The Evolution of Justice, Equity, and Equality

Practical Wisdom from the Past

Edited by Iwona Barwicka-Tylek,
Jan Halberda, and Maciej Mikuła

First published 2026

ISBN: 978-1-041-10253-3 (hbk)
ISBN: 978-1-041-10260-1 (pbk)
ISBN: 978-1-003-65413-1 (ebk)

Chapter 1

The Historian's Craft and Ethical Values. A Lesson from Aristotle

Iwona Barwicka-Tylek

DOI: 10.4324/9781003654131-2

Open Access of this chapter was financed by the ID.UJ Program at Faculty of Law and Administration of Jagiellonian University.

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

1 The Historian's Craft and Ethical Values. A Lesson from Aristotle

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1.1 Introduction

At first sight, it seems like historians and lawyers have much in common, and so legal history should be a welcome discipline at law schools. Marc Bloch, a French historian from the *Annales* school, observed that, even though the paths of a historian and a judge divide at some point of their intellectual journey, initially they proceed in a similar manner. Both must do their best to stay impartial and focus on the facts.[1] The method of historical inquiry "is basically a method of investigation, and secondarily a method of describing and interpreting the results of investigation"; therefore, "training in historical research has a peculiar value as pre-professional training for the law student."[2] What is more, since "[t]he law is notoriously a learned profession," historians can provide lawyers with "an appropriate erudition" and "legal history, when seriously considered, has been considered an alchemy for distilling legal principles."[3] Finally, as observed by Richard Posner: "Law is the most historically oriented [...] of the professions,"[4] which is at least partly due to its aspiration to become an autonomous discipline: "[t]o the extent that a field, whether it be music, mathematics, or law, is autonomous, developing in accordance with its internal laws, its current state will bear an organic relation to its previous states."[5]

By reading such quotes, legal historians might feel reassured that the law needs them. Every historian knows, however, that selectively chosen facts (in this case: sentences from different academic texts) reveal no truth on how things really are, unless they are presented against the whole background of other facts which coexist with them. It is enough to peruse the two articles I

1 Marc Bloch, *The Historian's Craft*, trans. P. Putnam (New York: Vintage Books, 1964), 139.
2 Laurence L. Howe, "Historical Method and Legal Education," *Bulletin of the American Association of University Professors* 36, no. 2 (1950): 349.
3 Daniel J. Boorstin, "Tradition and Method in Legal History," *Harvard Law Review* 54, no. 3 (1941): 424.
4 Richard A. Posner, "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," *University of Chicago Law Review* 67, no. 3 (2000): 573.
5 Posner, "Past-Dependency, Pragmatism, and Critique of History," 586.

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have just quoted to see how the picture changes. In each of these texts, there is a large dose of criticism of the usefulness of history – the ways it is being taught in law school, used in the education of lawyers, and, last and not least, used by legal professionals. For Posner, whose criticism of history is perhaps the most straightforward, the past-dependency of law makes the latter "suspicious of innovation, discontinuities, 'paradigm shifts,' and the energy and brashness of youth. These ingrained attitudes are obstacles to anyone who wants to reorient law in a more pragmatic direction."[6]

The important changes in epistemology of social sciences, which were initiated in the 20th century, have rejuvenated legal science and in a way pushed it in the direction expected by Posner. Legal philosophers and theorists seem to appreciate once again what he would perhaps categorise as "the brashness of youth": engagement, creativity, courage in seeking solutions to contemporary problems, and readiness to justify such solutions on ethical rather than merely utilitarian grounds. The question thus arises whether, under circumstances such as these, the distance between history and law is growing, justifying pushing legal history to the margins of jurisprudence and legal education, or perhaps some new grounds for their mutual affinity can be established.

I believe that the answer to the above question is yes: history still deserves to be treated seriously at law faculties. In this chapter, I refer to Aristotle's concept of human "political" nature (*politikon zoon*) and his concept of *phronesis* (*prudentia* in Latin – prudence, practical wisdom) to construct a perspective in which such an answer may be justified. I argue that history, although perhaps it is no longer a *magistra vitae*, deserves at least the name of *magistra prudentiae*.

