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Practical Wisdom in Legal Decision-Making

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Abstract

This paper's objective is to provide an account of certain aspects of a relationship between, on the one hand, moral and intellectual virtues and, on the other hand, the phenomenon of law-application. The paper is not centrally concerned with the relationship between a general conception of ethics (i.e. virtue ethics) and law, but instead focuses on the relationship of certain traits of character, in particular certain aspects of practical wisdom, and the process of legal decision-making. The paper's central objective is to present a plausible picture of subjectively possessed virtue, and in particular of practical wisdom, that is able to play a role in legal decision-making.

Keywords

Practical Wisdom, Legal Decision-Making, Legal Reasoning

Practical Wisdom in Legal Decision-Making*

My objective in what follows is to try to understand certain aspects of a relationship between, on the one hand, moral and intellectual virtues and, on the other hand, the phenomenon of law-application. What will occupy me is not so much the relationship between a general conception of ethics (i.e. virtue ethics¹) and law, as the relationship of certain traits of character, in particular certain aspects of practical wisdom, and the process of legal decision-making. In short, I would like to present a plausible picture of subjectively possessed virtue, and in particular of practical wisdom, that is able to play a role in legal decision-making. Although I cannot provide anything like a complete account of legal decision-making in here, I would also like to outline the way in which the theory of virtue and practical wisdom presented here might offer an alternative to the dominant conceptions of legal reasoning and decision-making.

To explain more precisely what the subject of this paper, let me start by outlining three (conceptually independent) ways in which virtues might be said to relate to law. Firstly, the development of virtue in the citizenry might be thought to be the reason that justifies the existence of law (in general) or of particular legal institutions.² Opponents to that view would not necessarily oppose the idea that developing virtue is a good thing, but would often object to doing it through law and politics rather than, say, education by the family or some religious organization. According to those opponents, accepting that virtue-training is the central goal of a political community would undermine politics' main business, which is to provide a fertile ground for autonomous choice. As far as actual institutional design is concerned, those

* The author is indebted to Zenon Bankowski, Luis Fernando Barzotto and Neil Walker for their generosity in commenting on an early draft.

¹ As distinct from deontological and utilitarian conceptions of ethics, in R. Hurthhouse's helpful typology. See Hurthhouse 1999:1-8.

² A paradigmatic defence of that is given by Aristotle, for whom politics' main business is the happiness of the citizens (for instance in *Politics* VII 1324a23-25, in Aristotle 1984:2101), while happiness cannot be attained without virtue (among many other passages, see *Politics* VII 1323b21-23, in Aristotle, idem).

opposing views do not necessarily lead to completely different arrangements. Aristotle, for instance, thought that the exercise of choice was a central component of the development of virtue and, more generally, of leading a good life³ and that means that political institutions would need to be arranged in such a way as to allow the citizenry to exercise choice (although he would also be willing to accept many different restrictions on choice).

Secondly, virtues might be said to provide the content of legal norms or directives: it is because being, say, truthful is good, that we should keep our promises and contracts. Law and virtues would, in this view, have a (totally or partially) homologous content. That is certainly not the view of many Aristotelians and, in particular, of Aquinas, who famously believed that not all virtues should be prescribed or vices proscribed.⁴

Thirdly, the possession of certain virtues by certain people might be conceived as a necessary condition for the appropriate working of a political community and of its legal system. This is a very complex question that branches out into many different possible sub-themes along the axes of “who” (should display the virtues), “which” (virtues) and “why” (they should be displayed). Should citizens possess civic friendship, for a society to be possible? What does “civic friendship mean”? Should political officials be truthful? Should all kinds of political officials have the same virtues?

In this article, I would like to contribute to the plausibility of the thesis that legal decision-making by public officials (paradigmatically judges) can only be carried out appropriately if those officials possess certain virtues. In other words, only a certain kind of *person* would be able to carry out proper legal decision-making. This suggestion runs against the deep suspicion in legal and political theory against the influence of subjectivity by those wielding political power for, in modern western societies, we came to believe that they should be ruled by law and not by men. Epistemologically, the modern empire of method

³ Although Aristotle did not consider liberty the most important political value, his theory of virtue supposes free choice. For a summary of the arguments see Miller Jr, 1995: 356.

⁴ Which is the subject of *Summa Theologiae* 1a2ae question 96, articles 2 and 3.

promised to purify, at least partially, our scientific conclusions from subjectivity and methodologies presented themselves to the jurist as auspicious strategies to tame the legal decision-maker's subjectivity. The aspiration of controlling subjectivity through method reaches its apex in 19th century legal formalism, but later theorists, who would be keen on admitting that subjectivity plays a role in legal decision-making, would also be careful to explain that legal justification (as opposed to the "discovery" of the right answer) would not be merely subjective (Wasserstrom 1961:25-30, 65-66; MacCormick 1978:15 ff). I believe this suspicion to be deeply rooted on an oversimplified conception of the relation between objectivity and subjectivity and, more importantly, I believe it to be detrimental to the ethical understanding of legal decision-making.

The full defence of this thesis is, of course, a larger project than I could fit into this article, but the arguments presented here are a key part of it. What I intend to provide here is a conception of the subjective/objective divide that would allow for a theory of practical wisdom as a form of relationship between subjectivity and objectivity.

In what follows I will start by making some preliminary clarifications on what I take to be the most fundamental connection between virtues and legal decision-making (section I). With that in place, I start to address the greatest obstacle in assigning virtues (in particular practical wisdom) a major role in legal decision-making: the fear of subjectivity in decisions taken by public officials. The first step in that argument is to object to an oversimplified conception of the divide subjective/objective that clouds our judgement, and to replace this flawed picture for an alternative (and less threatening picture). I try to do all that in section II. Section III is where the main elements of my main argument are displayed and defended. There I discuss practical wisdom, and in particular its "perceptive" aspect at some length, in a way that, will, hopefully, complete the work started in section II and deliver an acceptable account of how the decision-maker's subjectivity could (indeed must) come into play in all

forms of practical decision-making. Section IV complicates matters further by arguing that certain moral virtues are necessary conditions for the possession of intellectual virtues (or at the very least of one intellectual virtue, namely, practical wisdom). In section V, I move back to the specific context of legal reasoning to contrast my picture against of legal decision-making against a rival picture and conclude by indicating a few peculiarities of the use of practical wisdom in contexts of legal decision-making.

