafted by hand are often expensive luxury goods. This could have wide-ranging implications for the law.

As noted in the discussion of the difference between craft and mass production,[200] Judge Posner has observed that mass production reduces the cost of goods; small quantities of individualized handmade goods are replaced by the production of large quantities of goods of average quality.[201] There is a risk that lawyers may reserve their craftsmanship for high profile work for wealthy clients, and resort to techniques of mass production in other less visible work. Judges, too, are susceptible to this division of their work into craft matters receiving a high degree of attention and other matters receiving less. Indiana University Law School Dean Lauren K. Robel has observed that even judges who recognize the craft aspects of adjudication may be so pressed by a weighty case load that they "protect professional values of craft in the cases on which professional reputations are made, reserving public process for the high-status cases involving elite litigants."[202] Pride and responsibility in a job well done is reserved for high profile matters, while less visi-

197. *Id.* at 955.

198. *Id.* at 955-56.

199. *Id.* at 956. Mindfulness, for Elkins, appears to be closely related to the ability to exercise judgment well. "The state of mindfulness gives us presence in the very moment at which we engage the client, in the moment of our choice to employ our skill and our knowledge one way rather than another." *Id.*

200. *See supra* Part I.B.3 (contrasting craft and mass production).

201. Posner, *supra* note 79, at 12.

202. Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 904 (1993).

ble cases can involve mass-production techniques and particle board.

3. Experience and Situation Sense

> *[Craft knowledge is] knowledge that is learned practically through experience and that is demonstrated through practice.*
>
> –Peter Dormer[203]

A third implication of crafts being made by hand is that experience is extremely important in developing the skills and competencies of becoming a craftsperson. Aristotle was clear in his view that craftsmen develop their skills primarily through experience. Carla Needleman argues that with the craft of woodworking, as with any craft, it is necessary to "stay with the one craft, extending oneself more and more into the universal mystery it contains and can reveal in the order particular to the craft."[204] This key characteristic of craft knowledge is shared with practical wisdom, and is one of the primary bases by which Aristotle distinguishes theoretical wisdom. Aristotle maintains that *phronesis*, or practical wisdom, involves not just a knowledge of universals, but of particulars as well, since it is concerned with action and action is concerned with particulars.[205] Since perception "controls" particulars, *phronesis* must include a kind of perception.[206] C.D.C. Reeve calls this kind of perception "practical perception."[207] Thus, Reeve maintains, practical perception for Aristotle is not merely the perception of objects; rather, it is a "search, partly perceptual, for the solution to a problem," which "involves finding the right universals and bringing them together with a particular in the way that solves that problem."[208] Craft, like practical wisdom, is concerned with universals as well as particulars, what Aristotle calls "things that admit of being otherwise."[209] Thus, like the person of practical wisdom, the

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203. DORMER, *supra* note 40, at 7.

204. NEEDLEMAN, *supra* note 58, at 88.

205. *See* ARISTOTLE, *supra* note 96, at VI.7.1141b14-16, VI.11.1143a28-35.

206. *See id.* at VII.3.1147a25-26.

207. REEVE, *supra* note 99, at 67.

208. *Id.* at 69. Of *phronesis*, Reeve concludes, it is "more a kind of perception than it is a kind of knowledge of universals," although as a "kind of perception it [sic] none the less crucially involves knowledge of universals and of how to bring them to bear appropriately in particular situations." *Id.* at 72-73.

209. ARISTOTLE, *supra* note 96, at VI.4.1140a1-2, VI.5.1140b3-4.

craftsperson must have a "trained eye," a kind of perception akin to practical perception.[210]

Experience helps cultivate a trait of character that Llewellyn described as "situation sense." Kronman attributes to Llewellyn the idea that the "main aim of appellate judging is 'to locate and explore the significant situation-type' exemplified by the case at hand, devise a rule 'to uncover and to implement [that situation's] imminent law,' and fit the rule in question into a larger body of evolving doctrine."[211] An appellate judicial craftsperson will have the desirable attributes of "hesitance to upset the settled or to embark on an uncharted sea . . . a desire to move in accordance with the material as well as within it, to carve with the grain . . . to reveal the latent rather than to impose new form, much else to obtrude an outside will."[212]

4. Articulation

Fine artists give lectures, while crafts people give demonstrations.

–Howard Risatti[213]

a. In Craft

A fourth implication of the handmade quality of crafts is that craftspersons are often at a loss to describe or articulate in detail the nature and process of their work. Carla Needleman asks, "And what is the craft of weaving? The weaver can't say and it doesn't disturb him that he can't—weaving is weaving and that's enough for him, it gives him enough to work with."[214] Even when the craftsperson can explain the reasons for doing things the way he is doing them, he is never fully able to articulate all of his knowledge or reasons.[215]

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210. REEVE, *supra* note 99, at 74.

211. KRONMAN, *supra* note 3, at 223.

212. LLEWELLYN, *supra* note 8, at 222.

213. Risatti, *supra* note 54, at 40. Risatti notes that this quotation was shared with him in a conversation and was of unknown origin. He also observes: "Whether or not this was meant to belittle crafts is unknown. It is, however, a very astute observation because it goes to the heart of the differences between the two practices." *Id.*

214. NEEDLEMAN, *supra* note 58, at 65.

215. *See* DORMER, *supra* note 40, at 49 ("Teachers—whether they are teaching and demonstrating face to face or trying to pass on knowledge through the less satisfactory medium of writing books (or giving television or video lectures)—know much more than they can articulate.").

The difficulty of articulation is due in part to the fact that being a good craftsperson is not reducible to following a prescribed set of rules.[216] But it is also because much of craft knowledge is tacit knowledge. "Tacit knowledge refers to a body of knowledge which we have gained through experience—both through the experience of our senses and through the experience of doing work of various kinds. Tacit knowledge differs from propositional knowledge in that it cannot easily be articulated or described in words. Nor can tacit knowledge be described mathematically."[217] Knowledge is not tacit simply because it is difficult to put into words, or because it is technical or obscure. Lawyers who obfuscate through technical jargon and pettifoggery are not exemplifying "tacit" knowledge; more likely they are acting to preserve a professional monopoly by creating a mystique about what they do. Janik describes tacit knowledge as " 'those aspects of experience which are wholly knowable self-reflectively . . . but by their very nature are incapable of precise articulation.' "[218]

Because such knowledge is tacit, rather than easily explicable, it might easily be devalued as mindless or thoughtless. One danger associated with "tacit" knowledge is that what we "know" might only mask our prejudices.[219] Speaking of the visual arts, Peter Dormer has written that "the status of craft knowledge or tacit knowledge has declined sharply because it is held to have no intrinsic value."[220] While this is not a new development, he argues that over the past thirty years there has been an accelerating decline: "A number of factors have encouraged the flight from tacit knowledge: the development of reductionist abstract art, the widespread use of installation, performance and other non-traditional, non-craft-based media, and the substitution of craft knowledge with art theory as

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216. *See* discussion of role of rules in craft *infra* Part III.A.1.

217. DORMER, *supra* note 40, at 14. Dormer's distinction between tacit and propositional knowledge is somewhat misleading. Both propositional knowledge (i.e., knowing *that* some proposition is true) and non-propositional knowledge (i.e., knowing *how* to do something) can be either explicit (i.e., one is conscious of some instance of propositional or non-propositional knowledge) or tacit (i.e., one is unconscious of some instance of propositional or non-propositional knowledge). Thus, it is probably more helpful to contrast tacit knowledge (whether propositional or non-propositional) with explicit knowledge.

218. *Id.* at 21 (quoting Allan Janik, *Tacit Knowledge, Working Life and Scientific Method, in* KNOWLEDGE, SKILL AND ARTIFICIAL INTELLIGENCE 49 (B. Goranzon & I. Josefson eds., 1988)).

219. *See, e.g.*, DAVID HARE, MURMURING JUDGES 84-85 (1991). "Fortunately, most craft activity [whether a table, legal brief, or judicial opinion] is open to assessment and criticism." DORMER, *supra* note 40, at 16.

220. DORMER, *supra* note 40, at 25.

the unifying body of knowledge taught as fine arts in Western art schools."[221]

b. In Law

Much the same could be said about the status of craft knowledge within the law. During the past thirty years, "[a] number of factors have encouraged the flight from tacit knowledge: the development of reductionist" theories such as law and economics; "the widespread use of . . . [various] non-traditional, non-craft-based" approaches to legal thought such as critical legal studies, feminist theory, and critical race theory; "and the substitution of craft knowledge with . . . [legal] theory as the unifying body of knowledge taught" in Western law schools.[222] Theories such as law and economics and feminist legal theory are rooted in theoretical academic disciplines and therefore dispense with tacit knowledge almost entirely.[223]

Of course, the law does not have the luxury of remaining inarticulate, even when articulation is maddeningly difficult. John Barrett identifies skillful communication as a principal craft skill of a judge: "[E]ffective communication [ ] is one key way that a judge takes responsibility for her judgments. . . . Well-reasoned, written . . . explanations may provoke attacks, but they also offer bases for higher courts and for the audience to understand why a judge did what she did. Quality reasoning has legs to stand on. Weaker explanations, by contrast, deserve not to and usually will not withstand much scrutiny."[224] Nevertheless, given the difficulties that craftspersons sometimes have in articulating their work and processes, it should not come as a surprise that lawyers and judges are sometimes incapable of fully articulating all of their knowledge or reasons.

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221. *Id.*

222. *Id.*

223. Much the same can be said of the influence of philosophy to minimalism and conceptualism in the visual arts. *See id.* at 27.

224. John Q. Barrett, *Introduction: The Voices and Groups that Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 1, 6 (1996) (footnotes omitted).

B. Relation to Medium: Materials and Tools

Craft is medium-specific.

–Bruce Metcalf[225]

Essential to any design is the Wherewithal . . . the materials and tools to work with.

–The Carpenter's Manifesto[226]

[I]t is by his attitude to his materials, to his tools, and his understanding of the needs his products serve that we recognize the essential craftsman.

–Seonaid Mairi Robertson[227]

What is the craft of being human? The material, myself, that I have to work with constantly changes. It has qualities of clay, glass, metal, wood, wool; it is brittle, flexible, malleable, obdurate. It is as if the study of being human is the ultimate craft and all the crafts reflections of it.

–Carla Needleman[228]

The second defining characteristic of craft identified by Bruce Metcalf is that crafts are medium-specific.[229] Crafts are always identified with the particular materials and tools used to manipulate them.[230] What are the attitudes that craftsmen have towards materials and tools, and what might a lawyer or judge learn from them?

Speaking metaphorically, Karl Llewellyn notes that "[n]eat cabinetmaking is both easier, more likely and more reckonable when the workbench is well stocked. The invitation of the full range, *any one correct*, makes simple, unembarrassed, natural, in many cases half-automatic, the choice and use of some one which is just the one needed to produce reasonable regularity in the particular case."[231] A large variety of materials and tools, and the skillful knowledge of which is appropriate for use in what situation, empowers the craftsperson in her work. Knowing how to evaluate and choose among materials and tools is one of the key ingredients of

225. Metcalf, *supra* note 150, at 40.

226. EHRLICH & MANNHEIMER, *supra* note 31, at 9.

227. ROBERTSON, *supra* note 33, at 36.

228. NEEDLEMAN, *supra* note 58, at 12.

229. Metcalf, *supra* note 150, at 40.

230. *Id.*

231. LLEWELLYN, *supra* note 8, at 217. For a discussion of Llewellyn's concept of reasonable regularity, see *infra* Part III.B.

what Ehrlich and Mannheimer in *The Carpenter's Manifesto* call the craftsman's "wherewithal."[232]

1. Materials and Hardware

> *Wood is the main ingredient in carpentry, so it pays to get good wood . . . .*
>
> *–The Carpenter's Manifesto*[233]

> *The most interesting thing about wood for me is that it has a grain, as people do. That is, each piece of wood has a personality . . . .*
>
> –Carla Needleman[234]

> *Because I did not know any better I thought my outfit quite swell but in reality the rod was heavy, cumbersome and dead and the line did not fit it. Besides, the guides were spaced so far apart that the line kept wrapping around the bamboo between them.*
>
> –Ray Bergman[235]

> *Hardware stores have endless amounts of gadgets and doodads, with more arriving every day. Some of them are quite useless. Some may be just what you need. That's one reason why you should get to know a good dealer, one who can listen to your specific problems, reach into the dark recesses under the counter, and pull out exactly what you're looking for.*
>
> *–The Carpenter's Manifesto*[236]

A craftsperson will take great care in selecting appropriate materials. May Morris, speaking of the craft of embroidery, notes that the craftsperson's failure "is often due more to the use of poor materials than to want of skill in working. It is surely folly to waste time over work that looks shabby in a month. The worker should use judgment and thought to procure materials, not necessarily rich, but each good and genuine of its kind."[237] If good and genuine materials are not available, it is unlikely that a good product can be created by even a master craftsperson. A system of justice rife with inequities and problematic precedents will make it extremely diffi-

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232. *See* EHRLICH & MANNHEIMER, *supra* note 31, at 39-135.

233. *Id.* at 40. Cecile Francis-Lewis makes an almost identical point with respect to the craft of leatherwork: "Good leather is essential if one wishes to accomplish really fine work, and the kind of leather to employ varies according to the work to be done." FRANCIS-LEWIS, *supra* note 156, at 17.

234. NEEDLEMAN, *supra* note 58, at 87.

235. RAY BERGMAN, TROUT 19 (1938).

236. EHRLICH & MANNHEIMER, *supra* note 31, at 52.

237. May Morris, *Of Embroidery*, *in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 212, 222-23 (William Morris ed., photo. reprint 1996) (1893).

cult for even a skilled lawyer or an expert judicial craftsperson to work with her materials to create an admirable object.

A craftsperson will also have an appreciation for the individuality and variety of her materials. Christopher Williams has observed that "[w]ood is perhaps the material closest to man's own temperament—infinite in its variety, vital and filled with imperfections. Each species, each tree, each limb, each trunk is an individual and should be so treated. The woodworker adjusts his pace to the individual, at times asserting his strength, at times following the needs of his materials."[238] A judge evaluating the credibility of a witness, or seeking to find a punishment that will be appropriate for a particular individual, must likewise have an appreciation for the individuality and variety of the human material from which judgments must be made. At the same time, the craftsperson understands the universality of his materials. Potter and educator Seonaid Mairi Robertson states, "We shall better be able to bridge the great gulfs of climate, culture, education, and tradition which tend to separate us if we remember always that the raw materials of our crafts, iron, wood, clay—while it is true that each batch of clay is slightly different, each tree has its own characteristics—are still iron, wood, clay the world over. . . ."[239] The raw materials of justice, concepts like fairness, equal protection, and due process, although exhibiting local characteristics, are likewise very similar the world over.

Craftspersons are sensitive to the constraints upon their artistry imposed by their materials, and adopt an attitude of collaboration with their materials. William Morris, a leader of the Arts and Crafts Movement in the late nineteenth century, urged craftsmen to "never forget the material you are working with, and try always to use it for doing what it can do best: if you feel yourself hampered by the material in which you are working, instead of being helped by it, you have so far not learned your business, any more than a would-be poet has, who complains of the hardship of writing in measure and rhyme. The special limitations of the material should be a pleasure to you, not a hindrance. . . ."[240] A lawyer or judge will not find the materials of precedent and statute a hindrance to her work, but will find them a welcome guide and resource.

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238. CHRISTOPHER WILLIAMS, CRAFTSMEN OF NECESSITY 53 (1974).

239. ROBERTSON, *supra* note 33, at 14.

240. William Morris, *Textiles*, *in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 22, 37-38 (William Morris ed., photo. reprint 1996) (1893).