1.2 Three Ways of Life

In the *Nicomachean Ethics*, Aristotle[7] identified three kinds of life: the contemplative, the political, and "the life of indulgence" that is focused on increasing pleasure.[8] Each of these kinds of life, he argued, requires having a specific kind of knowledge, and each of these kinds of knowledge has a distinct attitude towards time. In the case of the most perfect contemplative life, one needs knowledge of the universals, which are immutable. A contemplative philosopher (Plato was the most illustrative example) employs reason to attain the eternal metaphysical truth, which resides outside human history, as the latter is

6 Posner, "Past-Dependency, Pragmatism, and Critique of History," 573.

7 The literature on Aristotle is vast, and the interpretations of the concepts which are of primary interest here vary, often significantly. That is why I refer directly to Aristotle's works. A reader who is interested in a different and much more extensive interpretation may consult: C.D.C. Reeve, *Practices of Reason: Aristotle's Nicomachean Ethics* (New York: Oxford University Press, 1992).

8 Aristotle, *Nicomachean Ethics*, trans. C.D.C. Reeve (Indianapolis: Hackett Publishing, 2014), 5.

happening in the constantly changing material world, which consists of diverse particulars that often seem to contradict one another and tend to deteriorate with time, being replaced with new ones. It does not mean, however, that time is merely an obstacle to living a philosophical life. On the contrary, since every philosopher occupies a specific position in historical time (which for him is the present), seeking the truth naturally encourages him to look into the past, as there the origins of the truth are concealed. To reach the truth, one should, in fact, think backwards, as relying on the past it is easier to differentiate between the knowledge that is eternally valid and will remain true forever, and the knowledge whose validity is temporally and spatially limited. This way, living as the universal truth suggests, the philosopher becomes almost as self-sufficient as the gods, but the cost is separation from the present world of human affairs, in which his reason could accidentally be blinded by sensations and desires coming from his body.

Two other kinds of life are more challenging to differentiate. Both are active lives in the sense that they both require doing something in (and with) the world that consists of many things which "can be otherwise" and so they are "practical" things (*ta prakta* – things to be done)."[9] The shape and content of such things can be chosen to some extent, which makes the world of human affairs (human *praxis*) dynamic, changeable, and full of diversity. And since it is impossible to discuss any change without reference to time, it makes the human world sensitive to the multiple relationships between the past, the present, and the future, as without them it would be impossible to understand any change, let alone to introduce it deliberately.

The life of indulgence is the least developed, as it is in fact the animal life form, perception dependent, in which one's reason becomes the means to increase pleasure and to avoid pain. Since perception requires the presence of some object, such life's focus is first of all on the present and the knowledge that serves it best is productive knowledge (*poiesis*), focused on making things that help to satisfy particular needs (animals also have it: they make nests or dens, for example). Productive knowledge, explained Aristotle, is concerned "with crafting things and getting a theoretical grasp on how something may come to be that admits of being and of not being and whose starting point is in the producer and not in the product."[10] Although present-oriented, productive knowledge does not ignore the past as it draws on the already gathered experience that makes the whole process of production more efficient.

Both forms of life described so far are not in fact *human* in the full sense. Aristotle was known for his taste for moderation, and so it is no wonder that neither the god-like nor the animal-like extremes could satisfy him. In his view, the most *human* was the third kind of life, the political life, in which both the god-like and the animal-like capacities would be combined in such a manner

9 Aristotle, *Nicomachean Ethics*, 101–102.
10 Aristotle, *Nicomachean Ethics*, 101.

as to result in a qualitatively distinct and specific human nature. According to the famous Aristotelian definition of man, we are *zoa politika*, that is, animals "among whom some one work common to all is produced."[11] For the philosopher, it was the natural and universal aspect of individual human development to establish relationships with others at multiple levels, which results in creating many political[12] communities, the most important of which is a state. Once established, the state is prior to its parts (individual citizens),[13] but only insofar as it is a good state, a state in which our humanity, complex as it is because of its animal- and god-like elements, may flourish. The task of the state is to facilitate living together, but above of all the possibility of living well.[14] That is what makes ethical language (with concepts like justice and equality) an important part of political science.[15]