I – Virtues, Mere Skills and Legal Reasoning

Let me start by clarifying what I mean by “virtue”: virtue is a settled disposition or *habitus* that allows you to do, perceive or think certain things effortlessly and intelligently (McCabe 2008:56). As such, they are (a) subjective traits that include (b) a motivational element, since they are inclinations to react to certain stimuli (c) a perceptive element, that is to say, a capacity to see something as something, or as Wittgenstein would put it, a capacity for aspect-seeing⁵. This perception should not be necessarily taken to be a moment of moral clarity or insight (a divination of the right answer), but could take the form of, for instance, a puzzlement that leads to further investigation on the matter. In that case, the “act” that I am motivated to perform by the perception is to investigate beyond appearances, to leave my intellectual comfort zone. That perceptive element, present in all moral virtues is, of course, a virtue on its own right, namely the intellectual virtue of practical wisdom (*phronesis*, *prudentia*).⁶ Certain feelings will also be connected to virtues (MacIntyre 1980:149), such as pleasure, regret or guilt. Finally, virtues enable its possessor to achieve a good life, not simply as means, but as integral parts of that good life (MacIntyre 1980:148-9).

Let me just add the caveat that this analysis of virtue should not be taken to imply that the motivational, perceptive and emotional aspect of virtue can be understood in isolation.

⁵ Discussed at length in section xi of part II of Wittgenstein 1958:193-229

⁶ Aristotle 1984:1748 and 1862, i.e. *Nicomachean Ethics* 1106b36 and 1178a18. For further explanation see Aubenque 1963: 39-40.

Quite the contrary: what makes them part of a single virtue (say courage) is the ways in which they interact and contribute to a final result.

The definition presented above is not completely innocent, in the sense that the aspects of virtue brought to the fore by it will play a role in my account of the particular virtues of legal decision-makers. But there is something missing in it, at least as far as classical accounts of what a virtue is are concerned. In my brief explanation of virtue, I have not discussed its *causa finalis*. The reason for that omission is the fact that I need to provide a more extensive explanation of it. Classical virtue ethics often distinguishes between technique and virtue on the ground that a mere technique is directed towards the excellence of the thing produced (in the way blacksmithing excellence is realized in a sword or a fine piece of jewellery), while virtue is directed towards the excellence of the producer. In McCabe's words:

‘So while a skill or a technique is directed to the excellence of the thing produced, a virtue is directed to the excellence of the producer (the development of good or bad dispositions of this kind, virtues or vices, is the development of a self).’ (McCabe 2008:57)

In apparent contradiction to that, my main contention in this article is that virtues are necessary conditions to achieve excellence not in the decision maker, but in the world beyond the self. What is relevant in relation to them, from the point of view of my argument is that they allow the world to be transformed in a particular way (through the decision taken by the legal decision-maker), not simply that the decision-maker becomes a better person.

This apparent contradiction could be explained away by arguing that although virtues are focused on self-improvement, they can also be, in a way that is accidental to their own nature, a necessary condition for appropriate legal decision-making. However, some problems raised by the distinction technique/virtue still persist. For starters, it would appear that, in certain situations, the value of self-improvement would be at odds with the external

benefit that might be generated by the action. I have argued elsewhere that public agents have less room for the exercise (and, hence, for the development) of certain virtues when compared with agents who are not bound by public office⁷. Think also of a doctor who allows himself to be deeply affected by the suffering of her patients. She might find herself unable to make certain decisions or to perform certain procedures.

The way out of this tension is to add another element to the conception of virtue exposed above. Many, if not all, virtues are essentially other-regarding. What that means is that all those forms of perception, motivation and feeling that constitute a virtue are aspects of the way in which the self relates to others. They not simply express, but truly constitute forms of recognition of those others *as* possessing a particular sort of value. If what the self is, she is in relation to others, it follows that her self-perfection is a *relational* perfection. Incidentally, this is an essential part of what is meant by saying that humans are *political*. Now that relationship finds its objective expression in many forms of communal living, first and foremost of which is a community's law. So, it is not just a happy coincidence that certain virtues might help a person to achieve excellence while also being essential for the appropriate discharge of that person's role as a legal decision-maker. There is an essential connection between the two "roles" that virtue plays in this case: it is only a perfection of the self because it helps the decision-maker to relate appropriately with another member of the community⁸. Granted, this does not eliminate the tension between self-improvement and appropriate exercise of a public role: it might still be the case that my ability to relate to others through law prevents me from developing other character traits that would be desirable to develop. However, because there is a direct self-improvement gain in learning to relate

⁷ In virtue of a more stringent requirement on impartiality that imposes itself to public agents, they are morally obliged to reason their way into their decisions (if that is at all possible in the concrete circumstances), in a way that might preclude them from developing the appropriate degree of spontaneity. For a complete argument see Michelon 2006a:59-83.

⁸ Indeed, in Aristotle's *Nicomachean Ethics*, the key to understand justice (and law) is to locate it in a relation with others (e.g. in 1130b1, Aristotle, 1984:1784).

legally to others, I am not simply sacrificing my self-improvement to the benefit of others when I exercise the virtues necessary to relate to them in such way.

A second problem arises from the technique/virtue distinction in the context of legal decision-making: if legal decision-making made virtuously improves the self that makes it, wouldn't other people who are not public officials directly in charge of legal decision-making miss out on a key form of self-development and improvement? I believe not. We do not relate to each other legally only through judges. There is probably more legal interaction in one day of someone's life (most of which are just a result of settled dispositions) than there are cases decided in court every year. Although judges are indeed the paradigmatic legal decision-makers, they are obviously not the only ones and, arguably, those virtues I am going to try and discuss in sections III and IV are also part of the engagement of other members of the community with each other through law.