In contrasting craft with fine art, Howard Risatti notes that when discussing fine art, the most frequently used terms are "painting" and "sculpture," which are "descriptive terms that refer to the processes used in creating the artwork."[241] In contrast, when discussing crafts, "[w]e tend to be more precise . . . making subtle distinctions between materials and processes."[242] Risatti attributes this difference to the fact that "the maker of fine art works to *overcome* material, whereas the maker of applied art works *in concert with* material."[243] This is in part because craft objects have a function, which means that attention must be paid to form.[244] In addition, "both form and function are intricately related to material."[245] Due to their concern with function, craftspersons must have a "keen interest in materials."[246] As Risatti explains, "To make a properly functional object, one must know and understand the physical properties of materials in order to choose which will be most appropriate for a specific object."[247] In contrast, a fine artist need not have such a developed interest in materials, since the artist's "principal concern is usually how the object looks."[248] Echoing this theme, silversmith and jewelry maker H. Wilson asserts that "[t]he one guiding principle of all true craftsmanship is this: the forms used in design should express naturally and simply the properties of the particular material employed."[249] Speaking of the potter's craft, Seonaid Mairi Robertson observes, "It is no use trying to bully the material, or to impress it with one's own originality. One has to know the point beyond which it cannot go."[250]

Reading these descriptions brings to mind the lawyer or judge who feels hampered or constrained by his materials, and thus seeks to bully the materials of precedent and statute to his own desired ends, one who seeks to overcome the material rather than work in concert with it—in short, someone who aspires to be not a craftsperson, but an artist. A craftsperson of the law, as with every other craftsperson, must know "the point beyond which" his materials cannot go. Robertson continues: "The master craftsman, who has served his long apprenticeship and knows his material inti-

241. Risatti, *supra* note 54, at 38.
242. *Id.*
243. *Id.* at 39.
244. *Id.* For a discussion of form and function in craft, see *infra* Part II.C.2.a.
245. Risatti, *supra* note 54, at 39.
246. *Id.*
247. *Id.*
248. *Id.*
249. WILSON, *supra* note 80, at 29.
250. ROBERTSON, *supra* note 33, at 23.

mately, works always with his material, finding in that union the deepest satisfaction."[251]

2. Tools

> *When one of your wise authors was four years old, he watched a carpenter named Schuster plane a board. He asked Schuster to let him try, but he couldn't get the blasted thing to cut at all. Schuster took the plane back and said, "No, no, you're doing it all wrong. You've got to wiggle your ears while you do it or it won't work." Schuster wiggled his ears and the plane started to take off big shavings. Your author unfortunately didn't know how to wiggle his ears and just couldn't get the plane to work. He was midway through college before he realized his ears probably had nothing to do with it.*
>
> *–The Carpenter's Manifesto*[252]

> *Tools are not mysterious or terrifying. They are logical extensions of the human body, just like implements used by prehistoric man. A hammer is a rock. A saw is a more efficient cutting tool than your teeth. Early man made holes with his fingers or with a stick. We do it with a drill and drill bit. With the right tool you can do any job.*
>
> *–The Carpenter's Manifesto*[253]

Craftsmanship involves the skillful use of tools. Tools serve specific purposes; one does not use a hammer when one wants to cut. Even good tools will work poorly if they are used on tasks for which they were not intended, or in inappropriate ways. A single tool is not fit for every job. And a tool that serves one purpose well may be unsuited for other jobs. Tools can be misused; they can become dull or less useful; and they must be maintained if they are to remain in good working order. Tools can also be dangerous; people are hurt when tools are misused.

Speaking of the craftsperson's tools must not be misunderstood as a denunciation of machines, for machines themselves are tools.[254] Potter Seonaid Mairi Robertson notes that "[t]he profes-

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251. *Id.*

252. EHRLICH & MANNHEIMER, *supra* note 31, at 8.

253. *Id.* at 64.

254. Ehrlich and Mannheimer note,

> Much has been made of the old craftsmen who worked by candlelight with nothing but hand tools and their fingernails. True enough, some of these people were geniuses. Their work is fantastic. But the craftsmen of old didn't know about electricity. Most of them would have welcomed the chance at least to try power tools. There are people who prefer the esthetics of hand tools, who like to feel the total control of every stroke. If you are one such, more power to you. Technically, however, except for finely sculpted or hewn work, there are few jobs or techniques that a power tool can't do better and more quickly than a hand tool.

Id. at 102.

sional craftsman does not glorify a primitive means as such; in fact, he emphasizes his tools."[255] The important point is that we must make sure that our tools are serving our ends and not the other way around.[256]

A good example of a set of tools available to lawyers and judges are canons of construction.[257] In his book, *The Common Law Tradition*, Karl Llewellyn included an appendix in which he listed a large number of canons of construction.[258] Across from each he included a different canon, which would appear to justify an opposite result. For example, the canon "every word and clause must be given effect" is paired with the canon "if inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage."[259] This juxtaposition of canons of construction has been construed by some commentators as evidence of Llewellyn's results-oriented realism: a judge, they say, is free to choose whichever canon suits his purpose, and use it deceptively or disingenuously to create the impression of a neutral rationale for achieving his desired result.[260] Undoubtedly there is some truth to such an interpre-

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255. ROBERTSON, *supra* note 33, at 27. Robertson further notes that the craftsman "is very much attached to his tools, he takes them up with as much fervour as the industrial worker often 'downs tools,' his care for and enjoyment of his tools reveals them almost as extensions of himself." *Id.*

256. Seonaid Mairi Robertson notes that "[m]en have been improving their tools since the beginning of time." *Id.* at 16. "Machines," he continues, "are not the all-powerful impersonal demons sometimes suggested, dominating our lives by some inherent power of their own.... And yet it is true that many of us live our lives at their mercy, desperately trying to adapt our pace and requirements to them." *Id.*

257. Canons of construction have been a topic of considerable interest in recent academic analyses of law and the work of judges. *See generally* J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1 (1993); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1 (1993) (arguing judges use canons of construction and "grand theories" of statutory construction to provide rational explanations for their decisions although other values lie behind such decisions); Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000) (distinguishing and discussing textual or linguistic canons and substantive canons).

258. *See* LLEWELLYN, *supra* note 8, at 521-35.

259. *Id.* at 525. Other examples include "[a] statute cannot go beyond its text" but "[t]o effect its purpose a statute may be implemented beyond its text," and "[i]f language is plain and unambiguous it must be given effect" but "[n]ot when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose." *Id.* at 522-24.

260. Two such commentators perfunctorily note that

> [i]n his critique, Professor Llewellyn purported to show that the canons of statutory construction were useless as rules for guiding decisions. His claim, that every canon could be countered by an equal and opposite counter-canon, transformed the canons from exalted neutral principles into "conclusory explanations appended after the fact to justify results reached on other grounds."

tation of Llewellyn's views; as noted, Llewellyn does not believe the law generates absolute certainty, but only reasonable regularity.[261] But viewing the judge as unconstrained in his choice of which canon to use ignores the heavy emphasis Llewellyn places upon the notion of craft, especially later in his career. Just as a craftsperson will know which tool is appropriate for a given task, so too a judge will know, at least with reasonable regularity, which canon is appropriate in a given situation. It is an unduly skeptical interpretation of Llewellyn that concludes that his view was that a judge was simply free to choose whichever canon suited his purpose.

C. Use and Usefulness

Craft is defined by use.

–Bruce Metcalf[262]

Debates about "merit" only make sense within an agreed system of values.

–Peter Dormer[263]

Judging judges, like judging cases, is a handiwork.

–Linda Ross Meyer[264]

The third distinctive feature of craft identified by Bruce Metcalf is that crafts are defined by their use.[265] Craft objects are not just admired for their beauty, they are subject to evaluation based upon their functionality.[266] Howard Risatti has argued that "[t]he role and identity of crafts in modern and postmodern society are probably the most important issues facing the field today."[267]

Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 647-48 (1992).

261. *See* LLEWELLYN, *supra* note 8, at 215-17. It must be acknowledged that at times Llewellyn seems to make a stronger claim about legal indeterminacy. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) ("[T]here is no single right and accurate way of reading one case, or of reading a bunch of cases.").

262. Metcalf, *supra* note 150, at 40.

263. DORMER, *supra* note 40, at 22. Dormer notes that some commentators believe that attempts to assess artistic merit in Western culture in the twentieth century are now meaningless exercises. "There is no agreed framework of values and consequently there can be no real connoisseurship; there are just private opinions publicly expressed and jostling for attention." *Id.*

264. Meyer, *supra* note 7, at 666.

265. Metcalf, *supra* note 150, at 40.

266. *See supra* Part I.B.1 (contrasting craft and art); *infra* Part II.C.2.a (discussing role of form and function in craft).

267. Risatti, *supra* note 54, at 34.

One criticism leveled at craft is that to the extent it represents "tacit" knowledge, both in the sense of being implied without direct expression and in the sense of being silent, then it might be beyond our capacity to analyze and evaluate.[268] Peter Dormer has written that "[t]here is often a temptation when considering craft knowledge to drop the guard of scepticism and to treat with laxity such vague and often opportunistic claims about 'intuition'; for a tension exists between the objectivity of science and the subjectivity of tacit knowledge. The myth prevails of the 'dumb artisan' (tacit, taciturn) who, because he or she cannot explain what is being done, appears to proceed unintelligently with a mixture of received traditions and intuitions."[269]

Most craft objects—be they quilts, cabinets, legal briefs, or judicial opinions—can be subject to evaluation. Craft knowledge includes both a "public aspect," which can be subject to what Michael Polanyi calls "destructive analysis,"[270] as well as a "private aspect," knowledge which resides in individual people and is ultimately ineffable.[271] In the realm of law, there is a highly developed, public, critical dialogue about the worth and usefulness of legal, and especially judicial, artifacts. We can differentiate good craftsmanship from shoddy craftsmanship, in carpentry and quilt making, as well as in the law. In the law, as in other crafts, we can distinguish craftsmanship from mass production and mere assembly. We can evaluate pieces of work (pots, cabinets, opening arguments, judicial opinions) as better and worse, even if we cannot reduce our reasons for doing so to rules or axioms.

I will briefly discuss three ways in which the use and usefulness of craft objects can be evaluated: first, in relation to plans, drawings, and visualizations;[272] second, in terms of outcome and process;[273] and third, in terms of their structural fitness and integrity.[274]

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268. *See* DORMER, *supra* note 40, at 13-14.

269. *Id.* at 14-15.

270. *Id.* at 16 (quoting MICHAEL POLANYI, PERSONAL KNOWLEDGE 50-51 (1983)).

271. *Id.* at 18. Speaking of the "private aspect" of craft knowledge, Dormer says, "There are no means of describing that knowledge adequately—even to oneself." *Id.*

272. *See infra* Part II.C.1.

273. *See infra* Part II.C.2.

274. *See infra* Part II.C.3.

1. Drawing and Visualizing

> *You can learn to draw—it's no mystery. Good plans, no matter how primitively drawn, are essential. It's amazing how many ways a project can go wrong when you have no plan to work from.*
>
> *–The Carpenter's Manifesto*[275]

> *Composition has to be there—it must sing!*
>
> –Nancy Crow[276]

> *The first step in a carpentry project begins in your head. Maybe you visualize a bookcase for your boxes of books, or a partition for privacy—you detect a dim shimmer of a design, but you can't fully focus the shape and its parts. Making a few sketches will help you solidify the shape.*
>
> *–The Carpenter's Manifesto*[277]

One of the most prized skills of the craftsperson is the ability to design, visualize, and compose. True craftsmanship is not only about means, but about ends as well. Aristotle distinguishes practical wisdom from cleverness, noting that being clever may be sufficient for achieving one's ends, but only one possessed of practical wisdom can have confidence that her ends are right.[278] Something similar can be said of craftsmanship. Peter Dormer notes that "[c]raft knowledge not only enables you to achieve your goal, it also enables you to imagine what your goal might look like. It becomes not merely the means of achieving the goal but the means of visualizing it in the first place."[279] And as Fred Miller argued, "Design cannot be taught, though much may be learned from the study of the methods of those who have worked before us."[280]

In the *Gorgias*, Plato distinguishes craft (*techne*) and knack (*empeiria*, tribe).[281] Ernest J. Weinrib has explained that for Plato, "[t]he distinguishing feature of craftsmanship is that the crafted object embodies an idea antecedently conceived in the craftsman's mind. The craftsman uses this idea as the model on which he keeps his mind's eye as he executes his work. The idea acts as the principle of order that integrates all the elements of the work into a co-

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275. EHRLICH & MANNHEIMER, *supra* note 31, at 9.

276. Nancy Crow, *Quilting: The Development of Art Quilts*, FIBERARTS, Jan.-Feb. 1990, at 44, 47.

277. EHRLICH & MANNHEIMER, *supra* note 31, at 22.

278. ARISTOTLE, *supra* note 96, at VI.12.1144a19-27, III.5.1114b1-25.

279. DORMER, *supra* note 40, at 19-20.

280. MILLER, *supra* note 185, at 1.

281. PLATO, *Gorgias*, *in* THE COLLECTED DIALOGUES OF PLATO 229 (Edith Hamilton & Huntington Cairns eds., 12th prtg. 1985).

herent structure."[282] Thus, one way of measuring or judging a work of craft is by how well it measures up to the idea that inspired it. On Aristotle's formulation, "craftsmanship is a process composed of two stages, intellection and production, with intellection consisting of the *eidos* [the craftsman's idea] in the soul of the craftsman."[283] As Ehrlich and Mannheimer put it in *The Carpenter's Manifesto*, "If you can draw what you want to build, a lot of your work is done. Drawing is the process of working out the design. All the other steps in carpentry are simplified by a good plan."[284]

The ability to draw and visualize is closely related to the skill of composition. Quilter Nancy Crow explains that "[n]o matter what the final shape, configuration, or techniques used, the composition cannot be ignored; yet, many so-called art quilts show a complete lack of understanding of composition. They appear awkward, their composition ponderous, labored, uninteresting, and inarticulate. In the best of the old quilts, composition is always there and often very strong. It has never ceased to amaze me that so many quiltmakers can take well-designed traditional blocks and rearrange them on a background or with sashing or borders until those once strong designs have become totally insipid."[285]

Craft objects may be judged or assessed in terms of how well they are designed, composed, or planned, as well as how well the material object achieves or embodies the design, composition, or plan. As Weinrib explains, "In this continuous sweep of activity from intellectual conception to material embodiment, intellect remains sovereign, since any deviation from the governing idea marks a defect in the product."[286] In contrast, a "knack is based on empirical experience rather than reason. The exercise of a knack does not reflect an ordering idea, but a mere familiarity with what happens to have worked in the past."[287]

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282. Ernest J. Weinrib, *Law as Myth: Reflections on Plato's* Gorgias, 74 IOWA L. REV. 787, 795 (1989) (footnote omitted).

283. *Id.* (citing ARISTOTLE, METAPHYSICS, at VII.7.1032b).

284. EHRLICH & MANNHEIMER, *supra* note 31, at 22.

285. Crow, *supra* note 276, at 46.

286. Weinrib, *supra* note 282, at 795.

287. *Id.*

2. Outcome and Process

> *Work must exhibit taste as well as skill, and harmony between means and end, by which I mean that every craftsman should so work that the utmost is made of the particular quality inherent in each craft.*
>
> –Fred Miller[288]

Closely related to the concern with visualization and composition is the craftsperson's interest in both outcome and process. With respect to outcome, the craftsperson cares about the consequences of his work. A cabinetmaker concerns himself with how a cabinet will be used, and measures his success in part according to how well the piece of furniture suits its intended purpose. A craftsperson concerns himself with how his work will be used and whether it will last. The craftsperson is also concerned with process, with whether the proper methods were employed—knowing "how" to work is a key component of the craftsperson's knowledge.

The interplay between outcome and process is apparent in the craftsperson's attitude and responsiveness to the imperfections and slight variations in his materials. Seonaid Mairi Robertson, speaking of the potter's craft, notes that a potter "cannot adopt an attitude of rigidity, of demanding a strictly preconceived effect" when decorating a pot: "This attitude of attentive responsiveness, of accepting and using the accidental within the limits of the general conception, is one that separates the craftsman from the technician."[289] We would expect that this capacity for attentive responsiveness will develop over time as the craftsperson gains experience with his craft, be it pottery or the law.

Carla Needleman warns that for a craftsperson, an overwrought concern for creating a successful outcome might increase the likelihood of failure: "I am not suggesting that the attitude toward results is the only attitude conditioning the way a craftsman works . . . . I do suggest that the desire to succeed is the progenitor of real failure and that this attitude is a far more subtly pervasive force than we realize."[290] Something similar is true of law. If a lawyer is overly concerned with results, with the outcomes of his or her arguments, this is the progenitor of real failure; sources of authority such as statutes and precedents may be treated cavalierly,

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288. MILLER, *supra* note 185, at 35.
289. ROBERTSON, *supra* note 33, at 24.
290. NEEDLEMAN, *supra* note 58, at 6.

twisted to fit a predetermined outcome or conclusion. This failure may even be more dramatic when it involves a judge. After all, to some extent we expect lawyers to take their outcomes as given and construct the most persuasive arguments available in support of those outcomes. In contrast, we expect judges to reason to their conclusions, rather than backwards from them.