The state is, to a significant extent, an artificial product of *poiesis*. Because we possess reason, human productive capacity is greater than that of any other animal. We are capable not only of understanding nature, but also of imitating it in order to create new things, which are at least partly the products of the will of their producers. Acting collectively, we gain access to the experience of former generations and because of that our "theoretical grasp" improves with time, leading also to the professionalisation of productive activity. In the 21st century, we see much more clearly than Aristotle did how the present condition of the human world depends on past discoveries and inventions, including those which are now outdated and no longer in use. Observing these historical changes, the words "development" and "progress" come to mind almost automatically, and perhaps, as suggested, for instance, by Steven Pinker,[16] one should not avoid looking at human history from such an angle. Aristotle would have also agreed that human *praxis* – since it is "practical" (variable, full of new possibilities) – should improve rather than deteriorate. Yet, he would have advised caution in equating development or progress with our *poietical* achievements. This is because things produced (as diverse as computers, sushi, films, or laws) are merely the means to satisfy particular and present needs, so judging them we are inclined to take into account their short-term utility. Such judgements lack the deliberation and imagination necessary to make them ethical, long-term, and future-oriented judgements – to consider whether and how they could really contribute to the development of the most human ways of life.

There is also another, strictly political problem with the things produced. They have the potential to trigger emotions and desires of both those who

11 Aristotle, *Generation of Animals & History of Animals I, Parts of Animals I*, trans. C.D.C. Reeve (Indianapolis–Cambridge: Hackett Publishing, 2019), 5.

12 In the broad sense of producing, having something in common.

13 Aristotle, *Politics*, trans. C.D.C. Reeve (Indianapolis: Hackett Publishing, 1998), 4.

14 Aristotle, *Politics*, 81.

15 Aristotle, *Nicomachean Ethics*, 3.

16 Steve Pinker, *Enlightenment Now* (London: Penguin Books Ltd., 2019).

have them and those who don't have them. Their lack is painful, and so it triggers greed, which distorts the individual sense of justice.[17] Having something in abundance is no better. It encourages a life of indulgence and the pursuit of one's own private interests and new pleasures, instead of caring about the political community to remain "some one work common to all." The negative consequences include various conflicts and, finally, the weakening of communal bonds. Aristotle's master, Plato, also understood this basic problem, as both observed the worsening condition of Athenian democracy. Paradoxically, the more developed the communal political life (as is the case of democracy in which all citizens are expected to live as *zoa politika*), the more prone it seems to be to deterioration and corruption. If such processes are left unchecked, instead of bringing citizens closer together to facilitate *human* cooperation at multiple levels, they drive them further apart over time. This is detrimental not only for the whole community, but also for individual citizens, for whom it becomes more and more difficult to trust other people's actions and to respond in a trustworthy manner by acting towards the common good and respecting the ethical requirements of justice.

Plato's solution to the problem required reducing the influence of the "animal" properties of human nature upon the political community. He advocated limiting the free activity of individual citizens to performing assigned social functions, determined either by perfect contemplative philosophers (*The Republic*) or meticulous laws (*The Laws*). For Aristotle, this solution was unacceptable as any political unity thus achieved would be a miserable imitation of political cooperation[18] undeserving of the name. It is not the responsibility of a state to transform people into a kind of domesticated animals that merely behave as *zoa politika* because of some external motivations provided by the state. Ideally, they should really become individuals who are engaged in public actions and contribute consciously to the producing of "some one work common to all" since it would simply be a natural aspect of their own personal growth. The goal of such personal growth is to finally become a mature, and to a large extent unique, representative of humankind, and not merely a standardised product of a particular state.

To understand Aristotle's solution to the problem (in short: how to encourage individual citizens to become more human and to choose political life rather than a life of indulgence in spite of the fact that every state is focused on triggering first of all our productive capacities), it is necessary to underline his naturalist position. "Nature makes nothing pointlessly," he claimed, and since it endowed every human being not only with reason and speech, but also a "perception of good and bad, just and unjust, and the rest,"[19] each of us is at least potentially capable of making ethical judgements. This way an individual

17 Aristotle, *Nicomachean Ethics*, 78.
18 Aristotle, *Politics*, 27.
19 Aristotle, *Politics*, 4.

may consciously choose actions which are not only efficient according to productive standards, but also have a chance to be noticed and recognised as good with respect to the desired and universal ideal of truly human life. To achieve this, however, another kind of knowledge is necessary. Aristotle calls it *phronesis* (other historical names: *prudentia*, prudence, practical wisdom, practical reason).[20]

Unlike *poiesis*, which helps to make things which are "producible," *phronesis* refines the things "doable in action."[21] Introducing this differentiation, Aristotle seems to refer to a rather simple observation that there are "things" which appear only in action: they are inseparable from the acting individual. Courage, for instance, is not a producible thing. Admittedly, we may try to define what courage is in general,[22] but to demonstrate it (and thus to make it "a thing" that influences the world of *praxis*), there needs to be someone acting courageously. The same is true for justice[23] and many other "things," which are for Aristotle the virtues of character. It is important to emphasise that things "doable in action," just as "producible" things, are practical, which means that they "admit of being otherwise,"[24] and so they allow diversity and change of their particular manifestations.