To conclude: virtues are subjective dispositions perceive and act, which are accompanied by feelings and are intrinsically connected to the way in which we relate (recognize) to each other. Most, if not all of them, are other-regarding and are directly connected to our recognition of alterity.

II – The frontiers between subjective and objective.

Defending the theses that the possession of a certain moral character is a necessary condition for success in legal reasoning and legal decision-making and that, consequently, the latter are not simply techniques that could be mastered with sufficient intellectual effort by mostly everyone with the appropriate intellectual investment, raises an immediate problem. It would seem that appropriate legal decision-making is subjective in a strong sense. Nowadays, most theorists would agree that legal decision-making is subjective in a weak sense. They might do

so by employing a distinction between “discovery” and “justification”. As Wasserstrom put it:

‘One kind of question asks about the manner in which a decision or conclusion was reached; the other inquires whether a given decision or conclusion is justifiable. That is to say, a person who examines a decision process may want to know about the factors that led to or produced the conclusion; he may also be interested in the manner in which the conclusion was to be justified.’ (Wasserstrom 1961:25)

That distinction allows the theorist to admit that decisions reached by legal decision-makers are subjective, but they sustain that the justification process can be understood objectively⁹. In that way, objectivity is preserved and subjectivity in legal decision-making is explained away. It is even possible to accept, in this way, that it is an asset to have virtuous judges, after all, the “discovery” of the right legal decision would be made easier if we have judges gifted with a certain moral perception. But discovery is accidental to legal reasoning, while justification is not. What I want to put forward here is an account of how the possession of certain virtues might be plausibly conceived a necessary condition for justification to be carried out appropriately.

Another way to accept subjectivity in a weak sense into legal decision-making is defended by Dworkin, who claims that subjectivity in the assessment of constitutional matters is unavoidable (Dworkin 2003:8). However, what Dworkin considers to be the unavoidable subjectivity of legal decision-making is very narrow: it comprises only principled positions on matters that judges hold on issues of political morality (Dworkin 2003:11). However, there is much more to subjectivity in legal decision-making than the use of personal moral conviction on matters of political morality by judges. In order to understand how possessing certain character traits, and not only upholding certain moral

⁹ See MacCormick 1978:15, where he defends that “[t]he process which is worth studying is the process of argumentation as a process of justification”.

opinions is of central importance to legal decision-making, let me first identify the conception of subjectivity that I believe is at the roots of our discomfort with accepting a greater role for subjectivity in legal decision-making.

There are two radically different ways of conceiving what differentiates subjectivity and objectivity, namely the ‘topological’ and ‘relational’ conceptions. According to the topological conception, subjectivity is identified as a stage where events occur (Kenny 1966:352-353). Feelings, thoughts, sensations, the will and other “mental events” happen in the inner world, which is opposed to the external world, where objective happenings take place. In the topological conception, the total world branches out into two separate worlds, which are partially insulated from one another: the subjective and objective worlds. The separation is carried out by means of a simple procedure: first one identifies certain kinds of events and, second, following certain criteria, those events are assigned to one of those two worlds.

This brief presentation of the topological concepts of “mind” and “external world” glosses over the many different, and sometimes opposing, conceptions of them defended (and sometimes assumed) by philosophers. As an example, think of how Descartes and Galileo would separate internal from external events on the basis that external events could be thoroughly described in terms of the so called “primary qualities”, while internal events would have to be described in terms of “secondary qualities”¹⁰. However, for Descartes, primary qualities are identified by the joint application of three criteria (detectability by more than one sense, possibility of being imagined clearly and distinctively and measurability), while Galileo only offers one criterion (impossibility of conceiving a material substance

¹⁰The terminology of primary and secondary qualities is not Cartesian (cf. Hacker 1991:10), but it was already in use in the XVII century (e. g. by Boyle) and it was philosophically current in Locke and Hume. The expressions then gained a philosophical course that lasts until now (e.g. Hacker 1991: passim and Putnam 1992: 82 ff).

without the particular quality)¹¹. In the standard interpretation of Kant, his take on the issue of the objective/subjective divide was also constructed along the lines of a difference between primary and secondary qualities¹². While the noumenal world is unknowable, we can use our reason to make sense of the phenomena that we register always in terms of secondary qualities. Our knowledge of the noumenal world is, for the most part, precluded¹³.

However, what matters to me here is not so much what separates Descartes, Galileo and Kant, but what unites them: the mind is a place where events occur, as much as the external world is a place where other sorts of events occur (for Descartes and Galileo, physical events, for Kant, for the most part, unknowable events).

For our purposes, the most important feature attached to this topological separation of the internal (subjective) realm and external (objective) realm is the ensuing thesis that the mind is better known than the external world (in its paradigmatic Cartesian formulation, “the mind is better known than the body”¹⁴). That makes one’s mind immediately known to oneself, while making it completely opaque to everyone else. All subjective events, ranging from emotions to perceptions, from sensations to beliefs (including moral beliefs), are inscrutable to everyone else. It is impossible to know whether someone is acting on moral principle or on self-interest, if one’s correct action was just a lucky guess or a result of considered judgement. If that is the conception of subjectivity that dominates one’s landscape it is easy to see why the *rule of men* would strike so much horror on both on the political philosopher and on the citizen: if there is no possibility of knowing what happens in other minds, there is no possibility of trusting them. A proper understanding of the constructive (indeed indispensable) role that subjectivity and, in particular, virtues, might play in legal

¹¹ For Galileo, see Galileo 1960: 28; for Descartes see summary in Hacker: 1991:11.

¹² This standard interpretation of Kant’s critical philosophy is sketched by Henry Alison, who proceeds to attack it. See Alison 1983: 3-10.

¹³ Although not in relation to moral and legal issues, as it is explicitly stated, for instance, in the Groundwork of the Metaphysics of Morals, 4:451-454, in Kant 1996:98-100.

¹⁴ Which is, of course, the subject of the second meditation, Descartes 1973: 23.

decision-making is dependent on the viability of another conception of subjectivity and of its relation to the objective world. I believe that the relational conception of subjectivity can provide just that.