Care must be taken that our designs remain somewhat tentative, for when they are executed "under the hand by the contact of tools and material," it may be that we are "coerc[ing] the material into the preconceived form."[291] W.R. Lethaby notes that "any one who has watched the process of throwing a pot on the wheel, of blowing glass, or of beating up metal out of the sheet, will have noticed how dozens of vitally beautiful forms are produced on the way to the final dulness predestined by the drawing."[292] Lethaby suggests that prior work should be consulted as a vast encyclopedia of methods and experience, "without intention to copy specific types, but to gather ideas generally applicable."[293] Lethaby could, I think, just as easily be speaking of lawyers and judges. Lawyers, and especially judges, must be willing to adjust their ends and conclusions when the materials of fact and precedent can only by force fit the form of their predilections or preliminary conclusions.

a. Function and Form

> *Because we tend to refer to the various crafts according to their materials—clay, glass, wood, fiber, and metal—we sometimes forget that it was once common to think of crafts in terms of function . . . .*
>
> –Howard Risatti[294]

Craft products can also be evaluated both in terms of form and function. Form relates to the aesthetics of the production, attention to detail, the quality of the finish, the integrity of the object, and in general to the quality of the construction. Function relates to how well the object suits its intended use, whether the materials are of an appropriate type and quality, innovation, quality of replication of its model, and how well the object holds up over time. Speaking of the craft of furniture making, Hasley Ricardo observes, "Now, all furniture that has any permanent value has been designed and wrought to meet the ends it had to serve, and the care-

291. W.R. Lethaby, *Preface* to H. WILSON, SILVERWORK AND JEWELRY 9-10 (2d ed. 1912).
292. *Id.* at 10.
293. *Id.*
294. Risatti, *supra* note 54, at 34 (emphasis omitted).

ful elaboration of it gave its maker scope for his pleasure and occasion for his pride."[295]

Howard Risatti notes that "[b]ecause we tend to refer to the various crafts according to their materials—clay, glass, wood, fiber, and metal—we sometimes forget that it was once common to think of crafts in terms of function, which led to their being known as the applied arts. Many people in the field consider this term pejorative, especially in relation to the fine arts, whose practitioners emphasize the uselessness of fine art as an essential feature of its aesthetic quality."[296] One reason fine artists have come "to insist upon the nonfunctionality of their work" is "to differentiate it from commercially oriented objects. Otherwise, the fine arts would be in danger of being swallowed up by them."[297] According to Risatti, "In self-defense, fine art has generally disavowed any connection with function . . . ."[298]

Crafts, although tempted to follow art in distancing themselves from function, do so only at their peril. Risatti notes that in consequence of the fine arts' condescending attitude towards the applied arts, "crafts people often feel compelled to emulate fine artists. Sometimes this is done simply by dismissing or ignoring critical discussions about function in relation to their work; at other times, their work essentially abandons the craft tradition for what seems like sculpture in craft materials. By taking either course, crafts people give up a great deal, perhaps too much."[299] Risatti goes so far as to assert that "to stay within the crafts field and ignore function . . . is to abandon the field's single most important element."[300] Function is crucial, Risatti explains, because "it gives crafts their identity, an identity that not only links the physical form of traditional objects to sources in nature but also becomes the raison d'etre that links them to the human body."[301]

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295. Halsey Ricardo, *Of the Room and Furniture, in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 274, 278 (William Morris ed., photo. reprint 1996) (1893). Ricardo elaborates: "The value of furniture depends on the directness of its response to the requirements that called it into being, and to the nature of the conditions that evoked it." *Id.* at 279.

296. Risatti, *supra* note 54, at 34.

297. *Id.* at 46.

298. *Id.* at 47.

299. *Id.* at 34.

300. *Id.*

301. *Id.*

b. Finishing

In Finishing we explain the various types of protective finishes for your work, and how to apply them so they'll last.

-The Carpenter's Manifesto[302]

A good finish, properly applied to a well-prepared surface, protects your projects from water, warping, nicks, and scratches.

-The Carpenter's Manifesto[303]

Another way in which the quality of crafts is evaluated is according to how well they are finished. One hallmark of good craftsmanship is attention—often painstaking attention—to detail. Judicial opinions, appellate briefs, and registration statements for the sale of securities are but a few examples of legal artifacts that are evaluated according to how well they are finished.[304] The fascination and loathing directed at *The Bluebook*, as well as the power wielded by one skilled in its use, is one manifestation of the importance of finishing in the legal profession.[305] A successful lawyer I know often tells young attorneys that the secret to being a good lawyer rests in understanding a single, simple, seemingly paradoxical truth: The first ninety percent takes ninety percent of the time, and the last ten percent takes ninety percent of the time. This is often true for the work of the carpenter and quilter; it is also true for work of the lawyer and judge.

The pressure pushing lawyers and judges away from properly finishing their work are multiple and mutually reinforcing. Craftsmanship takes time, and clients understandably do not often want to pay, nor do they often appreciate, the work necessary to

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302. EHRLICH & MANNHEIMER, *supra* note 31, at 9.

303. *Id.* at 294.

304. Michael Nava, *Lawyers as Writers*, VT. B.J. & L. DIG., Aug. 1996, at 13.

305. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). *The Bluebook* has had, in its seventeen or more editions, almost seventy-five years to acquire a certain reverential following. *See* Carol M. Bast & Susan Harrell, *Has the* Bluebook *Met Its Match? The* ALWD Citation Manual, 92 LAW LIBR. J. 337, 339 (2000). In our contemporary legal culture, this means that "[f]ailure to conform [with *Bluebook* citation form] may signal lack of knowledge or attention to detail . . . [and a] loss of credibility." *Id.* at 338. Yet, while facility with *The Bluebook* has become a badge of polish and excellence, *The Bluebook* itself has been called "a maze, a thicket, a mutant mass of legalisms run rampant." James D. Gordon III, *Oh No! A New Bluebook!*, 90 MICH. L. REV. 1698, 1704 (1992). Judge Posner perhaps best captured the irony of *Bluebook* adherence when he stated that "[t]he vacuity and tendentiousness of so much legal reasoning are concealed by the awesome scrupulousness with which [the] set of intricate rules governing the form of citations is observed." Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1344 (1986).

finish a job in a craftsmanlike way.[306] Judges face heavy case loads, and parties understandably want a prompt resolution to their cases.[307] The high cost of finishing is one reality that may be transforming legal craftsmanship into a luxury good that can be afforded only by the wealthy. The demands of multiple clients and projects, deadlines, and the complexity of legal documents also make it difficult to give craftsmanlike attention to the finishing details of one's work. Clients whom one has not heard from in months or even years often seem to expect their matter to receive your immediate and undivided attention as soon as they call. Technological innovation, from photocopiers, facsimile machines, computers, overnight mail, and e-mail have had a tremendous impact on client expectations of how quickly a job can be done.[308] One source of attorney dis-

306. *See, e.g.*, Alberta L. Cook, *Hourly Billing: A Thing of the Past?*, *in* BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS 31, 31 (Richard C. Reed ed., 1989); Martha Middleton & Vicki Quade, *Saving a Buck: Corporations Hunt Ways to Cut Legal Costs*, A.B.A. J., May 1982, at 523, 523; Richard C. Reed, *Value Billing*, LEGAL ECON., Sept. 1988, at 20, 22.

307. *See* Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 879 (1983) ("In the face of an onslaught of cases, we have seen significant increases in the number of federal judges and in the size of their personal staffs, the creation of new central legal staffs to screen cases and otherwise assist in the decision-making process, expanding reliance on 'subjudges'—for example, special masters and magistrates—and the emergence of centralized administrative structures like the Judicial Conference and the Administrative Office. These changes, many observers fear, threaten to displace our traditional conception of the judging function, characterized as it is by solitary craftsmanship and collegial arbitration." (footnotes omitted)); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396-97 (1982) ("Since 1938, the case load of the federal courts has increased significantly. Several factors explain this growth. First, the population, and with it the number of disputants willing to go to court, has grown. Second, Congress has created and the courts have articulated a multitude of new rights and legally cognizable wrongs. Third, more lawyers are now available, and some of them offer legal services to litigants who previously could not obtain such services. Finally, Congress has provided for the payment of attorneys' fees to various classes of victorious plaintiffs and has thereby created new incentives to litigate." (footnotes omitted)).

308. Anthony T. Kronman, *Professionalism*, 2 J. INST. STUDY LEGAL ETHICS 89, 98 (1999) ("Technology has . . . foreshortened the temporal horizons of lawyers. The phone (now portable), the fax (now ubiquitous) and the computer (now able to generate documents and revisions in documents at the speed of light) have together had the effect of accelerating the practice of law to the point where many lawyers today complain that their clients expect an instantaneous reply to every question and give them no time to think. The result is a fragmentation of experience, and the narrowing of one's temporal frame of reference, an inward state of mind that is outwardly reflected in the growing tendency of lawyers to move from one firm to the next with dizzying speed."); Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 88-89 (1998) ("[J]ust as television created 'sound bite' jounalism and discourse, technology seems to generate 'law-byte' reasoning and hypertext analysis. Lawyers and law students increasingly focus on accessing, managing, and linking information, and devote less time and energy to careful analysis or critical evaluation of legal rules. While technology unquestionably gives lawyers the ability to marshal bits of information instantly from a host of cases, and to dispatch them into memoranda and briefs like well-drilled soldiers in a war of logic, the

satisfaction may be the cumulative effect of such pressures that thwart good craftsmanship. When one is rushed, harried, or barraged with a constant stream of phone calls, e-mails, crises, and deadlines, it is difficult to pay the kind of attention that a craftsperson must pay to her work. Nevertheless, one way we can evaluate the quality of a legal work product is according to how well it is finished. And one factor that we might expect to correlate with an attorney's satisfaction with her professional life is whether one is able to give the attention to detail and finishing that craftsmanship requires.

3. Structure: Why Things Stand Up and How to Make Them Strong

> *"Structure" . . . explains the simple principles on which all construction, no matter how complex, is based.*
>
> *–The Carpenter's Manifesto*[309]

> *Structure is the guts of carpentry. It's the soul of your work, the built-in strength that withstands everyday stresses.*
>
> *–The Carpenter's Manifesto*[310]

> *Our own tendency is to overstructure, to make things stronger than they need be. That's our prejudice. We feel the small amount of extra work and materials is well worth it in the long run.*
>
> *–The Carpenter's Manifesto*[311]

Another basis of evaluation, both of crafts such as woodworking and the law, is how structurally sound they are. For a chair, this means being both steady and able to bear weight, while simultaneously being comfortable and aesthetically pleasing. Legal arguments are also subject to evaluation based upon similar structural criteria. Good legal arguments follow a familiar structure of clearly identifying the issue presented, articulating the applicable rule, applying the rule to the facts, and stating clear and limited

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speed of deployment inevitably discourages lawyers from taking the time to analyze the wisdom, correctness and applicability of legal arguments." (footnotes omitted)).

309. EHRLICH & MANNHEIMER, *supra* note 31, at 9.

310. *Id.* at 12. Ehrlich and Mannheimer continue, "The concepts of structure . . . are basic and relatively easy to grasp. Once you understand them, you'll be able to design and build more efficiently, more economically. And what you build will be strong and long-lasting." *Id.*

311. *Id.* The authors continue, "What if six people sit down on your bed during a party—will it collapse? In that sense it's always better to overstructure. It certainly can't hurt." *Id.* But, the authors warn, "don't get carried away. If you're planning to do a lot of rough carpentry and you need a temporary work table, just build a minimal structure. As long as it doesn't collapse, it's all you need. Figure your present requirements and whether they might change in the future." *Id.*

conclusions.[312] That there are great variations within this general structure does not undermine the basic structural principles. Legal arguments become structurally weak when they are unclear or obtuse, or when they fail to avoid formal and informal fallacies of reasoning.[313] A legal precedent, like a chair, should not be expected to bear more weight than it was designed to carry.[314]

Linda Ross Meyer asks, "But how do we know that judges are doing a good job? Just as we know how to appreciate a Cardozo or a Harlan. Good judges let us 'see' the law in a way that 'fits.' Their account of what the relevant precedents are, though perhaps at first disconcerting or contrary to the dogmatic doctrine of tradition, ultimately 'rings true' and 'looks right.' Judging judges, like judging cases, is a handiwork."[315]

a. Coherence

> *Weaving is the great classic symbol of the coming together and intermeshing of separate threads to make a new integrity.*
>
> -Carla Needleman[316]

> *What is weaving, then? It must not be farfetched to say that weaving is the attempt to bind together Law and Life—that the craft is that aim, although the practitioners of the craft would of course vary considerably in how they visualize what they are doing and why.*
>
> -Carla Needleman[317]

It is difficult to overstate the importance of coherence and integrity to the craft of law. Ronald Dworkin, for example, builds his entire jurisprudential theory upon the concept of integrity.[318]

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312. "IRAC is to legal analysis what 'Force = Mass x Velocity' is to Newtonian physics." James Ottavio Castagnera, *Why the Nation Needs More Lawyers*, 22 T. MARSHALL L. REV. 19, 26 (1996).

313. *See generally* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING (3d ed. 1997) (cataloguing and discussing formal and informal logical fallacies in legal reasoning).

314. *See* Kronman, *supra* note 308, at 98 ("The growing volume of law and the multiplication of decisions interpreting it has weakened the precedential value of each single judgement, since one can now often find many conflicting answers to the very same question, and this weakening of precedent has cut the practice of law off from its normative base in the past.").

315. Meyer, *supra* note 7, at 666.

316. NEEDLEMAN, *supra* note 58, at 61.

317. *Id.* at 62.

318. *See* RONALD DWORKIN, LAW'S EMPIRE 176-275 (1986). Dworkin defends the view "that integrity is the key to the best constructive interpretation of our distinct legal practices and particularly of the way our judges decide hard cases at law." *Id.* at 216. Dworkin states that "[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community

One basis for evaluating the work of a single judge is how well his decisions fit together with each other. A similar evaluation can be made with respect to a particular federal circuit or a state supreme court's jurisprudence. On a broader scale, if our legal system treats relevantly similar situations in inconsistent ways, it can legitimately be criticized for a lack of integrity or coherence. Thus, one of the primary functions of the Supreme Court is to resolve important disparities between jurisdictions.

b. Workability

One categorical distinction between art and craft is that craft objects have utilitarian functions while art divorces form and function.[319] Furniture is used, quilts keep us warm, and pottery holds food and carries water. One way in which such crafts are evaluated is in how well they perform their intended function. A pitcher, for example, is praised if the spout and handle are appropriately balanced, and if one can pour easily without spilling. Legal artifacts can also be evaluated according to their workability or functionality. One frequent criticism of judicial opinions is that they give inadequate guidance for the future. Whether highly technical statutory provisions or multifaceted judicial balancing tests, legal rules which give insufficient guidance can be criticized for their lack of workability. Another related aspect of workability is the unintended consequences, or the uses, to which a legal rule or precedent may be placed in the future. Chief Justice Warren Burger, for example, crafted what became the notorious *Lemon* test of Establishment Clause jurisprudence, a rule that he later denounced for the rigid manner in which it was applied.[320]

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personified—expressing a coherent conception of justice and fairness." *Id.* at 225. Law as integrity posits that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." *Id.*

319. *See supra* Part I.B.1 (contrasting art and craft).

320. *See* Wallace v. Jaffree, 472 U.S. 38, 89 (1985) (Burger, C.J., dissenting) ("The Court's extended treatment of the 'test' of [*Lemon*], suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts' . . . . In any event, our responsibility is not to apply tidy formulas by rote . . . ."); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1973).

D. Relation to the Past

Craft is also defined by its past.

–Bruce Metcalf[321]

The fourth defining feature of craft identified by Bruce Metcalf involves the unique posture crafts have in relation to the past.[322] I will discuss four features of craft's relationship with its past. First, attentiveness and responsiveness to the past is due in part to the fact that craftsmen are always participants in a shared tradition.[323] Second, the craftsperson's relationship with the past tends to engender certain attitudes in the craftsperson towards her work, including feelings of both pride and humility.[324] Third, the craftsperson's relationship with the past has implications for the craftsperson's creativity, and inclines him to favor incrementalism over radical innovation.[325] Fourth, craft has what I call a tripartite gaze, involving the past, present, and future.[326]

1. Participation in Shared Enterprise

There is something else, something I've hesitated about mentioning until now, not because it isn't important but rather because I didn't know and still don't know exactly how to place its importance. I don't work at pottery alone but at a small studio with like-minded people . . . . We have not chosen to work in the same place and mostly at the same time for the sake of convenience but, I would have to say, for the sake of inconvenience.

–Carla Needleman[327]

The exquisite jewelry of Egypt, Etruria, and Greece, work so fine as almost to appear miraculous, was the outcome of centuries of development. What remains to us is the sum of an infinite series of small improvements in work and method, added by one generation of craftsmen after another. Each worker brought his fraction of beauty to the store laid up and bequeathed to him by those who had gone before . . . .

–H. Wilson[328]

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321. Metcalf, *supra* note 150, at 40.
322. *Id.*
323. *See infra* Part II.D.1.
324. *See infra* Part II.D.2.
325. *See infra* Part II.D.3.
326. *See infra* Part II.D.4.
327. NEEDLEMAN, *supra* note 58, at 41.
328. WILSON, *supra* note 80, at 25.

One distinctive feature of being a craftsperson is that one is a participant in a shared enterprise, strongly rooted in tradition, and often poised perilously a single generation from oblivion. Thus, craftspersons often exhibit not only a familiarity with the tradition, and an appropriate and skillful use of its materials and tools, but also a commitment to the elevation and sustenance of the tradition itself. Potter and educator Seonaid Mairi Robertson observes that "[c]rafts are such a fundamentally human activity that they are more basic than any one language, and I have found a bond with craftsmen of all the countries where I journeyed."[329] Woodworker Sam Maloof has said, "[U]nless the knowledge which the experienced craftsman has gained through the years is shared, it will die. If we are selfish, and self-centered, and do not share, then all the work we have done in the past is for naught. You must give not only the reflection of your image through your work, but also whatever wisdom and knowledge you have gained over the years."[330]

Crafts are usually learned in community with others. Craftspersons often gather together, where, even when pursuing their own projects, they can learn from and challenge each other. Aristotle notes that when a craftsman is engaged in his work, he often benefits from consultation with others; in practical matters, we are more likely to trust deliberations that are communal than deliberations that are solitary.[331] James Elkins has suggested that "[i]n craft professions such as law, a sense of community emerges from the notion that one 'belongs' to the profession and 'practices' its discipline."[332]

Craftsmen often work together in a small workshop, where there might be some division of labor.[333] Being a part of a shared enterprise does not mean that practitioners will necessarily agree, either about methods or outcomes. Craft admits variety. Carla Needleman's description of a group of potters working together could

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329. ROBERTSON, *supra* note 33, at 13.