Phronesis is itself wisdom doable in action: it is performed by individuals and can be observed in their actions only. For Aristotle, "action" is a very broad term that covers "everything that expresses the mental life, that reveals a rational personality."[25] Action is the outward manifestation of one's character in the presence of others, with the awareness that both the doer and the action are subject to evaluation. Therefore, it is important that the action be justifiable under particular circumstances as only then can it be approved as good. Consequently, Aristotle reaches the following conclusion: "It seems, then, to be characteristic of a practically wise person (*phronimos*) to be able to deliberate correctly about what is good and advantageous for himself, not partially (for example, about what sorts of things further health or further strength) but about what sorts of things further living well as a whole."[26]

20 The interpretation of *phronesis* offered here is derived directly from Aristotle's works. It goes without saying that the account of *phronesis* offered here is only one of many possible interpretations. This is due to the fact that Aristotle was deliberately vague (see: Aristotle, *Nicomachean Ethics*, 3) in presenting the concepts belonging to his practical philosophy, which is no wonder since his aim was to provide knowledge which would remain "practical" itself, inspire independent thinking and promote diversity. Readers interested in learning more about the concept of *phronesis* may start with: Robert Hariman, ed., *Prudence: Classical Virtue, Postmodern Practice* (University Park: Penn State University Press, 2003).

21 Aristotle, *Nicomachean Ethics*, 101.

22 Aristotle, *Nicomachean Ethics*, 29.

23 Aristotle, *Nicomachean Ethics*, 21.

24 Aristotle, *Nicomachean Ethics*, 101.

25 Samuel H. Butcher, *Aristotle's Theory of Poetry and Fine Art* (London: MacMillan and Co., 1932), 123.

26 Aristotle, *Nicomachean Ethics*, 101.

When attempting to conceptualise *phronesis*, it is important to keep in mind that, because of its direct relation to action, it encompasses the whole time spectrum: the past, the present, and the future. Every action occurs in the present, yet the external conditions under which it is undertaken are determined by the past. And so practical wisdom must be informed by past experience. Also, it must guide the mind towards the future as there is no point in deliberating upon things which have already happened.[27]

In fact, in the concept of *phronesis* there are two overlapping, hidden dimensions of time, and, moreover, they are supplemented with something that is timeless and universal. A good way to understand this may be to look at two allegorical representations of *phronesis-prudence*. The first one is Titian's painting known as *The Allegory of Prudence*,[28] in which one can see three male heads: a young one on the left side of the viewer, a mature one in the middle, and an old one on the right. Depending on whether one looks at the faces from left to right or right to left, the painting becomes a representation of history (the old past – the mature present – the young future), or the representation of individual human life (first youth, then maturity, then old age). One seldom thinks about it, but these two dimensions of time run in opposite directions. The historical future is forever young and full of many possibilities (it is "practical" according to Aristotle's standard), while the future of every individual is to become old. Consequently, we have a preference for tried-and-true routines and habits whose validity and efficiency have already been proved. Adapting and conforming to them, individuals become more and more skilful producers of their own private happiness. Yet, this success, if viewed from a wider, historical perspective, may be seen as disadvantageous. It slows down changes which are sometimes necessary for the historical future to be wiser, and to eliminate the errors inherited from the past. The concept of practical wisdom, if examined against the background of Titian's painting, also suggests that individuals may benefit from diverting their eyes from their private future (which is slowly becoming the historical past), and courageously imagining and acting on behalf of a good future for all of humanity. Doing that, they save their own youth, so to speak, as they constantly exercise capacities and features naturally associated with it: imagination, engagement, courage to act, the need for novelty and change, and the ethical sensitivity that makes them expect justice, freedom, and equality to be present in the world of human affairs.