A relational conception of subjectivity would see the former not as referring to a place (with a specific epistemological status) where certain kinds of events occur, but as referring collectively to a number of ways in which a person might relate to the world. If we compare the Cartesian concept of “mind” with the classical concepts of *dianoia*¹⁵ or *cogitatio*¹⁶, it becomes clear that the latter express an ability to understand, that is to say, to engage in a particular way with the world while the former, as I said above, is a stage where emotions, the will, mental images, sensation and thought happen (Kenny 1968: 352-353).

If subjectivity is a generic name for ways in which we can relate to the world, whether of not reliance on certain subjective features of the public decision-maker is a good thing might depend on which sorts of ways of relating to the world we are talking about. In a topological conception of subjectivity, the primary relationship between the internal world and the external world would have to be conceived as a causal connection between the internal event (the decision-maker’s will, or prejudice, or personal interest, or moral ideal) and the external action. And that relationship might seem to describe appropriately situations in which for instance, one’s personal interest motivates her to do something. Indeed, this seems to be the kind of scenario that the ideal of the rule of law primarily opposes. Also, the idea that public agents are subject to a heightened requirement of impartiality is at its most convincing when placed in such contexts.

What a relational conception of subjectivity brings to this picture is a charge of oversimplification: beside the situation described above, there are also other forms of

¹⁵An example of this is the stoic use of *dianoia* to refer to the part of the soul that apprehends objects in the world, cf. Pereira 1992: 152-153.

¹⁶A brief comparison between the scholastic and the Cartesian uses of the word *cogitatio* can be found in Kenny 1968: 352 ff.

relationship between the person and the world that cannot be described as a causal connection between an inscrutable internal event and an action. A more complex view of the relationship between subjectivity and objectivity would help understand the different ways in which subjectivity can come into play in legal decision-making.¹⁷

III – Practical Wisdom and Perception

Let me start by stating my next claim in brief: practical wisdom (*Phronesis, Prudentia*) is the way practical decision-makers can face up to the difficulties presented above by providing a blueprint of an appropriate relationship between subjectivity and objectivity in contexts of decision-making, including legal decision-making. Before unpacking this claim, let me just acknowledge how irritating is the all too common strategy of appealing to Practical Wisdom as an explanation every time the theorist encounters an apparently insurmountable difficulty in explaining practical reason. Appeals to Practical Wisdom often take to form of appeals to a mysterious form of insight that allows the decision-maker to divine the answer to a difficult practical quandary. Certain features of classical accounts of practical wisdom might add to the confusion, if they are stated outside the context in which they make sense. Indeed, Aristotle's opinion that the *Phronimos* decision is the *criterion* for correctness¹⁸, if put outside its proper context, seems to be a confirmation of the worst fears of those who are afraid of accepting subjectivity in public decision-making.

I would like to think that my use of Practical Wisdom would not leave the aftertaste of an appeal to something that is beyond all rational accounts. Indeed, it seems to me that we can have a fairly straightforward and informative account of Practical Wisdom and of its role

¹⁷ This conception of subjectivity is part of a philosophical anthropology in which the subject transcends itself by coming into contact with the world and then returning to itself, which might be called a anthropology of exodus (thanks to LF Barzotto for that metaphor).

¹⁸ In the above mentioned passage of the *Nicomachean Ethics* (1106b36), Aristotle affirms that the just mean is determined by the right reason which is, in turn, defined by reference to the *phronimos* (Aristotle 1984:1748). For an enlightening discussion of the *phronimos* as criterion, see Aubenque 1963:33-41.

in legal decision-making. Moreover, I believe that such account would not necessarily lead to a normative procedure that would (in my view) explain away the very point of needing to appeal to it. That, I believe, is the insufficiency of methodological accounts of practical wisdom such as those provided by Klaus Günther and Neil MacCormick¹⁹.

The first element of an informative account of practical wisdom is the fact that it is not a single faculty, skill, ability or form of perception, but a bundle of those. The second is the understanding that what holds this bundle together in a complex division of labour is the task of acquiring knowledge (in a qualified sense) about particulars. With that in mind, I move on to try to explain how this objective might be achieved, what the constitutive parts of practical wisdom's complex bundle are and how the division of labour between those constitutive parts is structured.

In the philosophical tradition to which practical wisdom is a central concept, there has always been an apparent uneasiness between two aspects of it. On the one hand, practical wisdom is often said to be the ability to choose the right means to a particular end²⁰. This aspect of practical wisdom is often related to its intrinsic connection with deliberation. On the other hand, practical wisdom is said to be a form of perception, a capacity to see things in a particular way. But why would the perceptive side of prudence be restricted to the search for the appropriate means? Why couldn't it also be about ends? Is not the relationship between means and ends too messy to ground any clear distinctions between kinds of intellectual virtue? More generally, what is the relationship between the two aspects of practical wisdom? Is there an internal connection between them, or are those loosely connected features of a makeshift concept designed to explain too much? Those questions stem from a misunderstanding of practical wisdom that can be easily dispelled by explaining what it means in a theory of deliberation.

¹⁹ See the discussion below, in section V.

²⁰ See the *Nicomachean Ethics* at 1144a8 (Aristotle 1984:1807); also, *Summa Theologiae* 2a2ae question 47, article 6 (Aquinas 1974:23).

The best place to start to explain this is to flesh out what is meant by the means-end aspect of practical wisdom. The “ends” to which practical wisdom finds the means are not established by a whim or temporary fluctuation of the will. They are directly connected with what the agent cares deeply about, that is to say, to the settled dispositions that make up one’s character, that are constitutive of her identity. Those ends are both subjectively possessed and relatively stable and they point towards a division of labour between practical wisdom, as an intellectual virtue, and the agent’s moral virtues. Practical wisdom is conceptually connected to moral virtue in such a way that, if the particular skills/abilities/forms of perception that would normally constitute practical wisdom are used to help implement a vicious preference by the agent, those skills would simply part of the intellectual vice of cunning. For reasons I shall present later, I believe this distinction not to be *ad hoc* (see e.g. MacIntyre 1985: 154-5).