330. Sam Maloof, *A Conversation*, *in* APPRENTICESHIP IN CRAFT 145, 147 (Gerry Williams ed., 1981).

331. Aristotle contrasts human friendship, involving shared discussion and thought, with the life of cattle, which involves merely grazing in the same field. *See* ARISTOTLE, *supra* note 96, at IX.9.1170b11-12. Aristotle maintains that even when the activity is contemplation, an activity that is "loved for its own sake" and from which "nothing arises . . . apart from the contemplating," the wise man who contemplates truth "can perhaps do so better if he has fellow-workers." *Id.* at X.7.1177a33-1177b2.

332. Elkins, *supra* note 90, at 953. Elkins continues, "This sense of community is bounded by common knowledge and skills, and by a shared understanding that comes from undergoing a rite of passage with others." *Id.*

333. For an interesting discussion of the small workshop in the exercise and development of craft, see ROBERTSON, *supra* note 33, at 107-13.

just as easily be a description of a group of judges on a federal circuit or supreme court. Needleman explains: "I said that we are like-minded, choosing the word with special care, and yet there is probably no particular in which we would all agree."[334] Potters, as well as judges, often disagree with each other adamantly: "We disagree, richly and often, and do not often have many kind words to say about one another's finished pots—quite the opposite."[335] For judges, the disagreement is not only rich and frequent, but very public, reflected in majority and dissenting opinions in particular cases. Needleman adds, "We come from different backgrounds and we are not, in the usual sense, friends—we don't meet socially."[336] Again, this description fits precisely a group of judges working together. And yet, Needleman continues, "For me personally our association, enduring some years, is of the utmost value."[337] Needleman then reflects upon why this might be so: "I have my points of view, acquired over a length of time, through struggle with the clay and with myself, certain understandings I've come to, and I am convinced of their validity."[338] A nearby colleague, "on the other hand . . . has come to quite other conclusions, as reflected more in the way he goes about his work than in his words—we are mostly too busy to talk much—and I respect him, the quality of his seriousness and the effort he has been making to understand. It puts my conclusions in question and points up the far greater reality and worth of the struggle, which we share, than the conclusions we don't share."[339]

Historically, crafts were organized into guilds, which regulated the terms of entry into the craft in a way not unlike the professional bar regulates the terms of entry into the legal profession. Judge Richard Posner has compared medieval craft guilds to the legal profession, criticizing the negative effects of each operating as a cartel.[340] While arguing that the best explanation for the medieval

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334. NEEDLEMAN, *supra* note 58, at 41.

335. *Id.* at 42.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* Needleman also notes another aspect, "I work differently with other people around me than when I am alone. There is a certain tension, not all bad, in knowing that someone else can come to an unpleasant judgment about me because of the way I work." *Id.*

340. *See* Posner, *supra* note 79, at 1-3 (comparing the cartel of the medieval craft guilds with the modern legal profession). Posner notes that few cartels "have a mystique or an ideology, as restricted professions in general and the legal profession in particular have; for that we must go to the medieval craft guilds, early cartels that in periods both of prosperity and of decline resemble the corresponding phases of the legal profession." *Id.* at 7.

craft guilds is "that they were devices for maximizing the net earnings of their members," Posner notes that "the efforts that the guilds bent to this end fostered both a particular personal morality and a particular institutional mystique."[341] This personal morality "emphasized such values as loyalty, equality, conformity, personal responsibility, and patient craftsmanship, implying scrupulous attention to detail and to quality."[342] Posner also charts the decline of the craft guilds, which did not survive "the transition to mass production."[343] Posner maintains that a similar transition from guild production to mass production is taking place in the legal profession, with a concomitant decline in craft values.[344]

2. Pride and Humility

> *I believe it is not by the limited scale of his tools, nor by the medium or methods of his work, nor by his having the whole job in his hands, but by his understanding of the needs his products serve, and by his attitude to his material, that we recognize the essential craftsman—an attitude involving humility, sensitiveness, and the intuitive sense of going with, rather than against, the grain of life.*
>
> –Seonaid Mairi Robertson[345]

A second feature of craft's relationship with its past is that it tends to engender certain attitudes and feelings in the craftsperson. William Twining notes that the "distinguishing mark of the craftsman is pride in a job well-done for its own sake . . . . Craftsmanship is more akin to a form of love."[346] Addressing the reader in an introduction to his book on craft and contemporary culture, potter and educator Seonaid Mairi Robertson expresses the "wish that I could hand you a jug which I [have] made, and invite you to pour your milk from it; invite you to get the satisfaction of gripping its sturdy handle, of feeling your body respond easily to the change of balance as the shapeless mass of milk, firmly contained within, is canalized into a smooth jet flowing clean from the lip."[347] It is easy to detect the underlying pride in work well done and the love of his craft in Robertson's words.

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341. *Id.* at 11.

342. *Id.* Posner calls "this mutually reinforcing combination of morality and mystique the ideology of guild production," and observes that the "possession of an ideology distinguishes medieval craft guilds from conventional modern cartels." *Id.*

343. *Id.* at 11-12.

344. *See id.* at 13-23.

345. ROBERTSON, *supra* note 33, at 31.

346. Twining, *supra* note 14, at 149.

347. ROBERTSON, *supra* note 33, at 13.

In describing the remarkable craftsmanship of pottery from the Sung dynasty in China, Seonaid Mairi Robertson quotes Dr. Yanagi, a Japanese scholar, who noted that these works were produced by the " 'humblest layer of society,' " and yet they could be produced " 'without the least trace of difficulty.' "[348] Dr. Yanagi stated that " '[n]one of these people were to be compared with the self-conscious, learned individualists of to-day, with all their aesthetic theories and scientific knowledge. Yet these humble craftsmen were able to produce works of consummate art which have become models for this refined posterity.' "[349] One remarkable aspect of these Sung wares is " 'that they were not manifestations of the individuality of their makers. In them personality is submerged so that the article itself has come to the fore. Sung potters were working in a world where the question 'Who made it?' did not count.' "[350] Dr. Yanagi believed that " '[t]hese potters forgot themselves while working. The beauty of their product was rooted in the submissive reliance on tradition. Tradition, as everybody knows, is not the work of individuals, but the accumulation of the experience and wisdom of long generations of our forefathers, an aggregate power which in all cases is above the individuals.' "[351]

Speaking of the law, Thomas Shaffer suggests that "craftsmanship is a way to avoid hubris."[352] Striking a similar note, James Elkins distinguishes an "ethic of professionalism," which is often associated with arrogance, with an "ethic of craftsmanship," which suggests the need for humility: "While we may see ourselves as doing socially significant work, as devoting our lives to worthy goals like justice, or ensuring that every man and woman shall have access to the courts, are we not also like the simple potter or weaver who tries to make objects that have a functional beauty?"[353]

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348. *Id.* at 32 (quoting Dr. Yanagi from speeches given by him at the International Conference of Potters and Weavers, Dartington Hall, 1952).

349. *Id.*

350. *Id.*

351. *Id.* at 32-33.

352. Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 632 (1987). Shaffer explains, "When you are good at what you do, and you know it, and you know that others trust you to do what you do, you are not hubristic; you are, rather, trained in the skill for recognizing virtues in those who pursue other crafts." *Id.*

353. Elkins, *supra* note 90, at 965.

3. Creativity and Incrementalism

A third feature of craft's relationship with its past is a common attitude toward creativity and incrementalism that tends to be found in craftspersons.

a. Creativity

> *Through [craft] simple and learned people alike can have the experience of creating. There is a sense in which God alone creates. But He has created in us the creative spirit, and if we do not use it in ourselves, and nurture it in children, to be employed on the world in which we live, we stifle the part of us which is nearest to the divine.*
>
> -Seonaid Mairi Robertson[354]

When craft is compared unfavorably with art, it is often on the basis that craft does not admit of innovation and creativity. For example, R.G. Collingwood wrote, "[I]t is perfectly obvious that art proper cannot be any kind of craft. . . . The craftsman's skill is his knowledge of the means necessary to realize a given end . . . ."[355] Collingwood dismisses the possibility of creativity in craft by declaring its ends given.[356] Peter Dormer also suggests that "[a]n emphasis upon individuality in art has also aided the decline of craft," because the "acquisition of craft knowledge entails learning rules and imitating other people's work."[357] While in reality this does not necessarily entail a stifling of individuality, there is a strong assumption that "craft knowledge is 'other people's rules' and that these are an infringement of self-expression."[358]

It is true that craft is more rooted in tradition and more devoted to carrying forward in faithfulness to a tradition than is art. Nevertheless, as Seonaid Mairi Robertson has observed, "[T]he great bulk of the world's traditional craftsmen have felt free to make modifications, to evolve slightly different forms or patterns, so long as these served the practical purpose."[359] Even traditional

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354. ROBERTSON, *supra* note 33, at 158.

355. R.G. COLLINGWOOD, THE PRINCIPLES OF ART 26, 28 (photo. reprint 1977) (1938).

356. Craftsperson Seonaid Mairi Robertson takes issue with Collingwood's limitation of craft, noting, "I believe the craftsman *should* be concerned with the end, the product and its effect on the lives of others, not only with the 'means necessary' to achieving it." ROBERTSON, *supra* note 33, at 28.

357. DORMER, *supra* note 40, at 26.

358. *Id.*

359. ROBERTSON, *supra* note 33, at 28. Robertson acknowledges that "[i]t is true that the weight of custom and tradition have for long periods been very powerful, and sometimes only the slightest modifications were made over centuries. But the craftsmen—if they ever were made conscious of this—would probably have claimed that the best form had been evolved for this

crafts admit of recombination and adaptation; in the words of Walter Crane, it is in "our interpretation and use of them, and in the power of variation and expression, that modern invention and predilection tell."[360] Seonaid Mairi Robertson maintains that "vitality is the most universal characteristic of real craft."[361]

Some craftspersons are openly derisive of the ideal, or even the possibility of, unbounded creativity. Somers Clarke, a glass blower and member of the Arts and Crafts Movement in the late 1800s, observed that "[n]ovelty rather than improvement is the rock on which our craftsmen are but too often wrecked."[362] W.G. Paulson Townsend, speaking of the craft of embroidery, noted that "[t]here are a number of tricks practised by students revelling in ignorant, or shall we call it eccentric, genius; sometimes called 'originality'. . . . These students find no pleasure in the works [of the masters], or even the time-honoured examples in our museums; however, this cranky design will do some good, it will wear itself out, and in doing so enhance the beauties in good healthy work."[363]

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particular object, and would, very properly, have therefore asked why they should change it." *Id.* One can easily imagine a lawyer or judge giving a similar rationale for why certain settled rules of law remain undisturbed.

360. WALTER CRANE, THE BASES OF DESIGN 211 (London, George Bell & Sons 1898).

361. ROBERTSON, *supra* note 33, at 29. In making this point about the vitality of craft, Robertson contrasts craft objects with mass-produced goods, and maintains that "the greatest danger of objects produced in enormous numbers through complicated processes by many people is that they are very apt to become moribund in the process." *Id.* Again, an analogy to legal work suggests itself; consider the massive commercial contract. The craftsperson, in contrast, "knows that vitality . . . stands firm even at the cost of poverty, of scorn, of the accusation of being out of touch with the developments of his age." *Id.* at 30.

362. Somers Clarke, *Table Glass*, *in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 106, 110 n.1 (William Morris ed., photo. reprint 1996) (1893).

363. W.G. PAULSON TOWNSEND, EMBROIDERY OR THE CRAFT OF THE NEEDLE 32 (London, Truslove, Hanson & Comba 1899).

b. Incrementalism

Also ye shall not be too ravenous in taking of your [catch] as too much at one time, which ye may lightly do if ye do in every point as this present treatise showeth you in every point, which should lightly be occasion to destroy your own disports and other men's also, as when ye have a sufficient [portion] ye should covet no more as at that time. Also ye shall busy yourself to nourish the [sport] in all that ye may and to destroy all such things as be devourers of it. And all those that do after this rule shall have the blessing of God and Saint Peter, which He them grant that with His precious blood us bought.

–Dame Juliana Berners[364]

Never throw with a long line when a short one will answer your purpose.

–Richard Penn[365]

Craftspersons are not opposed to innovation and change, but they tend to take a more cautious attitude towards trying to make something entirely new. Craftspersons who are unwilling to innovate may become stagnant. Quilter Nancy Crow warns that when "[q]uilt after quilt is made employing some singular technique until the body of quilts takes on the look of the technique[,] each quilt [is] so like the previous one that the only adjectives that apply are 'repetitious' and 'boring.' "[366] Perhaps the quiltmaker becomes "stuck in formula quilts that are easier to sell in direct relationship to their unobtrusiveness?"[367] When this happens, "[i]t seems the quiltmaker is afraid to move on, unable to move on, or does not want to move on, while, unfortunately, the technique has become redundant and the quilts have no 'soul.' "[368] In a review of Nancy Crow's work, one critic noted that her "brave and refreshingly modern creations prove that quilting, indeed all craft forms, can remain true to their traditions while continuing to reflect the contemporary world."[369]

Speaking of the law, Sidney A. Shapiro and Richard E. Levy maintain that "[c]raft reflects the values of consistence with constitutional and statutory provisions and continuity with prior caselaw,

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364. DAME JULIANA BERNERS, TREATYSE (1496), *quoted in* JAMES ROBB, NOTABLE ANGLING LITERATURE 19 (London, Herbert Jenkins Ltd. n.d.) (footnotes omitted).

365. RICHARD PENN, MAXIMS AND HINTS FOR AN ANGLER 10 (Philadelphia, F. Bell 1855).

366. Crow, *supra* note 276, at 45.

367. *Id.*

368. *Id.*

369. Susan Tamulevich, *Nancy Crow: Improvisational Quilts at the Renwick Gallery*, FIBERARTS, Mar.-Apr. 1996, at 62, 62. Tamulevich opines, "What Nancy Crow does, almost better than any of her contemporaries, is to build upon the best practices of traditional quilting with the sensibilities of a contemporary artist." *Id.*

but permits interstitial evolution and, in exceptional cases, overruling precedent."[370] Benjamin Cardozo observed that the judge "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence."[371]

4. Craft's Tripartite Gaze

> *But, besides the past, it is well to look to the future. We, too, shall grow out of date. Fishers of a hundred years hence will cast an easy smile on ourselves and on our methods which we think so delicate and so final. Our tackle and our dress, our practice and our appearance, will seem to belong to the dark ages . . . . And yet [the fishermen in an old picture] were great fishers . . . and great men too, picked men, the best of their time. Is it possible that we shall ever be like that? Not only shall we be, but we are: we are, to the eye of futurity a century hence. We are just as antique, as obsolete and as far away.*
>
> –John Waller Hills[372]

> *The trout fly of today grew out of the trout fly of yesterday.*
>
> –John McDonald[373]

Former Yale Law School Dean Guido Calabresi often challenged students who were struggling with a legal question to "imagine the past, remember the future." The charm, and the puzzle, lies in the fact that the formulation seems to get it backwards—should we not remember the past and imagine the future? This inversion of expectations was, of course, intentional. When students were trying to reconstruct what had happened in a particular case, Dean Calabresi would incant: "*Imagine* the past!" When we were trying to predict how a proposed rule for today's case would be interpreted and applied tomorrow, he would thunder: "Remember the *future*!"

One purpose of Dean Calabresi's challenge was to sensitize students to the unique posture that law has towards the past, the

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370. Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053 (1995). Shapiro and Levy contrast the "craft" component of judicial behavior with an "outcome" component, which "focuses on the result in a given case and its implications for the parties and society as a whole; it reflects the values of justice and social utility as filtered through a judge's worldview." *Id.*

371. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Rather, the judge is to "exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the 'primordial necessity of order in the social life.' " *Id.* (citation omitted).

372. JOHN WALLER HILLS, A SUMMER ON THE TEST, at ix (2d ed. 1924).

373. John McDonald, *Introduction* to THEODORE GORDON, THE COMPLETE FLY FISHERMAN: THE NOTES AND LETTERS OF THEODORE GORDON, at x (John McDonald ed., 1947).

present, and the future. Law looks backwards, seeking fit, consistency, and fidelity with what has been done before; at a minimum, justice demands that like cases be treated alike. Law is also ineluctably rooted in the present; today's case will result in somebody losing life, liberty, or property. In addition, law also focuses an eye on the future; we must worry about how the rules we adopt today will be applied by our posterity who may not yet be born to situations that we may be unable to imagine. The nature and demands of law's tripartite gaze seem to be different from any other form of human endeavor or social practice.

The dictate, "imagine the past," reminds us that the past is not just a simple, objective fact, easily retrieved, represented, and remembered. This is a truth that is obvious to historians, who intuitively grasp the myriad ways in which the past can be created, recreated, and mythologized. It also reminds us of the importance of empathy, the capacity and inclination imaginatively to seek to understand the varied perceptions and recollections that different individuals will have. The dictate, "remember the future," focuses our minds upon the gravity of our obligation to the future. It is not enough for lawyers and judges simply to "imagine" what might happen tomorrow; imagination can be fanciful, even frivolous. An obligation to remember is much more solemn, perhaps even sacred.