The second image that reveals some essential aspects of *phronesis* can be found in Cesare Ripa's *Iconologia*, where Prudenza was shown as a woman

27 Aristotle, *Nicomachean Ethics*, 99–100.

28 The painting can be seen in the National Gallery in London; reproduction is available online. Accessed June 23, 2025. See: https://commons.wikimedia.org/wiki/Category:Allegory_of_Prudence_by_Titian.

with two faces (old and young),[29] which also suggests a kind of an exchange between the past and the future. Among the many attributes of prudence whose allegorical meanings are referenced by Ripa, there is a mirror, in which the young face looks (which is evidenced by the reflection on its surface). As Ripa explained, the mirror signifies that practical wisdom does not guide the actions of those who are unaware of and thus unable to correct their defects.[30] This confirms that prudence requires education that includes much more than providing expertise in this or that area (Aristotelian "theoretical grasps") and supplementing it with some trained routines and procedures (*techne*), which are crucial elements of *poiesis*. Such education should take into account human development and should also have formative value.

1.3 Crafts and *Phronimoi*

While eating chocolate may increase pleasure, eating too much sugar is not beneficial to humans in the long term. It is possible that a candy maker who discovers a cheaper way to make tasty chocolate will be praised as useful, and so will his productive knowledge. Nevertheless, such a producer lacks *phronesis*, and eventually this deficiency may result in a number of unexpected problems (medical, economic, psychological, etc.) in the wider society. To circumvent this, it is possible to implement legislation that reduces the risk by prohibiting certain actions (such as the use of harmful flavour enhancers). However, this is often done retrospectively, when the harm is already done and the negative consequences of certain practices become apparent. Furthermore, this approach to externally guide actions restricts the human components of *praxis* by limiting our freedom, imagination, and creativity, which are essential for deliberation and innovation.

The concept of *phronesis* introduces a novel perspective on the limitations of human activity. In this case, the limitation is not external but internal, as it depends on the natural human development process, in which it is the task of an individual to become a mature human being. The term "mature" in this context refers to an individual whose actions are adjusted to specific circumstances (which increases, but does not guarantee, their productive success). However, these actions also reveal a personality that seems to be the reliable embodiment of universal human nature. *Phronimoi* use all the capacities that make us human in a humane way, and thus in their actions it is possible to grasp the important "doable things" that we all have in common: human values, performed as virtues. This way they encourage others to cooperate rather than compete. The presence of *phronimoi* in society is invaluable, especially in areas where (and at times when) "things" produced tend to get too practical

29 Cesare Ripa, *Iconologia, ouero Descrittione d'imagini delle virtu', vitij, affetti, passioni humane, corpi celesti, mondo e sue parti* (Padova: Per Pietro Paolo Tozzi, 1611), 442.

30 Cesare Ripa, *Iconologia*, 441.

(variable), and the diversity of opinions as to what to produce and how grows, setting individuals and groups apart. "We also speak of people as practically wise in some area," adds Aristotle, "when they rationally calculate well about what furthers some excellent end, concerning which no craft exists."[31]

There are crafts in which the development of both *poiesis* and *phronesis* should matter. These are the crafts whose products have a direct impact on interpersonal relationships. Aristotle identified politics as the most significant of these crafts. Politics is first and foremost the exercise of power in a poietic manner, with the intention of producing a specific effect determined in advance. Nevertheless, those engaged in politics need more than poietic political *techne*. In order for good politics to be achieved, both citizens and politicians must possess a certain degree of practical knowledge. In the democracy known to Aristotle, citizens should perform their *phronesis* mainly through legislative activity.[32] With regard to politicians, the most exemplary democratic *phronimos* was Pericles.[33] As Aristotle makes clear,[34] it was largely due to Pericles that Athenian democracy was for a period of time a good democracy.[35]

The language of *phronesis* is also pertinent to the field of law. We do not expect a carpenter to produce chairs prudently and with an overt interest in the eventual prudence (or lack thereof) of his clients. This does not imply that chairs cannot be employed in public (political) action, or that such action cannot be judged ethically. In ancient Rome, for example, the curule seats (*sealle curules*) constituted an important element of the authority of the magistrates. At times, there were those who advocated the destruction of chairs when they perceived that this authority had been misused.[36] Nevertheless, regardless of the specific manner in which the chairs may be used in the realm of human *praxis*, a carpenter should not be accused of being an accomplice in doing injustice of any kind. The case of lawyers is different, though. Their productive activity cannot be separated from everyday practical life. The legal profession, being generally a craft, should facilitate human life, with its political and ethical dimensions.