In order to understand how deliberation connects that conception of practical wisdom as providing means with practical wisdom as perception, let me also make a few clarifications on the latter. Practical wisdom is not just any form of perception, but a perception of something *as something*. For both Aristotle and Aquinas (with whom I wholeheartedly agree in this matter), sense data does not come to us as streams of raw data to be organized by our reasoning capacities. Our senses see the data streams *as something* already. When we look at a tiger we do not see a certain amount of orangeness and blackness, but a tiger. For Aquinas, that is because we have inner senses that organize data streams into *gestalts*, totalities of meaning (McCabe 2008:123-127). Those four inner senses (*communis*, *imaginatio*, *aestimativus*²¹ and sense-memory) are an integral part of our sensibility and are conditions for us to be able to relate to the particularities of the world. Our reasoning capacities, being linguistic in nature, are necessarily universalistic and have an intrinsic limitation in dealing with particulars. We learn about particulars through our senses

²¹ In humans, the *aestimativa* is called by Aquinas *cogitativa*, in order to emphasize the capacity that humans have to acquire their *aestimativa* by comparisons (and not only by instinct, as it occurs in other animals).

(including, and crucially, through our inner senses), which allow us to recognize in a particular data stream something (or things).

Now, one of the crucial aspects of those inner senses is that they are partly innate and partly acquired. In order to make the interplay between innate and acquired sensibility clearer, let me briefly sketch how the inner senses work according to Aquinas²². The first inner sense is *sensus communis*, which refers to our ability to form gestalts from sense data. When I see the tiger and not only patches of colour, that is the working of my *sensus communis*, which is partly shared by ourselves and other superior animals, and that is partly innate. That coordination of all the data streams flowing in from our senses into a common totality is the work of this particular inner sense. This capacity is not entirely passive, for the subject seeks sense in the data stream and in seeking sense (i.e. to see the data input *as something*) we need to rely on a basic inherited structure. We are not restricted to it, though. Through habit and experience, including the reflexive experience of language and reasoning, we can build on that inherited basis by using and contributing to the resources of the culture we are immersed in. However, this reasoning would not be possible if we could not retain our gestalts. Neither would story-telling, lying, telling jokes and other activities in which those gestalts feature in the absence of direct sense data. According to Aquinas, the job of retaining those gestalts formed by the *sensus communis* is performed by another inner sense, that of *imaginatio*. Part of that sense of the totality of an object is a certain preliminary idea of how that object relates to the subject herself. Both humans and other superior animals assess the meaning of the gestalt formed by the *sensus communis* for them. This sort of preliminary assessment is an integral part of our experience of the object, not of any reasoning. To use a common example, the lamb that runs away from the wolf is not making the assessment as a result of any reasoning, but simply because it perceives the wolf *as dangerous*. This again

²² What follows is a sketch of the relatively brief discussion in *Summa Theologiae* 1a, question 78, article 4 (Aquinas 1970:134-143)

might be either hardwired in our biological existence (as my perfectly normal fear of highs seems to be) or acquired. If I stick my hand in the fire, fire might come to mean “dangerous to touch” for me. This evaluation is performed by my third inner sense, the *aestimativus*. Our fourth inner sense is analogous to our *imaginatio* and refers to our capacity to retain these assessments for future use. For lack of a better name to it, let us call it, following McCabe, sense-memory.

What the structure of these four inner senses brings out is a more complex theory of perception (than, say, Hume’s) which gives a convincing explanation of how our perceptive capacities can evolve by means of an interaction between agent and environment. In this account, our senses learn as much as our reasoning capacities. Indeed, they can even store certain achievements of our reasoning capacities.

This perceptive capacity to see data streams *as-something* is directly connected to what Wittgenstein called a form of life. The concept is used by Wittgenstein to explain the embeddedness of our linguistic criteria in certain complex form of interaction between individuals. As Cavell puts it:

That on the whole we do [project words we have learned in some contexts into further contexts] is a matter of our sharing routes of interest and feeling, modes of response, senses of humour and of significance and of fulfilment, of what is outrageous, of what is similar to what else, what is a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation - all the whirl of organism Wittgenstein calls ‘forms of life’
(Cavell 1969:52)

Now, an important part of that form of life is a capacity for appropriate aspect-seeing. The fact that we concur in seeing tigers and wolves when the appropriate sense data hits our inner senses means we share a way to relate to the world. Participation on the form of life that

is a condition for *logos* (discourse) comprehends a biological element and an ethnological element (Cavell 1995:158). The ethnological element (which is very salient in Wittgenstein's own work) might help with relatively simple operations like recognizing certain sorts of objects as part of a social practice (think of the Lilliputians trying to describe Gulliver's watch without partaking in the western conventions of time-mapping), but it might also help to identify morally relevant aspects of reality such as certain forms of human need and suffering. The latter are the most relevant in our quest to provide a workable conception of practical wisdom for legal decision-makers. How we acquire the ability of perceiving those aspects of the social reality (aspects that might be sometimes hidden even from the agents) is a complex matter. Aristotle famously thought that virtue is acquired through experience, through embedding oneself in the world (including the social world) or, in Wittgenstein's jargon, to insert oneself in a form of life. But experience is a vague word that needs specification and I shall come back to that later on in this paper. For now, let me try to pull the strings together and explain how the "sense-perception" aspect of practical wisdom might fit with its "selection of means" aspect.

The key to understand this is in a crucial difference between practical syllogism and logical syllogism. If a logical syllogism is valid, the conclusion flows *necessarily* from the premises. By 'necessarily', I mean that no new piece of information could possibly upset the flow from major premise to conclusion. Conversely, a perfectly acceptable practical syllogism is vulnerable to new information and, indeed, the practice of identifying relevant information and pitching it against an acceptable practical syllogism is a central feature of deliberation. Think of the following example:

Major premise: It is good to punish people that kill others as a result of their negligent
behaviour

Minor premise: By imprisoning X for 3 years, I will be punishing him for behaving negligently and, as a result, having killed Y

Conclusion: X should be imprisoned.