In looking to the past, the craft is mindful of, but not beholden to, tradition. Speaking of the potter's craft, Seonaid Mairi Robertson observes that "[t]radition enshrines the knowledge and the satisfactions of generations of a community. It is 'more than one man deep.' Tradition respects the natural limits of the material, and embraces its richness; acceptance of a tradition sustains and protects the craftsman while leaving him freedom to be wholly himself within its range."[374] Tradition even reserves a place for the occasional genius, who comes along "once in many years," and who, "having served and understood his material, suddenly by an act of faith extends these limits, and shows us that this material is capable of uses undreamed of."[375] Again, one can almost imagine that Robertson was speaking of a lawyer or judge's use of tradition and precedent in her work.[376]

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374. ROBERTSON, *supra* note 33, at 23.

375. *Id.*

376. For a defense of the role of tradition in the law, see, for example, Kronman, *supra* note 111; Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

Seonaid Mairi Robertson has observed that "in an age which has almost lost its craft traditions a much greater responsibility is put on the individual craftsman, to draw strength from the past and yet be alive to the needs of the present. Men and women today who devote their lives to any aspect of art or craft must resolve their relationship to the past."[377]

E. Judgment

> *The skills, the responsibility for making judgments, the satisfaction of seeing something produced . . . which are a part of even the simplest jobs in . . . a craft-centered community . . . [are lost when] [s]ome men are become all brain, and some all hand; neither are whole men.*
>
> –Seonaid Mairi Robertson[378]

> *[Craftsmanship] depends on the judgement, dexterity and care which the maker exercises as he works. The essential idea is that the quality of the result is continually at risk during the process of making . . . .*
>
> –David Pye[379]

In sum, each of the characteristics I have described contributes to the elusive and difficult to define attribute of good judgment.[380] Ultimately, good judgment is the primary (or summary) craft virtue of the lawyer and judge.[381] The importance of good judgment is probably self-evident in the case of judges, as is the intrinsic satisfaction that comes to a judge from exercising judg-

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377. ROBERTSON, *supra* note 33, at 43. Craftsmen, Robertson notes, "may race ahead, excited by the intricacies of contemporary structural developments, as architects or engineers, or move in a steady flow between the past and the present as workers or advisers in rural industries, or accept the slower pace of practical rediscovery which is the way children learn, or even turn their gaze backward as art historians, who also are needed if they will interpret our past to us. We need all of them . . . ." *Id.* at 43-44 (emphasis omitted).

378. *Id.* at 37-38.

379. DAVID PYE, THE NATURE AND ART OF WORKMANSHIP 7 (1971). Pye calls the craftsman's workmanship the "workmanship of risk." *Id.*

380. In a forum discussion of his book, *The Lost Lawyer*, Dean Kronman reflected upon the difficulty of defining what constitutes good judgment.

> I have to say that [judgment] is the most difficult concept that I've wrestled with. Though I wrote a book about it, I felt in the end—and I'm being candid with you about this—I felt in the end that I hadn't touched the nerve of it. That I'd skirted around the question but not put my finger on it. And it may be, in the end, that it isn't something which is easily capturable in theory, being itself a non-theoretical, pre-theoretical or post-theoretical virtue. The virtue of sound judgment may not be the kind of thing that a theory can ever adequately capture or express. But I tried in the book.

Anthony T. Kronman, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 126 (1995).

381. *See* KRONMAN, *supra* note 3, at 97; *see also* Kronman, *supra* note 380, at 121 (discussing the exercise of judgment as the most important and satisfying aspect of practicing law).

ment well.[382] The importance of judgment may be less evident in the case of practicing lawyers. But exercising judgment well, on behalf of clients who may be in great need or otherwise vulnerable, may be the activity most likely to bring satisfaction and professional fulfillment to lawyers.[383] Opportunities for exercising judgment exist when counseling a troubled client about options for vindicating her rights;[384] in advising a client whether to accept a settlement or to proceed to trial;[385] in devising a trial strategy;[386] and in crafting the wording of the issue presented in an appellate brief,[387] to mention but a few examples.

As Anthony Kronman has argued, however, trends in the legal profession in the past generation have significantly undermined the opportunities for lawyers, especially young lawyers, to learn and experience exercising good judgment.[388] These trends have been

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382. Indeed, saying good judgment is the definitive quality of the good judge comes close to being a tautology. Nevertheless, giving an account of what contributes to the quality of good judgment is very difficult.

383. *See, e.g.*, ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY 63-64 (1998) ("Behind my desk hangs a nineteenth-century Old Testament sampler that [my wife] Ellen found for me in a flea market. It is from the Book of Isaiah, and it reads 'Fear Thou Not, For I Am With Thee.' To me, the quotation expresses perfectly what every lawyer should strive for in the lawyer-client relationship, but oddly, the very idea—of the lawyer as counselor—is today rejected in certain professional quarters."); Kronman, *supra* note 380, at 121 ("I believe that it is in the exercise, the cultivation and exercise of this capacity [of judgment or prudence], that the true source of satisfaction in the doing of the craft [of being a lawyer] itself consists. It is in the acquisition of judgment and its exercise on behalf of one's clients that the sense of oneself as an accomplished craftsman rests.").

384. "The lawyer, when acting as a counselor . . . minimizes the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation. . . . It is the counselor's function to help clients make informed and rational choices among alternative courses of conduct . . . . In the performance of this function of counseling, the lawyer must maintain a certain detachment so that an objective decision may be made." Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 690-92 (1982) (emphasis omitted).

385. *See, e.g.*, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507-11, 589-94 (1990); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 73-76 (1995); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 841-49 (1998).

386. *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1407-13 (2000).

387. "Issue statements can make or break a lawyer's credibility. . . . Once you determine your strongest arguments, you must frame your issues concisely and accurately. As you draft the argument, continue to edit and refine the issue statements. Judges and clerks usually read issue statements first. . . . I cannot over-emphasize the importance of well-crafted issue statements." Sherri Adelkoff, *IRAC: Twelve Tips for Better Brief Writing*, LAW. J., June 2, 2000, at 5, 5.

388. *See* KRONMAN, *supra* note 3, at 271-314 (discussing recent trends in law firms); *see also* Kronman, *supra* note 380, at 121 ("[A]s the opportunities and occasions for the development and expression of judgment began to shrink in [large] firms as a result of their growth in size, their internal bureaucratization, the division of legal labor into ever finer narrower specialities, the

particularly acute for practicing lawyers, especially those working in large metropolitan firms. But similar trends are evident in other parts of the legal profession, including the judiciary. For practitioners, forces contributing to these trends include the treatment of associates as interchangeable producers of billable hours, increased specialization, the explosion in the length, complexity, and redundancy of legal documents such as contracts, indentures, and prospectuses, and most importantly the ascension of salary as the primary metric for evaluating professional stature.[389] For judges, these forces include increased case loads,[390] judgment-limiting statutes and rules such as the federal sentencing guidelines,[391] increased automation leading to longer and more technical opinions,[392] and an increased reliance upon law clerks for drafting opinions.[393] The pro-

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loss, the collapse of the traditional long-term relationship between firm and outside client and its replacement with episodic one-on-one transactional encounters that had no life beyond the moment of the deal, all of that created a situation in which occasions for the development and exercise of judgment began to shrink. And so it was no wonder . . . that work in these firms should have become less and less satisfying to the young people going into them.").

389. *See, e.g.*, Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-906 (1999). At a forum discussing his book, *The Lost Lawyer*, Kronman elaborated: "America's large firms have become explicitly, candidly, without shame in the last twenty years unembarrassedly commercialistic in their outlook and practice. The bottom line has become the only line for them, and the older ethos of craftsmanship which was nourished and reinforced in a very deliberate and careful way by lawyers in these firms a half century ago has disappeared, and has been replaced by an ethos of moneymaking which puts the exclusive stress mark on the number of billable hours that you put in and the number of dollars those billable hours produce." Kronman, *supra* note 380, at 121-22.

390. *See, e.g.*, Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 101-05 (1994); John A. Martin & Michelle Travis, *Defending the Indigent During a War on Crime*, 1 CORNELL J.L. & PUB. POL'Y 69, 93-97 (1992); Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349, 350-52 (1994); Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, 52.

391. *See* Joseph B. Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1 (reporting U.S. District Judges Jack B. Weinstein's and Whitman Knapp's refusals to hear any more drug cases in protest of mandatory federal sentencing guidelines for drug crimes).

392. In the words of U.S. Circuit Court Judge Abner J. Mikva, it "is no longer a court secret" that "judicial opinions have become less luminous and more voluminous." Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1357 (1988). Speaking of the craft of creating working drawings, Lewis F. Day makes an observation that might just as easily be said of the judicial opinion. In 999 out of 1,000 cases, Day maintains, over elaboration "implies either that, having little to say, a man fills up his time in saying it at unnecessary length, or that he is working for exhibition." Lewis F. Day, *Of Designs and Working Drawings*, *in* ARTS AND CRAFTS ESSAYS: BY MEMBERS OF THE ARTS AND CRAFTS EXHIBITION SOCIETY 249, 260 (William Morris ed., photo. reprint 1996) (1893).

393. *See* KRONMAN, *supra* note 3, at 347-51 (discussing recent trends in courts).

fession's elevation of remuneration as the primary measure of professional standing has probably also contributed to the dissatisfaction of judges, who understandably might feel undervalued when their neophyte clerks depart to earn salaries as second- or third-year associates higher than those earned by judges.[394]

These trends in the profession have not eliminated the need, nor opportunities, for exercising good judgment. But it is difficult to examine the state of the legal profession and not conclude that something has gone deeply and fundamentally awry.[395] And I have a nagging suspicion that reduced opportunities for lawyers—especially for incomers to the legal profession—to view themselves as belonging to a craft tradition, and to be nurtured and coaxed in the development of their craft skills, has contributed in a significant way to the erosion of professional satisfaction among lawyers.

If lawyers and judges were to develop, renew, or remember a vision of their professional life as being guided by craft virtues, as they seek and cultivate opportunities to exercise their craft—especially craft judgment—the likelihood that they will find satisfaction in their professional life is much greater.[396] For judges the opportunities for—indeed the necessity of—exercising judgment are unavoidable. My impression is that this may be part of the reason why levels of professional dissatisfaction are lower among judges than among other lawyers. In other areas of the profession, pursuing the craft vision in today's climate and professional culture might be very difficult. In some areas of the profession, I fear, concern for the professional development and well-being of associates

394. *See* Robel, *supra* note 202, at 904 n.62 (quoting Survey of the United States Circuit Judges, *in* 2 WORKING PAPERS AND SUBCOMMITTEE REPORTS (Federal Courts Study Comm. ed., 1990) (quoting one federal judge who responded to the survey that "the biggest problem we have is salary. The top lawyers simply have no interest in our jobs. You cannot educate your children, take any meaningful trips or pay normal living expenses. Congress has taken away most of our prestige by making us 'the laughing stock' of the legal community.")).

395. *See, e.g.*, Schiltz, *supra* note 389, at 872-88 (cataloguing evidence of lawyers' lack of well-being).

396. This is likely to be true both for those on the giving and receiving end of mentoring relationships. "In today's profession, lawyers have the opportunity, indeed the obligation, to lead by example, to give back to the profession by mentoring junior colleagues as wise and trusted counselors, teachers and guides." Kathy Morris, *C'mon You Can Do It—Mentor, Mentored: It's Not Easy, But It's Worth It*, BUS. L. TODAY, July-Aug. 1999, at 29, 29. The mentoring relationship gives a seasoned lawyer or judge the opportunity to pass on the accumulated wisdom and skill of his or her craft, thus preserving tradition, culture, and ethics, and creating a sense of camaraderie and shared responsibility for the betterment and refinement of the craft. In the process, both mentor and mentee can experience a renewed and deepened commitment and enthusiasm for their work. *See* Bill Brooks, *The Art of Mentoring: 'Listen, Listen, Listen,'* RES GESTAE, Nov.-Dec. 1998, at 32, 32; Dianne Molvig, *Mentoring: Reaching Out, Giving Back*, WIS. LAW., Mar. 1998, at 10, 12-13; Morris, *supra*, at 29.

is so low that the suggestion that significant firm resources should be expended creating opportunities for the development of judgment and other craft virtues by young associates, for example, by taking seriously the obligation to mentor novice lawyers, will be viewed as ridiculous or—perhaps worse—as quirky or quaint.[397]

1. Deliberation, Choice, and Action

Closely related to the exercise of good judgment is the legal craftsperson's love of deliberation. Kronman criticizes judges who value efficiency more than deliberation, relying too much on staff, including inexperienced law clerks, adopting a case management rather than a deliberative state of mind, transforming the work of judging from "statesmanship [to something] requiring only administrative skill instead."[398]

2. Character and Temperament

Good judgment, Aristotle maintains, rests upon deliberative excellence. But Aristotle is notoriously cryptic about what is required to be skilled at deliberation.[399] He does, however, emphasize the importance of experience and moral virtue[400] in making right the ends towards which practical deliberation aims.[401] Yale Law School Dean Anthony T. Kronman has given perhaps the most compelling account of what virtues of character are required for one to excel in practical reasoning, particularly in the context of the law. In his book, *The Lost Lawyer*, Dean Kronman argues that the two most important virtues of character for the exercise of good judgment are sympathy and detachment.[402] Sympathy, Kronman ex-

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397. In his article, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia laments that "[n]ot only are young lawyers expected to become fungible billing units for their firms, they are expected to become cash cow alumni for their alma maters." 91 MICH. L. REV. 2191, 2212 (1993) (quoting a student who wrote to Judge Edwards in response to his original article on this topic).

398. KRONMAN, *supra* note 3, at 342.

399. *See, e.g.*, REEVE, *supra* note 99, at 79-84.

400. The Greek term is *arete ethike*, sometimes translated as "excellence of character."

401. *See* ARISTOTLE, *supra* note 96, at VI.13.1144b30-1145a2. In this regard, Aristotle distinguishes *phronesis* from cleverness (*deinotes*). Cleverness is the capacity "to do the things that tend towards the mark we have set before ourselves, and to hit it." *Id.* at VI.12.1144a23-6. In contrast, *phronesis* involves not only being clever, but also having the correct ends, which rests upon moral virtue. *Id.* at VI.12.1144a8-9, VI.12.1144a29-36.

402. *See* KRONMAN, *supra* note 3, at 66-74.

plains, involves taking competing options seriously by "strain[ing] to feel the force of those internal norms that are the source of whatever appeal" the option presents, and by striving to see values associated with a particular choice "in their most appealing light."[403] Kronman characterizes sympathy "as an attitude midway between observation, on the one hand, and identification or endorsement, on the other."[404] The second habit of character Kronman believes is important to exercising good judgment is detachment: "[I]f sympathy goes beyond mere observation, it also falls short of outright acceptance."[405] Detachment enables one to "entertain a point of view without making it one's own, in the sense of giving the values associated with that point of view one's full endorsement."[406] Detachment is important because, in making practical choices, oftentimes more than one alternative must be sympathetically considered before a judgment is made. To this list I would add humility.[407]

Others have identified a number of other traits or habits of character that would be distinctive of the judicial craftsperson. John Q. Barrett has argued that "at the level of craft, good judging includes maintaining an even temperament, taking hands-on responsibility for the work, communicating effectively, and generally seeking to embody propriety in all aspects of one's life on and off the bench."[408] In his article, *Reflections on the Art and Craft of Judging*, William A. Bablitch identifies "principled decisionmaking" as the most important element in the judicial craft, an element which he defines as the ability to be "free from personal bias and prejudice," a responsiveness to well-developed values and principles, restraint in decisionmaking, and having an "intelligent heart."[409] Bablitch also emphasizes that such judges will know their place within the constitutional system and within society, will be intellectually humble, and will be aware of the value judgments they make on a daily basis.[410]

Paul Gewirtz has argued that candor and sincerity are particularly important aspects of the judicial craft: "Candor and sincerity are part of the distinctive process that legitimates judicial

403. *Id.* at 70.
404. *Id.* at 71.
405. *Id.*
406. *Id.*
407. *See* Scharffs, *supra* note 107, at 135-57.
408. Barrett, *supra* note 224, at 4-5. Barrett continues, "These are not matters that can be decreed through the Code of Judicial Conduct. They exist in the judge who can, and who remembers to try to, summon them from within." *Id.*
409. Bablitch, *supra* note 7, at 40.
410. *Id.* at 40-41.

power—a process of decisionmaking and discourse whose requirements include writing opinions and giving reasoned justifications. These constraints help to promote the public accountability of judges and to stimulate judicial reflection and self-control. Without a requirement of candor, the constraints would be meaningless. Thus, misreading and other dishonesties in judicial opinions are generally more than craft flaws; candor in judicial reasoning is part of the morality of craft."[411]

III. BECOMING A CRAFTSPERSON

Nemo nascitur artifex [no one is born a craftsman].

–Sir Edward Coke[412]

In the future the role of the craftsman will be more important than ever before.