It is, perhaps, no accident that many contemporary legal theorists prefer the term "jurisprudence" to legal science, and the often posed question is "whether legal theory represents a *prudentia* which engages in practical

31 Aristotle, *Nicomachean Ethics*, 101.

32 Aristotle, *Nicomachean Ethics*, 105.

33 Aristotle, *Nicomachean Ethics*, 102.

34 See: Aristotle, "Constitution of Athens," in *Aristotle's Politics. Writings from the Complete Works: Politics – Economics – Constitution of Athens*, ed. Jonathan Barnes, trans. F.G. Kenyon (Princeton–Oxford: Princeton University Press, 2016), 286.

35 See: Iwona Barwicka-Tylek, "Intricacies of Practical Wisdom: Or Why Would Aristotle Vote for Pericles Rather Than Lenin?," *Krakowskie Studia z Historii Państwa i Prawa* 11, no. 3 (2018): 324.

36 See: Cassius Dio, *Roman History, Volume III: Books 36–40*, trans. E. Cary and H.B. Foster (Cambridge, Mass.: Harvard University Press, 1914), 69.

accounts of law, or a *scientia* that studies objective facts about it."[37] The theoretical impulses to merely "observe the truth" (such is the original meaning of the Greek *theoreia*) are replaced by efforts to empathically support the world of *praxis*, also by elaborating on the common criteria of passing ethical and political judgements on the individual and collective actions undertaken. Diversity is viewed as natural and the unpredictability of human affairs is acknowledged. The initial fear that admitting that would result in extreme relativism and constructivism is at least partly assuaged, and a very Aristotelian taste for moderation seems to be spreading. Some researchers overtly admit that it is time for Aristotelian social science,[38] in which concepts like practical wisdom, *phronesis*, and prudence play an important role.[39]

In recent decades, some experts, including in the field of law, have argued[40] that lawyers need knowledge that is more than just productive and a language in which it could be expressed so it could be taught. In this language, ethical concepts (freedom, equality, justice, dignity, etc.) become the guiding principles for practical reasoning. The language must supplement the language of legal routines, as following such routines in an imprudent manner risks the debasement of community practices over time. Human *praxis* is in a state of constant change, and thus lawyers' activity should be time-sensitive in order to account for such changes and to respond to them in an active manner. This implies responding not merely as craftsmen, but as *zoa politika* who strive to contribute to a better (more human) future for all of us. As succinctly stated by Roscoe Pound, "[l]aw must be stable, and yet it cannot stand still."[41]

In contrast to the two other forms of knowledge, the nature of *phronesis* is not readily explicable. That is true of all of the Aristotelian middle terms, which are for him the most crucial. As a middle term, *phronesis* extends in both directions. It reaches particulars, just as *poiesis* does (it draws on – and manipulates – all that is perceptible, experiential, time-dependant). However, it also reaches universals, just as theoretical knowledge does. Consequently, *phronetic* action is a particular, individual conclusion[42] of practical reasoning that aims to overcome, or at least soothe, dialectical tensions between particularity and universality. It takes a lot of effort to reach and also to carry out such

37 Sean Coyle and George Pavlakos, *Jurisprudence or Legal Science?: A Debate about the Nature of Legal Theory* (Oxford: Hart Publishing, 2005), 2.

38 Stephen G. Salkever, "Aristotle's Social Science," *Political Theory* 9, no. 4 (1981): 479–508.

39 See: R. Andrew Sayer, *Why Things Matter to People: Social Science, Values and Ethical Life* (Cambridge–New York: Cambridge University Press, 2011); Bent Flyvbjerg, Todd Landman, and Sanford F. Schram, *Real Social Science: Applied Phronesis* (Cambridge–New York: Cambridge University Press, 2012).

40 See: Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1993).

41 Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan Co., 1923), 1.

42 Donald Davidson, *Truth, Language and History* (Oxford–New York: Oxford University Press/Clarendon Press, 2005), 280.

an original conclusion. No wonder that to become practically wise, individuals need to develop all the "equipment" they have as humans: perception, volition, engagement, imagination, virtue, reason, etc.