In this particular argument, the end is set by the major premise, the one that, as we said above, shows the kind of person I am. The minor premise introduces a means to achieve the end established in the major premise and the conclusion point to an action that should be performed. The conclusion seems to be perfectly acceptable, given the premises. But let me add a further element: lets suppose that X happens to be Y's father. Now other factors come into play for the decision-maker, the understanding of the pain of loosing a child; the pain caused by the knowledge that the child was killed by one's own fault. The perception of that pain, that most humans would understand upon being told about the relationship between X and Y would be very likely to bring considerations of appropriate proportional punishment to bear on the case and might show that three years imprisonment is too harsh a punishment and that the father either should have a shorter period of incarceration or else, simply be let go free (as it happens, I believe, in most contemporary legal systems). The perception of the father's pain is a key factor in determining the right means to achieve the putative end.

In this simple picture (which I am going to make slightly more complex bellow), it is clear how the means-end and the perceptive aspects of prudence might intersect. Perception of relevant factors that are not already factored into the practical syllogism would potentially destabilize the argument and conduct to the opposite conclusion (which, in the practical syllogism, is always an action).

Now let me complicate matters further. Think of the following argument:

Major Premise: An equal distribution of resources available in a particular social group among the citizenry is a good.

Minor premise: In this particular society, taxation on those who have more than their equal share of the resources and allocation of that revenue to individuals in the form of a monetary compensation proportional to each individual's claim to be given an equal share is a way to get to an equal distribution of resources available

Conclusion: it is good to institute in this particular society forms of taxation on those who have more than their equal share of the resources and allocation of that revenue to individuals in the form of a monetary compensation proportional to each individual's claim to be given an equal share.

This sort argument can be challenged in two different ways. On the one hand, one might attack the major premise by arguing that equal social distribution of resources is not a worthy objective or it is only an objective subject to some conditions. That sort of challenge is theoretical, in the sense that it attacks the universal conception of the good that the decision-maker is departing from. If the challenge is successful, the end of the decision-maker would change and, consequently, the decision-maker himself would be partly transformed. Another way in which the argument could be challenged would be to point out that the system of money transfers from individual to individual is not as good at bringing about equality of distribution of resources as a system of public provision of services to all the citizenry (say, an universal health service system). It might be argued that, say, universal provision of services reinforces the sense that all citizens are on the same boat that that they should care about the suffering of others, at least to some extent and that, in turn, would make equality in the distribution of resources more likely to be achieved. If this challenge is successful, the decision-maker is enlightened as to how the world works and about how to bring about the ends he so much believes in, but there is no further (necessary) transformation of the self.

However, the dynamics of rational decision-making and deliberation is not that neat. Even if we accept a conceptual separation between arguments about ends and means, actual processes of decision-making are messier in two related senses: (a) sometimes arguments about means trigger a need for theoretical reflection. In my example above, the decision-maker's deliberation might lead her to consider whether social solidarity is not an end in itself that she should strive for. This consideration, in turn, would call into question the end she initially thought important to pursue (equality) and how it might articulate with the end of reinforcing social solidarity. Secondly (b), it is also a means to bring other ends that might be already part of the decision-maker's subjectivity but that were lurking in the background. As Aristotle and Aquinas were deeply aware, human good is rather complex and being able to perceive which aspects of the situation call into question each goods is a considerable deliberative achievement.

In such contexts the sort of perception of totalities needed is rather complex and depends on our ability of stocking considerable numbers of complex and interlocking *gestalts* in our *imaginatio* and sense-memory. That aspect of our subjectivity is build up in a number of different ways, all of which are often brought together within a slightly vague conception of experience. Although I do not have the space to provide a comprehensive account of *phronesis*-building experience here, it is important for my argument to identify at least a few of its main sources. In the first place, one acquires certain relevant categories by relating in a particular way to the events in one's life. Loosing a loved child will bring deep understanding of the suffering afflicting the killer in my first syllogism above. But, as Martha Nussbaum and others have pointed out, there are other ways to acquire a certain degree of understanding by being exposed (and relating in a particular way) to human artefacts, in particular stories (Nussbaum 1995: 4-10). Martha Nussbaum rightly points out that the novel's narrative structure and ordinariness of theme makes it a particularly effective way to acquire the

relevant subjective tools. But one should not underestimate other forms of story telling. Fairy tales, and the stereotypes that go with it, make up for the lack of subtlety and character construction by their somehow wider (perhaps sweeping) unities of meaning. Beside personally experienced events and stories stand practices of reasoning and arguing. Aristotle's claim that virtue is a creature of habit and not of argument does not mean that the latter has no role whatsoever to play in the acquisition of practical wisdom, but only that it must build on other forms of experience. Although reasoning cannot do all the work, it might usefully influence the configuration of our inner senses.

So, at least one aspect of our subjectivity, our sense-perception, is a key element in practical decision-making and, by implication, in legal decision-making. But that subjectivity is neither mysterious nor static. It grows with experience, that is to say, with particular forms of engagement between the subject and certain aspects of the world, such as events that happen in one's own life and the narration of stories both fictional and real. Living through those events and being exposed to those stories and arguments cannot *by itself*, bring any growth in moral perception. The subject needs to engage with those events and stories in a particular way. In other words, the subject must possess a particular set of virtues that allow her to engage appropriately with them.

In the next section, I discuss virtues that allow appropriate (i.e. *phronesis*-enhancing) engagement by the subject. Those might be called epistemic virtues since they allow for the development of an intellectual virtue (practical wisdom), but that should not obscure the fact that they might be aspects of more general moral virtues. The discussion is not meant to be exhaustive and, indeed, I believe that there might well be many epistemic virtues, which either allow or at least facilitate *phronesis*-building. But a brief explanation of the mechanism through which they contribute to the development of practical wisdom is in order.

IV – Virtues as conditions to practical wisdom.