–Marshall McLuhan[413]

How does one become a craftsperson? Assuming that one is intrigued by the idea of viewing one's professional development as a lawyer or judge as learning a craft, what should one do next? Once again, the best way to answer these questions is to look at other craft traditions that still view themselves self-consciously and proudly as crafts.

Crafts are learned first and foremost by observing and following the example of others. In 1898, Fred Miller observed, "[N]o student can afford to ignore the work of other days and peoples, not for imitation, but to widen his sympathies and to cultivate the critical faculty, which as a student he is probably wholly without."[414] The philosopher Michael Polanyi notes that "[t]o learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot analyse and account in detail for its effectiveness."[415] Polanyi explains that learning a craft involves learning rules, but not simply being told those rules by the master: "By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules . . . including those which are not explicitly

411. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 667 (1983) (footnote omitted).

412. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND § 138, at 97 (Garland Publ'g 1979) (1628).

413. *Five Decades: American Craft Council*, *supra* note 57, at 87 (quoting Marshall McLuhan (1966)).

414. MILLER, *supra* note 185, at 4.

415. MICHAEL POLANYI, PERONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 53 (4th prtg. 1968).

known to the master himself. These hidden rules can be assimilated only by a person who surrenders himself to that extent uncritically to the imitation of another. A society which wants to preserve a fund of personal knowledge must submit to tradition."[416]

The suggestion that learning a craft requires submission to authority and tradition cuts against much of the grain of contemporary American culture. Nonetheless, the submission described by Polanyi is neither blind nor unthinking. Writing about the visual arts, Peter Dormer has observed that "[a] common assumption is that craft skills are mechanically learned and exercised; and that they are thus obviously unthinking and uncreative."[417] Dormer also notes that "[t]his modern prejudice goes hand in hand with an attitude, perhaps peculiar to the latter half of the twentieth century in Western culture, that one can learn skills as and when one thinks one needs them."[418]

Dormer maintains that in general there are "three stages in the intellectuals' sleight of hand when it comes to craft issues. The first is to begin by trying to take the learning of the craft seriously. The second is the realization that learning the craft is going to require much more time (and humility) than first envisaged. The third stage, because their own efforts are, understandably, not very good, is to dismiss the craft element as 'sterile and rule-bound' and claim as more expressive their 'freer' efforts."[419]

I will discuss four aspects of becoming a craftsperson, focusing first upon the role of rules and theory in craft, next upon the ubiquity and necessity of uncertainty in craft, then upon the role of apprenticeship and failure in learning to become a craftsperson, and finally upon the craftsperson's attitude toward money as a reward for his or her work.

416. *Id.*
417. DORMER, *supra* note 40, at 40.
418. *Id.*
419. *Id.* at 65.

A. The Role of Rules and Theory: Constraint and Responsibility

> *Fishing is not an exact science.*
>
> –Larry Cotter[420]

> *Craft knowledge is genuine knowledge. To possess it in any form is to see the world in an enriched way compared with someone who does not possess it. There is nothing magical about this. If you are a dentist . . . you cannot help noticing the shape of people's mouths and cheeks and making inferences about the state and number of their teeth.*
>
> –Peter Dormer[421]

> *[I]n flye-fishing for a Trout, the Angler must observe his twelve several flies for the twelve months of the year; I say, he that follows that rule shall be as sure to catch fish, and be as wise, as he that makes Hay by the fair dayes in an Almanack, and no surer; for those very flyes that use to appear about and on the water in one moneth of the year, may the following year come almost a moneth sooner or later, as the same year proves colder or hotter . . . . [A]nd for Winter flie-fishing, [general rules are] as useful as an Almanack out of date. And of these, (because as no man is born an artist, so no man is born an angler) I thought fit to give thee notice.*
>
> –Izaak Walton[422]

Craft knowledge involves both rules and theory, but cannot be completely expressed in terms of either. An understanding of the role and place of rules and theory in craft is an important element in understanding how crafts are learned. Craft knowledge is often described by craftspersons as involving neither rules nor theory, but rather a kind of working technique, know-how, or tacit knowledge.

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420. *Magnuson-Stevens Fishery Conservation and Management Act: Hearing Before the Subcomm. on Oceans and Fisheries of the Senate Comm. on Commerce, Sci., and Transp.*, 106th Cong. 7 (2000) (testimony of Larry Cotter, CEO, APICDA Joint Ventures, Inc.), *available at* http://www.senate.gov/~commerce/issues/ocfish/oo.html.

421. DORMER, *supra* note 40, at 68.

422. WALTON, *supra* note 173, at 23.

1. Rules

As the English are methodical even in their recreations, and are the most scientific of sportsmen, [fishing] has been reduced among them to perfect rule and system.

–Washington Irving[423]

It is the physicality of the crafts that pleases me; I learn through my hands and my eyes and my skin what I could never learn through my brain.

–M.C. Richards[424]

Practical reason and craft are similar in that neither is governed by a set of rules, no matter how nuanced or complex.[425] As Sarah Broadie has observed, "[R]ules of a craft are developed without recourse to preestablished rules; yet surely it belongs to the craft itself, not to any other kind of ability, to develop its own rules. And in this the craftsman shows himself more artful and more admirable than if he merely follows rules."[426] One advantage of learning at the foot of a master is that the master can help "reveal to the novice the possibilities that exist for extending the craft," in short, "they cannot help [but] demonstrate the principle of 'rules are there to be broken' (but only if you fully understand them in the first place)."[427]

This is not to say that learning the rules is unimportant; rather, it is to say that no set of rules will be complete, and the most skillful craft work will be done by master practitioners who are not consciously thinking about the rules. A craftsperson will thus be guided by rules, but may not be conscious of those rules while in the midst of practicing his craft.[428] Michael Polanyi explains that "the aim of a skilful performance is achieved by the observance of a set of rules which are not known as such to the person following them."[429] Peter Dormer observes that there are two differ-

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423. WASHINGTON IRVING, *The Angler, in* THE VOYAGE AND OTHER ENGLISH ESSAYS FROM THE SKETCH BOOK 29, 36 (Boston, Houghton, Mifflin & Co. 1891).

424. *Five Decades: American Craft Council*, *supra* note 57, at 88 (quoting M.C. Richards (1964)).

425. *See supra* Part I.C.1.

426. BROADIE, *supra* note 97, at 203.

427. DORMER, *supra* note 40, at 50.

428. An artist, in contrast with a craftsperson, may have contempt for rules, finding them unduly constraining of creativity. Peter Dormer has observed that "some artists and art students believe that the only purpose of a rule is to be questioned. Questioning convention is the orthodoxy of the avant-garde." *Id.* at 42. The notion of an avant-garde craftsperson is quixotic if not oxymoronic.

429. POLANYI, *supra* note 415, at 49 (emphasis omitted).

ent ways in which rules can be "unknown." The first, which would seem to be inapplicable to the law, is that rules are always unknown.[430] The second, which does seem applicable to the law, "is that rules are learnt and then, as one becomes expert, 'forgotten' (they become second nature and we take them for granted)."[431]

Ludwig Wittgenstein offers a basis for understanding the general nature of craft knowledge.[432] Peter Dormer describes Wittgenstein's basic insight as follows: "All craft activity is organized activity: it follows rules, conventions and patterns. The goal of a craft is not the practice of rules for their own sake but the successful accomplishment of a task—ideally, new, surprising and wonderful tasks."[433] Wittgenstein's concept of constitutive rules is helpful in understanding the type of knowledge that we call craft knowledge. Dormer explains that "[t]he 'constitutive rules' that govern a particular kind of craft activity are not external to it: they are that craft activity. The rules that enable us to draw or paint or ride a bike are not separable from the activity. Rules, in the sense now under discussion, are the components of an activity which together add up to a body of knowledge. They cannot be divorced from that activity: if they are then you destroy that activity. To paint a portrait (a coloured likeness of a living model) is to obey the rules of portrait painting—not in the sense of obeying an order from someone else, but obeying the internal logic of an activity."[434] In paragraph 199 of *Philosophical Investigations*, Wittgenstein explores the kind of rules that constitute craft activity. He writes, " 'To understand a sentence means to understand a language. To understand a language means to be a master of a technique.' "[435] Dormer elaborates: "One of the observable characteristics about learning language or using it is that we do not consciously set out to learn by being taught rules, at least not explicitly. A young child does not learn to speak and understand what Mother or Father is saying by

430. As an example of rules that are unknown, Peter Dormer, suggests riding a bicycle. "Millions of people can ride a bike, yet no one knows how they ride a bike, nor can they tell anyone else how to ride a bike, although plenty of people can tell a cyclist how to improve after conquering the essentials of moving forward, maintaining a balance, and avoiding obstacles. One does not learn to ride a bike by looking at the rules." DORMER, *supra* note 40, at 20. The accuracy of Dormer's observation is confirmed by recollecting how you learned to ride a bike, or how you taught your child to ride. It is unlikely, to say the least, that you began by consulting a rulebook or instruction manual.

431. *Id.*

432. *See id.* at 60-69.

433. *Id.* at 60.

434. *Id.*

435. *Id.* at 61 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1968)).

learning the explicit rules of grammar; these explicit rules demand an understanding of language in the first place. The child learns from people speaking to him and picks up the rules of speech without being aware that they are rules."[436]

Socrates is credited with the view that an expert is a person who can state the rules from which he or she proceeds.[437] Hubert L. Dreyfus has argued that this formulation gets it backwards. Experts, Dreyfus argues, do not reason from rules. Rules are for beginners. Dreyfus argues that a novice at driving a car or playing chess will be acutely aware of the rules governing driving or playing chess.[438] Some crafts involve only a few straightforward rules. May Morris, speaking of the craft of embroidery, notes that "[t]here are no mysteries of method beyond a few elementary rules that can be quickly learnt; no way to perfection except that of care and patience and love of the work itself."[439] As one progresses through successive stages—from an advanced beginner, through competence and proficiency, and even on to expertise—awareness of rules decreases. Dreyfus argues that "[i]f one asks an expert for strict rules one will, in effect, force the expert to regress to the level of a beginner and state the rules he still remembers but no longer uses."[440] Dreyfus concludes that "no amount of rules and facts can capture the knowledge that an expert has when he has stored his experience of the actual outcomes of tens of thousands of situations. The Socratic slogan 'If you can't explain it, you don't understand it' should be reversed: anyone who thinks he can fully explain his skill, does not have expert understanding."[441]

Peter Dormer suggests that Wittgenstein's and Dreyfus's thinking "supports the thesis that 'real' knowledge includes tacit knowledge and that practice often precedes theory and that theory is embedded in and inferred from practice."[442] "The constitutive rules of a craft are only learned by actually doing the activity. In-

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436. *Id.* at 61. Dormer comments, "I believe that Wittgenstein means that rules are embedded in and are inferred from practices—from events and experiences, from living—and not the other way around." *Id.* Dormer also notes that "one of the mistakes the beginners make in practice—as distinct from Wittgenstein's theory—is to begin by trying to interpret the rule. You think about it. You are prickling all over with self-awareness and puzzlement before committing brush to canvas or bow to string." *Id.* at 62.

437. *See* Hubert L. Dreyfus, *Is Socrates to Blame for Cognitivism?, in* ARTIFICIAL INTELLIGENCE, CULTURE AND LANGUAGE: ON EDUCATION AND WORK 219, 225 (Bo Goranzon & Magnus Florin eds., 1990).

438. *Id.* at 221.

439. Morris, *supra* note 237, at 212.

440. Dreyfus, *supra* note 437, at 227.

441. *Id.*

442. DORMER, *supra* note 40, at 64.

deed, they are the activity. This is a fundamental point about craft knowledge. You cannot understand it or know it until you can do it. Reading about it is not the same as understanding it."[443]

2. Theory

> *Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.*
>
> –Benjamin N. Cardozo[444]

Craft knowledge can also be contrasted with theoretical knowledge.[445] Peter Dormer explains that "[c]raft knowledge is often difficult or even impossible to translate into theory or to encode (for the purposes of computing) into mathematical or logical languages."[446]

Carla Needleman, speaking of the craft of pottery, maintains that "[s]peculative imagination is useless. If it were possible to learn through speculative analogy, the craft would not be necessary. The craft teaches precisely through bypassing the self-indulgent speculative part of the mind that would rather think about working than work. The craft provides experience. I can learn through the order of experiences contained in a craft if I am willing not to be hasty in drawing conclusions and if I am willing not to think I know better and can manipulate the order of experiences. The craft will lead me if I am able to put aside my impatience and follow."[447]

Similarly, the craft of the law is not reducible to or representable by theory. Linda Ross Meyer has suggested that while looking at judicial decisionmaking as a craft "cannot give us a theoretical or normative account of a good judge, it resonates with and reminds us of what we already know: a thoughtful judge is one who listens (a court proceeding is called a 'hearing,' after all), who responds to possibilities opened by past practices, who is more silent than loquacious, who is focused on the case, who is humble, and who is not trying to apply any theory of adjudication, grind any political axes, or control the future. The thoughtful judge, like the

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443. *Id.* at 42.

444. CARDOZO, *supra* note 371, at 9.

445. *See supra* note 97 and accompanying text (describing Aristotle's distinction between *phronesis* (practical wisdom) and *techne* (craft), each of which is a subset of *praktikos* (practical knowledge), with *sophia* (theoretical wisdom)).

446. DORMER, *supra* note 40, at 11.

447. NEEDLEMAN, *supra* note 58, at 23.

thoughtful craftsman, looks for the shapes of justice that are slumbering in the case."[448]

Douglas Lind maintains that judges do not and should not pay much attention to prevailing theories of adjudication because "the interpretive claims and normative considerations of externalist theory are simply irrelevant and unnecessary" to the "craft-bound excellence" to which judges aspire.[449] In contrast, Llewellyn believes that there is a place for academic lawyering because it brings "out for observation lines of function and method in the craft," which "sharpens the eye for the work" of judging.[450] Kronman, echoing Llewellyn, notes that "[w]ithout displacing the practical know-how that constitutes the core of the craft of judging, critical reflective thought can in this way become an element or ingredient in it, helping to ensure the craft's integrity and increasing its effectiveness."[451]

Kronman argues that law professors must use their classrooms "to combat the idea that law becomes interesting or intelligible only when seen from the standpoint of another field; to discredit the claim that one cannot participate in its culture without having first mastered the idiom and techniques of some more rigorous nonlegal discipline, such as philosophy or economics; to discourage the belief that behind the surface chaos of the law there are simple organizing structures that it is the chief object of law study to describe in an abstract way[; and] . . . to stress the importance of individual cases."[452]

3. Tacit Knowledge and Working Techniques

> *We also explain hundreds of little tricks toward better work, tricks we've learned from daily experience.*
>
> *–The Carpenter's Manifesto*[453]

448. Meyer, *supra* note 7, at 665. Meyer prefers the word "handiwork" to craft. *See id.* at 654 n.43.

449. Lind, *supra* note 7, at 357. Lind suggests that as craftsmen, judges are involved in a "fundamentally different cognitive approach" to the law, that they must "develop a working knowledge of the conditions of excellence for [their] craft in order to try to accommodate them in practice." *Id.* at 357-58. These conditions require decisions to "be arrived at impartially, rest on reasoned explanation, and satisfy objectives of coherence and workability . . . ." *Id.* at 369-70 (footnote omitted).

450. LLEWELLYN, *supra* note 8, at 266.

451. KRONMAN, *supra* note 3, at 220.

452. *Id.* at 375.

453. EHRLICH & MANNHEIMER, *supra* note 31, at 8.

[Technique] is not some fetishistic obsession on the part of [the craftsman], but an essential feature inherent in traditional craft practice.

–Howard Risatti[454]

Any project, no matter how complex, is put together with a lot of simple techniques . . . . You can learn techniques. Some you learn instantly, just by watching or being told how, such as turning a screwdriver to drive a screw. Some take a little more time, such as hammering without bending the nail or hitting your thumb. Other techniques, like planing, take years to perform skillfully, although you can do them adequately with a little practice . . . . The point is they all can be learned.

–The Carpenter's Manifesto[455]

Tacit knowledge or 'know-how' is immensely powerful: it gets things built.

–Peter Dormer[456]

In contrast to theory and rules, much of a craftsperson's knowledge can be described as involving working techniques or tacit knowledge.[457] Peter Dormer explains the relationship between theoretical knowledge and tacit knowledge as follows: "To build an engine demands the practical knowledge of the engineer and the machinist—which is complex; much of it defies description in words. It is . . . 'tacit' knowledge . . . . But it is also slowly acquired. If we had to rely on discovering ideas through craft, through plodding empiricism, then we might never have progressed as far as steam engines, let alone beyond them. The power of theoretical knowledge is that it provides general insights into how fields of action work and how we might improve our practice. Theoretical knowledge has been described as a springboard."[458]

Craftspersons often describe their work as involving tacit, experience-based knowledge. For example, the potter Carla Needleman describes the technique of "centering" clay on a potter's wheel as follows: "Centering can easily be done with the eyes closed. I close my eyes now and sense the clay riding true between my hands. I have a deep sense of well-being, a kind of joyful seriousness, a potentiality."[459] For the craftsperson, Howard Risatti ex-

454. Risatti, *supra* note 54, at 40.

455. EHRLICH & MANNHEIMER, *supra* note 31, at 142.

456. DORMER, *supra* note 40, at 10.

457. *See supra* Part II.A.4 (discussing difficulties of articulation when dealing with tacit knowledge).

458. DORMER, *supra* note 40, at 10.

459. NEEDLEMAN, *supra* note 58, at 8. Needleman explains the act of centering further:

> When the wheel is going quite fast I stop kicking, place my foot on the support to the right, and wet my hands. The two hands squeeze the clay at the base of the mound, forcing it up. The palms then push on the top of the clay, pushing it

plains, "Technique . . . is directly related to material, and material is directly related to function. To know which materials to use for a specific object requires a keen knowledge of their physical properties—which materials will withstand prolonged use, which are impermeable or pliable, what is their tensile strength, and so forth."[460] In addition, "the maker of traditional craft must also know how to work the material into the desired object."[461] Often, this will be neither simple nor straightforward. On the contrary, "[o]ne must first select the proper material, then work the material through several stages before beginning to form the object."[462] Being able to undertake skillfully the stages of producing the craft object "is still a very difficult and sensitive procedure, requiring a great deal of intellectual and practical knowledge as well as motor skill."[463]

Howard Risatti notes that working techniques are closely related to the objects created by craftspersons: "We commonly speak of weaving cloth, of blowing glass, of throwing pots, of smithing metals, of turning, bending, or joining wood. In traditional craft practice material is something to work with in the effort to create meaning."[464]

Tacit knowledge or working know-how is not simply a compilation of numerous "tricks of the trade." As Peter Dormer notes, "There is a great difference between acquiring a small number of tricks and acquiring a grasp of a body of practical knowledge."[465] In fact, one who is overly concerned with tricks misunderstands craft. James Elkins has argued that "[c]raftsmanship is perverted by the obsession for techniques and strategies—'tricks of the trade.' Although these strategies and tricks are contained in the notion of craftsmanship . . . they are not the container itself—they are not craft."[466]

Carla Needleman describes the relationship between thought and feeling in the potter's craft as follows: "Thought, so much slower than feeling, enters in and, finding something precious no

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down again. My hands are steady, not riding the irregularities of the clay mound, but mastering the clay with steady pressure.

Id.

460. Risatti, *supra* note 54, at 40-41.

461. *Id.* at 41.

462. *Id.*

463. *Id.*

464. *Id.*

465. DORMER, *supra* note 40, at 56. Dormer adds, "You can acquire fragments of skill; but if you limit yourself to the techniques, then you may forfeit expertise in a variety of skills within the same discipline." *Id.*

466. Elkins, *supra* note 90, at 965.

longer there, attempts to reconstruct in words so as to salvage the experience by remembering it. Many intellectually stimulating ideas about craftsmanship, full of interesting connections, have their genesis in such a moment. But, looking back upon such verbal constructions of my own, I find that not one of them ever helped me to become a better craftsman."[467]

Understanding of the law likewise cannot be reduced to a set of rules or sufficiently represented by a theory. This is what Llewellyn had in mind when he described the skillful lawyer's knowledge as akin to "situation sense," or "horse-sense," by which, as Anthony Kronman explains, Llewellyn meant the "ability to see beyond the details of the case at hand coupled with a resistance to the kind of theoretical extravagance that leads only to abstractions of unhelpful generality."[468] Kronman, reflecting upon Llewellyn's craft ideal, describes the "true judicial craftsman" as one who "knows that his work is constrained even in its most creative aspects and regards the iconoclastic bogey of an utterly free judicial prerogative as a fantasy or myth. He knows that his craft is not a science and cannot be made into one . . . [that] his craft is not blind habit, and that invention is ingredient in it, though his thinking is at every step guided by professional dispositions that precede and shape it."[469]

B. Craving Certainty and Tolerating Uncertainty

The fact of our lives is uncertainty, and we crave certainty.

–Carla Needleman[470]

A craftsperson must have a high tolerance for uncertainty. Speaking of the potter's craft, Carla Needleman has observed that "[t]he fact of our lives is uncertainty, and we crave certainty."[471] Needleman notes that when she "extend[s]" herself into her craft, she becomes "willing to sacrifice any of [her] opinions that experience proves false."[472] Oliver Wendell Holmes expressed a similar belief when he said, "If I were dying, my last words would be: have

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467. NEEDLEMAN, *supra* note 58, at 9.

468. KRONMAN, *supra* note 3, at 223.

469. *Id.* at 224.

470. NEEDLEMAN, *supra* note 58, at 3.

471. *Id.* Needleman adds, "I don't know what to feel when I look at a pot I've made. The relationship between myself and this object, my production which now exists independently of me, is ambiguous and unsure." *Id.*

472. *Id.* at 12-13.

faith and pursue the unknown end."[473] Indeed, lawyers and judges must deal with greater uncertainty than their counterparts in other crafts such as carpentry. Speaking of what he learned about being a judge from his work as a carpenter, Judge Robert Satter notes that whereas a "carpenter deals in lengths, widths, angles," and "has to be accurate," in contrast a judge "deals in uncertainty."[474] The judge "must muddle through ambiguous statutes and conflicting precedents when drafting an opinion; he must rely on his intuitions about human nature when sentencing a felon, or awarding custody of a child."[475] As Llewellyn put it, craft does not usually generate "certainty," but rather "reasonable regularity."[476] In her discussion of Heidegger's account of practical wisdom, Linda Ross Meyer suggests that when we stop expecting certainty and control from overarching theories, "we see that the better and perhaps the best role of thinking is in keeping questions open, lingering in enlightened confusion, so that we do not miss the next insight when it comes."[477]

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473. Letter from Oliver Wendell Holmes to Dr. John C.H. Wu (Apr. 10, 1924), *reprinted in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTES AND UNCOLLECTED LETTERS AND PAPERS 175, 175 (Harry C. Shriver ed., 1936).

474. Satter, *supra* note 2, at 104.

475. *Id.* Judge Satter follows this comparison with another contrast between judging and carpentry. "The difference between the two callings simply confirms the wisdom of Aristotle that 'one should not demand more exactitude than the subject matter permits.' From the precision required in carpentry, I came to appreciate the complexities of judging." *Id.*

476. LLEWELLYN, *supra* note 8, at 215-17. "If there is *regularity*, there is continuity enough; and be it noted that sharp, sudden upset is almost never needed, *if* there has been no prior piled-up log jam to block the passage of the prior needed small adjustments. The *reasonable* aspect of the regularity, on the other hand, holds out full room to adjust any complex of tension to the hugely variant needs of whatever the relevant type-situations may be . . . ." *Id.* at 216.

477. Meyer, *supra* note 7, at 652. Meyer concludes, "The openness of practical reason is cause for celebration, not devaluation." *Id.* For a contrasting account of practical reason inspired by Heidegger, see Leiter, *supra* note 108, at 267-71 (arguing that practical know-how does not admit of theoretical articulation in terms of explicit rules, but relies upon a background of mindless coping skills).

C. Learning and Transmitting Craft

> *Our main goal . . . is to communicate to you a way of thinking, of seeing—a method of approaching and solving carpentry problems.*
>
> *–The Carpenter's Manifesto*[478]

> *I think it is a mistake to try to cram a technical knowledge of fishing down a youngster's throat. Not only may it sour him on the whole deal, but it will deny him the fun of learning through trial and error. No boy enjoys 'doing as he's told,' but when left to his own devices there is no limit to the effort he will expend in satisfying his curiosity.*
>
> –Harold F. Blaisdell[479]

How does a craftsperson learn her craft? She does so slowly, patiently, and ideally at the knee of a master craftsperson. Perhaps it is not surprising that the place in the law where the ideal of apprenticeship still has some professional resonance is in the judicial clerkship. The judge, as master, guides the novice lawyer, as apprentice, through the early stages of developing professional competence. If judging is a craft, then in the clerkship we should find evidence of the ideals of apprenticeship. Like apprentices in other crafts, the judicial clerk gives up the possibility of earning much more money for the experience of working at the elbow of a master craftsperson. A judge who is committed to the idea of viewing her work as a craft will treat her clerks as apprentices, and will see in the relationship the opportunity to pass on to succeeding generations the knowledge and skills pertaining to the craft of the law.

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478. EHRLICH & MANNHEIMER, *supra* note 31, at 8. The authors of *The Carpenter's Manifesto* note that the

> notion that carpentry is something mysterious or beyond the nontechnical mind is wrong. We've found that the two types of carpentry books usually available haven't helped to dispel that prejudice. First there are the heavy technical tomes for the professional. Some are excellent, but they assume you have five years of fundamentals behind you, and they are therefore incomprehensible to most people. Then there are the light-reading crafts books, the how-to books, which may tell you how to build certain projects . . . , but little else. When you're done, you still have no idea what carpentry is *about*, how to design and build something on your own.

Id.

479. HAROLD F. BLAISDELL, THE PHILOSOPHICAL FISHERMAN 6 (1969).

1. Apprenticeship

Apprenticeship is the birth of a new craftsman.

–Gerry Williams[480]

Historically, the way a craftsperson learned her craft was by apprenticing herself to a master craftsperson.[481] Over a period of years, and for very little compensation, the apprentice would learn the craft, beginning with mundane and menial tasks—cleaning the floor, sharpening tools, cutting and preparing materials—and slowly moving on to other work. Much can be said about the nature of learning through an apprenticeship. Nonetheless, I will focus on but four aspects of apprenticeship: the potential for exploitation and tough love;[482] craft as learning how to work, as opposed to merely creating objects;[483] the role of theory, practice, and repetition in learning a craft, and the pace at which craft learning takes place;[484] and the role of mimicry and copying, and the implications for creativity.[485]

a. Exploitation and Tough Love

The idea of apprenticeship is dangerously close to master-and-servant, and in this sense UnAmerican.

–John Reeve[486]

Apprenticeship is fraught with hazard, the primary one being the exploitation of the apprentice by the master. Apprentices have often been required to work long hours, forced to perform repetitious and mind-numbing work under oppressive conditions. Potter John Reeve observes that the master-servant relationship "is an exploitive relationship: in the short term, the master exploits

480. Gerry Williams, *Introduction*, *in* APPRENTICESHIP IN CRAFT 13, 13 (Gerry Williams ed., 1981).

481. John Glick defines a master as "a craftsman who has achieved a level of expressive and/or technical expertise combined with a depth of experience, who is capable of guiding another person through exploration in the chosen medium." Glick, *supra* note 177, at 25. An apprentice "is a person actively involved in a working studio, under the direct guidance and influence of a master," and is distinct from an employee, who "is a worker who has specified jobs to perform, jobs which usually vary little in scope from day to day." *Id.*

482. *See infra* Part III.C.1.a.

483. *See infra* Part III.C.1.b.

484. *See infra* Part III.C.1.c.

485. *See infra* Part III.C.1.d.

486. John Reeve, *On Apprenticeship*, *in* APPRENTICESHIP IN CRAFT 152, 153 (Gerry Williams ed., 1981).

the apprentice by using his labor and paying little for it; and in the long term, the apprentice exploits the master by getting his training free."[487]

Gerry Williams, a potter, writes that "[t]he goal of a successful craft apprenticeship should be twofold: to provide the master with assistance in the working environment, and to train the apprentice in professional practices."[488] John Glick, also a potter, advises would-be apprentices to exercise care in choosing an apprenticeship: "The master (role model), the studio environment, and the aesthetic climate present are some basic factors that will matter greatly."[489] Glick suggests that for a would-be craftsman, having no apprenticeship is preferable to "one in which the apprentice is never exposed to broad human experiences and values, as well as meaningful studio activity."[490] If one joins a studio that is really involved in mass production, Glick warns, the "philosophies of any such enterprise are doomed to mimic a poor model and end up by watering down further an already malnourished set of values."[491]

Glick suggests that in choosing an apprenticeship, the apprentice should give appropriate attention to the master's reputation,[492] working philosophy,[493] the type of work done,[494] and such practicalities as studio time,[495] space,[496] duties,[497] and compensa-

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487. *Id.*

488. Williams, *supra* note 480, at 14.

489. Glick, *supra* note 177, at 26.

490. *Id.* In contrast, "[a] prolonged contact with a lifeless job, doing drudgery work for experience, is of questionable value." *Id.* The mere fact that one works in a studio is not enough, if the studio "is identified with a poor quality, mass-produced, 'handmade' ware geared for a wholesale marketing system." *Id.* Glick continues, "Usually, a line of products and a catalogue are part of the scheme of things." *Id.*

491. *Id.*

492. Glick urges apprentices to "[t]ry not to be swayed by the reputation of the master (or the lack of it), because a reputation grows not only from a response to the work of the master, but also from hearsay, rumor, jealousy, misunderstanding, and excess praise. In other words, judge and see for yourself by getting close to the person behind the reputation." *Id.* at 27. Identical advice could be given to a young lawyer evaluating law firms.

493. Glick asks, "Does the working philosophy you sense in the studio revolve around a loving relationship with the entire craft process? This can be the most beautiful of all possible introductions to the life of the studio artist. Or is the thinking in terms of pounds, inches, and hours?" *Id.*

494. Glick notes, "Major clues about the master come from a thoughtful contact with the work he or she does. Look beyond productivity alone. Try to discern and measure the values expressed in the work." *Id.* at 28.

495. Glick encourages the would-be apprentice to ask such questions as, "What is the ratio of time spent doing studio work to time available for your own pursuits?" and "[w]hat about time together with the master?" *Id.*

496. "Would you have a separate space and your own equipment . . . ?" *Id.* at 29.

tion.[498] The following advice by Glick about selecting an apprenticeship could just as easily be given to a young lawyer looking for a first job:

> If you accept my premise that there are very few really well-rounded apprenticeship opportunities, the situation may seem even more extreme .... Obviously, no one can detail a foolproof plan to land the ideal apprenticeship. I know that part of the entire apprenticeship concept necessarily involves compromise. The trick is to identify your priorities well enough that when you assess the compromises in a given instance, you can see your chances for survival clearly and then act accordingly. Remember also that while the master you seek has abundant problems of his own, there is still likely to be a continual stream of willing individuals knocking on his studio door who want to relate in any way possible. If you decline to apply to or accept a position, you deny the master little of value, really. If you take on the responsibility of a position without a deep conviction that it is right for you, then you not only cheat yourself of your own growth, but you offer less than an honest person to the master as a pupil.[499]

Apprenticeship is not an ideal about which we should become starry-eyed or romantic; it is about tough love. Apprentices are likely to chafe under the exacting standards and disapproval of their masters. Thomas L. Shaffer, speaking as a law professor on the obligations of "elders" to newcomers to a profession, observes that "[p]rofessional craftsmanship entails colleagueship that comes from learning, at the hands of an elder, demanding standards and relatively rigid attention to telling the truth about our work."[500]

In today's legal environment, one reason the ideals of apprenticeship are under siege is because in order to compete for the best law school graduates, starting salaries of first-year associates are very high.[501] Given the high degree of mobility of lawyers, firms are less willing to take a long-term view of the young attorney's development, and are more likely to expect young lawyers to be revenue generators immediately. This leaves no room for apprenticeship, and may contribute to widespread associate dissatisfaction.[502]

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497. "Even though the role you fill will change as your skills become more useful, it is best to have a good grasp of the general expectations on the master's part." *Id.*

498. "How would you survive financially?" *Id.*

499. *Id.* at 26.

500. Shaffer, *supra* note 352, at 632.

501. Patricia M. Schnegg, *An Embarrassment of Riches*, LOS ANGELES LAW., May 2000, at 11, 11-12.

502. *See, e.g.*, Schiltz, *supra* note 389, at 881-88.

b. Learning How to Work

Crafts are about one thing: the secret of how to work.

–Carla Needleman[503]

Becoming a craftsperson is not primarily about receiving instruction about how to make a certain type of object; rather, it is about learning how to work. Potter Carla Needleman describes her relationship with an apprentice as follows: "My young friend has come to me to learn a thing I have no intention of teaching her. She imagines that a craft is the objects it produces and has come to me to do what she thinks of as the craft of pottery—to make pots . . . . I am tempted to give in, to give her the instruction she wants and let it go at that . . . . Pottery is not about making pots . . . . Crafts are about one thing: the secret of how to work."[504]

For a craftsperson, learning how to work is seldom, if ever, acquired exclusively from books. Carla Needleman notes that "[a]lmost everyone who works at a craft today was taught it, had formally or informally some or a great deal of instruction. Whether or not he read about the craft, tried to teach himself from books, almost everyone has had at least one human instructor, another craftsman, because as good as many of the books are, and some of them are excellent, there is no substitute for the help that can be given by another person."[505]

Needleman goes on to observe that "[t]he actual working relationships in the course of teaching a craft are so different from what I would express as my intention. Nothing ever proceeds in a straight line, and it is all so slow, so blundering and so slow."[506] A law professor teaching first-year students, an experienced practitioner dealing with a first-year associate, or a judge interacting with her clerk, could each express similar feelings.

503. NEEDLEMAN, *supra* note 58, at 122.
504. *Id.* at 121-22.
505. *Id.* at 112.
506. *Id.* at 128.

c. Theory, Practice, and Repetition

Learning a skill is not the same as being expert. Being an expert in a body of craft knowledge means living that knowledge.