In the past 30 years, epistemology's struggle with its inner demons has produced an unexpected upshot. From Ernest Sosa's seminal articles of the 70's and 80's to Roberts and Wood recent *Intellectual Virtues*, epistemologists have been essaying with the idea that subjective features (including certain virtues) hold at least one of the keys for a correct account of human knowledge²³. Now, practical wisdom, and the perceptual schemes outlined above that I take to be an important part of it, is itself a virtue. It is an epistemic virtue, not a moral virtue, but it is a virtue nevertheless. Moreover, as I have mentioned in my definition of virtue, it is an integral part of the possession of any virtue. However, that should not blind us to the fact that practical wisdom is complex and is more adequately described as a bundle of virtues, which might even include some moral virtues, or aspects thereof.

For all the novelty of the ways in which contemporary virtue epistemology flashes out those connections between virtue and knowledge, it must be acknowledged that the idea of specific virtues that are integral parts of broader intellectual virtues, in particular or practical wisdom, is not entirely new. Aquinas not only put forward a list of the constitutive elements of "prudencia", amongst which features openness to be taught and caution,²⁴ but he also offered clear evidence of previous work attempting to identify those constitutive parts.

I cannot offer a complete account of the constitutive parts of prudence here, but I would like to provide some clarification as to the mechanics of interaction between practical wisdom and those more specific "epistemic" virtues²⁵. I am not interested here on the relationship of those virtues to our ability to reason matters through or to build theories. My

²³ Although many virtue epistemologists use the word "virtue" in a broader sense than the one used in this paper. Some use it to refer to any sort of subjective perceptive perfection, including the accuracy of external senses (e.g. good eyesight).

²⁴ Although Aquinas includes caution not among the perceptive elements of prudence, but as one of the elements of its preceptive part (*Summa Theologiae* 2a2ae question 48, sole article, reply, in Aquinas 1974: 54-55).

²⁵ I use epistemic in brackets in order to call attention to the fact that some of those epistemic virtues are specifications of general moral virtues to specific contexts of knowledge acquisition, which is, in turn, conceived very broadly to encompass not only our true justified beliefs, but also the excitement of our perceptual schemes by particulars.

focus in practical wisdom leads me to focus on the relationship between the subject and the particularities of a given situation. The first and foremost role of epistemic virtues in relation to practical wisdom is to prevent what Roberts and Woods called “perceptual rigidity”²⁶ (Roberts R and Woods W J 2007:202-204).

By “perceptual rigidity”, I mean a failure of a subject’s perceptual framework to react appropriately to certain stimuli, that is to say, a kind of aspect-blindness. The result of this failure is at best the creation of an obstacle for a perceptual framework to change appropriately; at worst it makes this change impossible. It is worth keeping in sight what the stakes are here, to wit: the possibility of the subject improving the way in which she relates to the objective world.

Each of our perceptual frameworks generates for us a zone of conceptual clarity, within which stimuli are disposed along familiar conceptual lines. One should not expect a significant challenge to our conceptual framework from stimuli that sit comfortably within it. One of the ways (perhaps the most important) in which our perceptual framework might be challenged and transformed is to acknowledge that it proves to be useless to understand certain stimuli. Here, the challenge for the subject is, first of all, to be able to perceive the shortcoming of one’s own perceptual framework as it stands at a particular moment. The often-cited experiment run by Brunner and Postman serves to illustrate the point: subjects are invited to recognize playing cards shown to them. Anomalous cards (black hearts and red spades) are inserted in the deck with all the other regular cards. Subjects often failed to identify the anomalous cards, and classified them within the four familiar categories (red hearts and diamonds, black clubs and spades). What is interesting for my purposes is that some subjects did recognize the anomalous cards, the irritation in their perceptual framework, even though they had no previous concept of red spades or black hearts.

²⁶ Although I borrow their phrase here, the overlap between what I mean by it and what Roberts and Woods mean is only partial, given the fact that there is only partial coincidence between what I call perceptual scheme and what they call perception (or acquaintance).

I can get to perceive this uneasiness of my perceptual framework to cope with certain features of the particular situation because our perceptual framework does not generate only a comfort zone: it also creates a *peripheral conceptual perception*. We acquire our perceptual framework from experience (which I use here to encompass very basic sense-experience, complex forms of engagement with the world and with others and everything in between) and we do so by being presented with exemplars of the fact or object. We acquire our perceptual framework *in context*. Our peripheral conceptual perception is the ability to perceive something *relevantly* unusual in a new context on which we project our perceptual framework.

One's openness to be influenced by this peripheral perception varies from subject to subject and reacting appropriately to it (with neither over-reaction nor blindness) is a matter of possessing certain traits of character. We might call those traits of character "intellectual virtues". Roberts and Woods provide a number of good examples of intellectual failure that result from the possession of the wrong character inclinations by the subject. Some of those failures create blind spots in our perceptual framework. Take the example of dogmatism, that is to say, the "disposition to respond irrationally to oppositions to the belief [held]: anomalies, objections, evidence to the contrary, counterexamples, and the like." (Roberts, R and Woods W J 2007:195). Such persistent disposition of character would lead the subject to discount whatever threatens their perceptual comfort zone as irrelevant and, as a result, the subject would fail to carry out the necessary investigation of the perceptual anomaly.

Dogmatism is, of course, just one of many ways in which one's settled dispositions might thwart the evolution of one's perceptual framework. A subject might lack interest in investing the necessary energy, might lack the courage to pursue a line of inquiry that could potentially jeopardize one's life by implying the need for a certain kind of action, or might fail in a myriad of other ways.

An appropriate use of one's peripheral conceptual perception is, hence, dependent on the possession of certain character traits. If that use is a condition for the evolution of our perceptual framework, which is, in turn, a constitutive part of practical wisdom, we must conclude that practical wisdom is dependent on the possession of certain character traits.

V – Practical Wisdom in Legal Reasoning

There can be little doubt that practical wisdom is a key intellectual virtue for legal decision-makers as well. The alternative to this would be to offer a method in which those forms of subjective perception that are key elements of practical wisdom could be tamed within in legal contexts.