–Peter Dormer[507]

Crafts are not learned exclusively by studying books. It is unlikely that one could become skilled in the various aspects of being a lawyer—be they advocacy, counseling, drafting, writing briefs, researching—exclusively by reading case books and treatises. Rather, craft learning is based upon the experience of trial and error. Carla Needleman asks, "What is the craft of weaving and where does it begin? If craft is a process of learning, learning from inside oneself through having been through it, nothing one can learn from books or from being told, how can I know if this or that modern technique, apparatus, or shortcut cuts me off from an essential ingredient of experience?"[508] Voicing a similar sentiment, the nineteenth-century craftsperson Fred Miller argued that "[t]he only training worth anything is working under a practical man, for technique cannot be imparted successfully by written directions . . . ."[509]

One consequence of craft learning being based upon experience is that crafts are learned slowly. Peter Dormer has remarked that "[a]cquiring a body of practical knowledge takes time: it is a slow empirical process."[510] Similarly, Carla Needleman has observed that "[a] craft is, can be, an education in failure, an education in the attitude toward failure, an education in and transformation of my attitude toward failure."[511] Echoing this view, Seonaid Mairi Robertson notes that "[h]aving chosen her craft, a student should pursue it for some years . . . . Being rooted securely in the traditions and practice of one craft, in a knowledge of the relationship between materials and method and the finished product, she will much more rapidly appreciate the qualities of the materials and methods of another craft."[512]

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507. DORMER, *supra* note 40, at 40.

508. NEEDLEMAN, *supra* note 58, at 64.

509. MILLER, *supra* note 185, at 35.

510. DORMER, *supra* note 40, at 56. Dormer adds, "Intellectual leaps via theoretical insights are useful, but only after practice." *Id.*

511. NEEDLEMAN, *supra* note 58, at 15. Needleman calls coping with failure an essential part of becoming a craftsperson. "I fail and I go on. Failure is a beginning, failure is the springboard of hope." *Id.*

512. ROBERTSON, *supra* note 33, at 90.

Practice and repetition are necessary to develop the constituent skills of a craft. Speaking of calligraphy, Peter Dormer notes that "[i]t helps to watch and then to mimic the élan with which the tutor draws the letter—mimicry and demonstration make the learning task much easier."[513] Peter Gullers, a photographer, describes the general character of craft apprenticeship as follows: "Many people would like to acquire skills, but the long and arduous years of apprenticeship are a deterrent."[514] And Peter Dormer explains, "[T]he rules that make up practical knowledge—the constitutive rules—cannot be apprehended intellectually until one begins to be able to do them."[515]

As a result of the long time it takes to become adept at a craft, there is often a mismatch between judgment and practical ability when one is learning a craft. Peter Dormer observes that sometimes judgment or "discrimination can often outgrow ability," which results in frustration for a student who sees the many flaws in his work as "a reminder of [his] incompetence."[516] On the other hand, sometimes judgment does not surpass what one can practically accomplish. As Dormer notes, "I have in the past been shocked at how, having completed a drawing and thinking it quite good, I have discovered a few weeks later that it is really quite bad. What I saw then and what I see now are not the same."[517] Many law students, I suspect, have experienced both sides of this mismatch between judgment and practical ability when they look back on an early effort to brief a case, or when they review their performance on an exam some time after taking it.

Although there may be incongruence between judgment and practical ability, their development is interconnected. As Peter Dormer observes, "[T]he very acquisition and practice of craft knowledge is woven in with judgment and ideas about what you are doing and learning. Practical work is not independent of your mental grasp of it: they are inextricably bound in with one another."[518]

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513. DORMER, *supra* note 40, at 45.

514. *Id.* at 41 (citing S. Gullers, *Automation-Skill-Apprenticeship*, *in* KNOWLEDGE, SKILL AND ARTIFICIAL INTELLIGENCE 35 (B. Goranzon & I. Josefson eds., 1988)). Gullers also notes that in order to learn a craft "[b]oth self-control and, to some extent, physical and intellectual subjection are needed." *Id.*

515. *Id.* at 56.

516. *Id.* at 46.

517. *Id.*

518. *Id.*

d. Mimicry and Creative Expression

The student who does not surpass the master, fails the master.

–Attributed to Leonardo da Vinci[519]

Craft knowledge is handed down from generation to generation and is learned through mimicking the work of one skilled in a craft.[520] Fred Miller noted that "[t]he student can be helped . . . by being shown good examples of old and modern work in which the resources of the particular craft are developed on right lines."[521] Peter Dormer argues that "[i]n learning a craft, the role of mimicry is probably essential. This means one needs to work alongside a skilled practitioner."[522] And Harry Collins, a sociologist of science, likewise maintains that "[s]kill-like knowledge travels best (or only) through accomplished practitioners."[523]

Watching and imitating—mimicry—plays an important role in developing craft skills. In describing his experience of learning the craft of calligraphy, Peter Dormer notes that "[t]he early stages can be described as copying."[524] But copying is not as easy as it might seem: "One must understand how the forms are constructed. This understanding is greatly helped by teaching and demonstration."[525] Nevertheless, the imitation of the master by the student is not slavish. Among other things, the novice must learn to distinguish the relevant from the irrelevant in the way the master goes about accomplishing a task. In learning calligraphy, Peter Dormer "recognized that it was helpful to imitate the way my teacher held the pen, her wrist movement, the placing of the wrist of her draw-

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519. Maloof, *supra* note 330, at 146.

520. Potter John Glick notes that masters must also be aware of their intergenerational obligations.

> We owe each new generation of craftsmen our skills, our philosophies, and an exposure to our lives as whole, if fallible, human beings. We cannot afford to halt the needed transfer of knowledge and feelings by denying contact because of pride or inconvenience. If we are not willing to give of ourselves, we have no right to criticize nor be indignant at conditions in the crafts which we wish were otherwise.

Glick, *supra* note 177, at 30.

521. MILLER, *supra* note 185, at 27-28.

522. DORMER, *supra* note 40, at 47. Dormer adds an important qualification "that some people can infer the essentials of a craft from past examples." *Id.* at 56. He states that "[t]raditionally, most painters and sculptors studied work from the past (and from their peers) to learn new ways of doing things." *Id.*

523. *Id.* (citing HARRY COLLINS, CHANGING ORDER (1985)).

524. *Id.* at 44.

525. *Id.* at 45.

ing hand upon the board, but not that she pursed her lips or squinted her eyes."[526]

This is not to say that mimicry is mindless copying. Martin Heidegger compares thinking and craft as follows:

> A cabinetmaker's apprentice, someone who is learning to build cabinets and the like, will serve as an example. His learning is not mere practice, to gain facility in the use of tools. Nor does he merely gather knowledge about the customary forms of the things he is to build. If he is to become a true cabinetmaker, he makes himself answer and respond above all to the different kinds of wood and to the shapes slumbering within wood—to wood as it enters into man's dwelling with all the hidden riches of its nature. In fact, this relatedness to wood is what maintains the whole craft. Without that relatedness, the craft will never be anything but empty busywork, any occupation with it will be determined exclusively by business concerns. Every handicraft, all human dealings are constantly in that danger.[527]

Woodworker Sam Maloof likewise notes that an apprentice naturally "is strongly influenced by the master craftsman with whom he works. This often presents a problem in that the apprentice tends to imitate the work of the designer/craftsman. A strong student, however, will seek his own direction."[528]

Fred Miller, a nineteenth-century craftsperson, recollected, "I worked for a designer whose style captivated me, and I became a weak reflection of him when I attempted original work. It is as natural as it is common that a young man should become enamoured of the work of a particular artist, and consciously or unconsciously copy it: no harm follows this if the tendency is kept in check by other influences at work, but to become the pupil of one man, however clever he may be, is harmful."[529] H. Wilson, a nineteenth-century silversmith and jewelry maker, warned students not to copy the designs of another: "Not only is deliberate copyism dishonest, it checks the development of the student's native powers and stunts his individuality."[530]

An important question is whether the learning of skills "by rote and constant practice which seems such a burden—constitute[s] a long-term brake on expression and creativity."[531] Learning a skill is "hard business: doing a skill badly when wanting to create something excellent is a demoralizing experience. This is

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526. *Id.* at 47.

527. MARTIN HEIDEGGER, WHAT IS CALLED THINKING? 14-15 (Fred D. Wieck & J. Glenn Gray trans., 1968); *see also* Meyer, *supra* note 7, at 654-55 (providing an interesting reflection upon the implications of Heidegger's view for thinking and practical reason).

528. Maloof, *supra* note 330, at 145-46.

529. MILLER, *supra* note 185, at 10-11.

530. WILSON, *supra* note 80, at 11-12.

531. DORMER, *supra* note 40, at 40.

why learning is not and cannot always be fun. Learning a skill is not a mechanical activity but an emotional as well as intellectual and physical process."[532] Indeed, Fred Miller noted that "[h]abit and custom largely govern taste, because so few of us think independently and act for ourselves. Yet it is in the breaking away from the established order of things that our personality finds expression, and an original turn is given to work. You use tradition and are guided by precedent, but are not bounded by it."[533]

As Aristotle observed, craft involves both a knowledge of universals and particulars.[534] Carla Needleman voices a similar sentiment, suggesting that a craftsperson must strike a "proper balance or blend of the universal and the particular."[535] She urges that "[w]e need to see the universal in the particular. If we long only for the universal, it is imagination, not vision, and if we lose ourselves in the particular, it is a waste."[536] At the intersection of, or in "communication" between, the two, Needleman says, we find "vision."[537] The craft of the law similarly reflects a concern with, and an ability to, work with both universals—such as general rules and principles—and particulars—the specific, highly detailed, and often singular facts of a case or situation.

2. Failure and Disillusionment

Almost all beginners, learning the craft of pottery, make the same errors . . . .

–Carla Needleman[538]

a. Mistakes

Making mistakes is a necessary part of learning a craft. Of his experience learning calligraphy, Peter Dormer writes that "[s]eeing mistakes, gaining the ability to discriminate, is the key to becoming an expert."[539] In his discussion of what he learned about judging from his work as a carpenter, Judge Robert Satter recounted an experience of having to use a crowbar to take out a

532. *Id.*
533. MILLER, *supra* note 185, at 28-29.
534. ARISTOTLE, *supra* note 96, at X.9.1180b7-22.
535. NEEDLEMAN, *supra* note 58, at 81.
536. *Id.*
537. *Id.*
538. *Id.* at 133.
539. DORMER, *supra* note 40, at 45.

crooked nail. A skilled carpenter with whom he was working, reassured him, "[t]hat's OK, Bob. The measure of a good carpenter is how he corrects his mistakes."[540]

Carla Needleman, in her study of the craft of pottery, discusses the ubiquity and importance of failure to being a craftsperson: "There are times when the clay is too hard or too soft, wedging tires me, there's a draft from somewhere on my feet, and I seem to have forgotten how to throw."[541] When facing such difficulties, she responds by becoming "aggressive, I attack the clay, can't do anything right, get tired, dirty, and miserable, produce two pots I know then and there I'm going to break up tomorrow, and stop for the day."[542] Potter John Glick notes that "[c]*onstructive failure* is a term I would apply to much of my own early learning in the studio. In fact, I can hardly confine the notion to early experiences, since to this day I occasionally bang my head against my inadequacies."[543]

Any craftsperson, including the lawyer, will have such days when nothing seems to work. For the judge, she may realize that the day's draft will need to be discarded, even as she works on it. Furthermore, the missteps and miscues are often a necessary part of the process of getting it right. Days filled with failure "are embarrassing," says Needleman, but they are part of the truth of any craft.[544]

James Elkins maintains that as lawyers, "[w]hen we pay attention to ourselves at work and imagine ourselves as craftsmen, we begin to see and experience the failures integral to craft."[545] Elkins believes we pay too little attention to failure in the professional work of lawyers, relegating failure "to the study of professional negligence and the sanctioning of professionals who violate prescribed ethical rules or who engage in criminal conduct."[546] The reality is that the craftsperson "always fails in some degree. Despite his experience, despite the sureness that he sometimes is able to reach and briefly hold, there is within him, as he works, a hesita-

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540. Satter, *supra* note 2, at 104.

541. NEEDLEMAN, *supra* note 58, at 10.

542. *Id.* at 11.

543. Glick, *supra* note 177, at 30-31.

544. NEEDLEMAN, *supra* note 58, at 11. Reflecting upon Needleman's description of failure, James Elkins notes, "These days of failure make for honesty in a craft. They take us back to the beginning, show us how little we know, and bring a sense of humility, an attitude which is needed to offset the arrogance so common to professional work." Elkins, *supra* note 90, at 962.

545. Elkins, *supra* note 90, at 960.

546. *Id.* Elkins continues, "A sense of craftsmanship begins with humility, limitation and failure." *Id.* at 961.

tion a doubt, a fear .... This unsureness is necessary for the growth of both him and his craft."[547]

b. Disillusionment

A related but seldom articulated aspect of craftsmanship is disillusionment. As potter Carla Needleman reflects, "Craftsmanship begins with disillusion. And leads, not all at once but after many experiences, to a valuation, a respect, for the state of disillusion. Disillusion begins to be seen as a positive state, dividing—it's true—my dreams but beyond that having the effect of bringing about in my whole organism a quiet and a seriousness that unite me as nothing else has power to, and I like it."[548] Disillusion is an emotion not unknown to the law student, lawyer, or judge.

D. For the Love of Money

Given the character and characteristics of craft, and what is involved in becoming a craftsperson, it is not surprising that craftsmen are not driven primarily by a pursuit of money. When a craftsperson becomes preoccupied with the bottom line, he is on the way to being a manager or mass producer.

This is perhaps the single greatest obstacle for lawyers viewing their work as a craft. For a profession that has always had to fight the tendency to equate professional success with remunerative rank, the trends of the last several decades seem to have exacerbated the difficulty of resisting measuring our professional success primarily in terms of the "bottom line."

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547. Harry Remde, *Close to Zero*, *in* A WAY OF WORKING 49, 55 (D.M. Dooling ed., 1979). Due to the ubiquity of failure, a craftsperson necessarily remains "both master and apprentice in his work." *Id.* at 54.

548. NEEDLEMAN, *supra* note 58, at 54-55.

CONCLUSION

> *If there is a name which I would like to copyright, it is "craftsman." It is a name which places a tremendous responsibility on those who claim it . . . . And believe me, in our world and in our time, we are deeply in need of the values which come under the head of "craftsmanship."*
>
> –Charles Eames[549]

> *I believe the right question to ask, respecting all ornament, is simply this: Was it done with enjoyment—was the carver happy while he was about it? It may be the hardest work possible, and the harder because so much pleasure was taken in it; but it must have been happy too, or it will not be living.*
>
> –John Ruskin[550]

When reflecting upon the character and characteristics of craftsmen, it is impossible not to be struck by how rarely this ideal is realized in real life, even among people involved in the useful trades, such as carpentry. The ideal of craft and craftsmanship seems very old fashioned and out of style in a culture that seems to value getting rich quick as the highest mark of success. Perhaps some solace can be found in the fact that it is easy to imagine the past as an ideal and idyllic time, and compare our current situation unfavorably with it. In point of fact, concern about the deterioration of the craft ideal is very old. Bemoaning the current state of affairs, and comparing it unfavorably with a distant and romanticized past, is a temptation not easily resisted. In addition, it must be acknowledged that the lives and lots of many craftspersons were, and are, cramped and limited. In traditional societies, children often had no choice or prospects but to follow their fathers or mothers and learn their trades. These aspects of craft hardly represent an ideal towards which we should aspire or hope to return.

Nevertheless, as I study craft traditions I cannot help but be moved. Further, I cannot help but be struck by the implications for lawyers. For me, it is in immersing myself in the details of other craft traditions that I see the connections and commonality between those endeavors and the work of a lawyer. The role of craftsmanship and craft virtues may be most easily seen in the work of the judge—indeed being called a master craftsperson might be the

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549. *Five Decades: American Craft Council*, *supra* note 57, at 82 (quoting Charles Eames (1957)).

550. JOHN RUSKIN, THE SEVEN LAMPS OF ARCHITECTURE 218 (E.T. Cook & Alexander Wedderburn eds., 1903) (footnote omitted).

highest compliment a judge can be paid. But I believe it is evident in other practices of the law as well.

As I have worked to find meaning and fulfillment in my life in the law—as a law clerk, big-firm attorney, and professor—I have found guidance and sustenance in the notion that what I should be aspiring to become is a craftsperson. I find it difficult not to be inspired by a discussion of craftsmanship, anachronistic and out of fashion as it may seem. It is encouraging to view myself as part of an enterprise that should value experience and age, which holds out the possibility that over time I can become better at what I am doing. When discussing and reflecting upon what it means to be a craftsperson, part of me wants to loosen my tie and take a furniture building class, work with my hands, and make something real and solid, which stands a chance of outlasting me and being used by unborn generations. I feel a little like Judge Learned Hand, speculating whether I might accomplish more by constructing a boat or building a house.

But inevitably I remind myself that I don't have to head to the carpenter's workbench, the potter's wheel, or the weaver's loom to develop craftsperson's skills; I can do it in my practice and teaching as a lawyer, if I choose to do so. If I choose to treat my vocation as a craft.