In the last few years, legal theorist's attempts to cope with the problem of bridging the gap between universals and particulars (which is, in the account provided, the key role of practical wisdom) in legal decision-making have generated theories that push practical wisdom to the periphery of decision-making. None of those theories denies that practical wisdom might be somehow useful, and indeed some of them are attempts to explain in methodological terms what practical wisdom consists of²⁷. However, it is not very clear that any of those theories truly engages with practical wisdom and often it seems to be considered simply an intuition, insight or divination of mysterious origin and dubious value. Indeed, the theory of perception that is a key element of a theory of practical wisdom is not thematized in those attempts that, by and large, seem to assume a modern conception of the subjective/objective divide and, consequently, of perception.

The most sophisticated such attempts are Neil MacCormick's and Klaus Günther's, in arguments that are, at their core, very similar. I have explained and outlined a critique of MacCormick's view elsewhere (Michelon 2006b) and I shall not reinstate that critique here in

²⁷ Klaus Günther, for instance, starts his section on the discourses of application with an attempt to connect them and the Aristotelian notion of *phronesis* (Günther 1993:171-201).

any detail. Nevertheless, it is worth outlining MacCormick's view in order to show how it fails to capture the perceptive aspect of practical wisdom as a means to bridge the gap between universals and particulars.

MacCormick starts by objecting to what he calls the intuitionist approach, according to which "we have the capacity to discern (to 'intuit') the factors in situations of choice that make a decision right or not wrong" (MacCormick 2005:84). So MacCormick's intuitionist judge has a capacity to single out the aspects of the case that are relevant. In order for it to make any sense, however, it is necessary to connect this intuition with a sentimental theory of moral perception that is heavily dependent on two universalistic criteria, namely, impartiality and full information.

Let me explain this sentimentalist/universalist approach. If intuitions are to be trusted at all, they have to be the expression of sentiments of resentment or contentment that the decision-maker might feel when faced with the particular situation. Those emotions can be felt either directly or sympathetically and, since the latter is an expression of the deep attachment we have to others, it is the key emotion for the perception of morally relevant aspects of particular cases. Now, it is clear that not any sympathetically felt emotions would do. Both Smith and MacCormick add further requisites for those emotions to help in perceiving relevant particularities. For MacCormick, the right moral sentiments require that the agent be (a) impartial and (b) fully informed about the situation (MacCormick 2005: 87-88). Here one can perceive the true depth of MacCormick's commitment to a deontological conception of ethics, since impartiality and full information are clearly the necessary conditions for correct norm-application. Indeed, it is not surprising that Günther, another deontologist, arrives at similar conclusions about his attempt to fit the idea of phronesis into discourse ethics through the introduction of a "discourse of application": if the key to success

in discourses of justification is universalization, the keys to success in discourses of application are impartiality and full-information.²⁸

Neither MacCormick nor Günther envisage the need for anything like the theory of practical wisdom outlined in the preceding sections and, in so far as they are willing to accept the need for *phronesis*, they would have it reduced to rational procedures and techniques of information gathering guided by the idea of impartiality. The active role of the decision maker's subjectivity and, in particular, of her perceptive framework, are not part of the basic structure of legal and moral decision-making: norms and methodology can cope with the most fundamental problem of decision-making, i.e. the connection between universals and particulars.

What I have outlined in the preceding sections is an attempt to show how the 'intuition' of relevance can be conceived as part of the subject's intellectual framework. If the picture presented above is correct, subjectivity is not inscrutably private and, as a result, there are ways of conceiving it that do not lead to the conclusion that *phronesis* is a mysterious form of divination that cannot be rationally understood or, importantly, improved. The understanding of how our inner senses operate and of how our perceptual framework might leave space for a peripheral conceptual perception allows us to understand subjectivity as a way to relate to the objective world, a way where we can pin our hopes for a more wholesome explanation of how we relate universals and particulars, law and facts.

I cannot here offer a full defence of the superiority of an approach to legal decision-making that is predicated on the possession of a perceptual (and, hence, subjective) conceptual framework that is an integral part of practical wisdom to a methodological-deontological approach to it. My aim was simply to defend the plausibility of the former.

²⁸ Günther (1993) explicitly refers to both requirements. The demand for full information is justified in pp. 229-239, while the general requirement of impartiality for appropriateness discourses is discussed throughout the book and, as a matter of fact, this is one of the books' main theses, as we can see on p. 203.

In doing so, I hope to be helping to strengthen the position of a certain approach to legal theory and the theory of legal decision-making that is in tune with the picture I put forward. Zenon Bankowski has, for many years now, insisted on the idea that good legal decision-makers develop something akin to a legal peripheral conceptual perception. According to him, the way in which legal decision-makers acquire that skill to ‘jump out of the law’ when appropriate is the experience of relentlessly applying the legal categories that frame their perceptual framework to numerous cases (e.g. in Bankowski 2001:104-108; 135). Learning the regular case of concept application would help the decision-maker to perceive an awkward element in the particular case and trigger a need to reflect upon the appropriateness of the conceptual “drawers” that make up one’s conceptual framework. It might be that it turns out to be a false alarm and that our perceptual framework needs no change. But it might be the start of a revision process that would reshape the way in which the subject relates to the world through legal concepts. I believe that the early Hart was onto something similar when he defended the thesis of the defeasibility of legal concepts (Hart 1948: 173 ff). If legal concepts are inherently defeasible, i.e., if no enumeration of the necessary and sufficient conditions for their application would be able to exclude the possibility of an extraneous, unexpected factor, excluding the application of the concept to a situation in which all the necessary and sufficient conditions obtained²⁹, it follows that we must need a way to spot that unexpected factor. A theory of legal decision-making as practical wisdom would fit the bill.

It is clear that legal decision-making is not simply to be subsumed under general practical wisdom. Any conception of law and legal decision-making that is any use for us must acknowledge the fact of positive law. Indeed, positive law heavily influences the perceptual framework of a legal decision-maker and, consequently, her perceptual peripheral

²⁹ For an enlightening discussion of Hart’s thesis of defeasibility, see Atria 2001 (specially pp 87-140)

zone is first and foremost (although not exclusively) a legal zone. Subjectivity is a form of engagement with the world that is not necessarily opaque to critical scrutiny and to improvement and, therefore, should not be thought of as a threat to the rule of law. If anything, it is a necessary condition to realize it.

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