That is not all. *Phronimoi* provide examples of actions that fulfil the normative standard of being human. Any action of this kind is, and remains, risky and may thus be deemed imprudent. This is especially true since, according to Aristotle, "noble things and just things," as well as "good things," "admit so much difference and variability that they seem to exist by conventional law alone and not by nature."[43] That is why *phronimoi* must participate in the political and ethical dialogue on what is good. First, not only to enrich this dialogue with their own expertise, but also to gain better insight into the prevailing opinions to be able to choose an action that would probably be widely accepted as serving the common good under particular circumstances. There is one crucial inconvenience here. Increasing probability cannot be equated with certainty. Practically wise persons realise that errors are part and parcel of their *phronesis*. There may be multiple errors: in deliberation, in perception of a given situation, in adjusting the means to the ends, in specifying the right time – *kairos* – to take up the action, and others. Most of such errors are simply entangled in the inevitable particularity of acting. That is why each *phronimos* needs far-reaching ideals (some universals conceived as values) to orient oneself in life, and not to give up acting humanly when (productive) successes do not come right away.

Unfortunately, when there arises a discrepancy between an artificially produced world of human affairs and the requirements of human nature that is too great, success may never come. Under such circumstances any prudent action may pass unnoticed, judged as violating all too well-known routines or be rejected as not productive enough. Paradoxically, that is exactly the time when the lack of *phronesis* becomes not only an ethical, but also a political issue: the time when the sense of justice in society and trust in institutionalised communal practices diminishes.

1.4 "Triviality" of History?

The problem with providing a comprehensive account of *phronesis* is evident in Aristotle's practical philosophy. This is further compounded by the challenge of educating professionals from diverse fields in this rather unique competence. In fact, such an endeavour is arguably unfeasible, given that practical wisdom is more of an individual endeavour than the result of a specific training programme that would include some content-based knowledge and know-how.[44] Nevertheless, *phronesis* appears to be of significant importance

43 Aristotle, *Nicomachean Ethics*, 4.

44 A good example of this can be found in the second book of *Politics*, where Aristotle discusses a problem that is quite *phronetic*: whether and when to change the laws. After having examined

to Aristotle, related directly to the perspectives for the changes that would deserve to be classified as development, progress, and improvement. In a political community where there is room and encouragement for individuals to act as *phronimoi* (and not merely to fulfil their professional duties), it is easier for others to retain the ideal of humanity. This ideal, if treated *phronetically*, is not something that could ever be produced in a specified manner (*poietically*). It is a distant ideal that always lies in the future and should motivate individuals to grow personally as humans, thus also improving interpersonal relationships.

The lack of clarity surrounding the concept of *phronesis* should not be a reason to avoid discussing it or advocating it whenever the well-being of the existing political communities is at stake. Aristotle himself exemplified this approach, becoming a practical philosopher rather than merely a contemplative one. He felt compelled to present his opinions on politics and ethics, despite the fact that they would not be as indisputable as the theoretical (objective) truth. Furthermore, he acknowledged alternative, non-philosophical, approaches to becoming familiar with *phronesis*.

Since *phronesis* is action, to comprehend it, and thus become more familiarised with it, crafts and arts (both are poietic activities, as they offer specific products) which focus directly on presenting human actions could also help. History and poetry were two suitable candidates for this function. Cicero, an admirer of the Aristotelian concept, thanks to whom *phronesis* became *prudentia* in Latin, suggested that it was history one should trust, as it was, according to him, the "teacher of our lives" (*magistra vitae*)[45] precisely because it presented past actions and allowed for the analysis of all their aspects, both particular (time and space dependent) and universal (related to universal political and ethical ideals). Aristotle, however, held a different view. For him, poetry was the most appropriate medium for achieving this purpose.

Aristotle mentioned history only briefly and with a clear intention to praise poetry at its expense. Both history and poetry, he admitted, were interested in human affairs and performed actions. Yet, a historian speaks of things "that have happened." while a poet speaks "of the sort of things that might happen and possibilities that come from what is likely or necessary."[46] History, according to Aristotle, deals "with singular events yoked together merely by the time

several arguments in favour of and against legal innovations, Aristotle concludes: "therefore, we had better reserve the discussion of them to a more suitable occasion." The occasion did not come. Aristotle seems to understand that, although deliberation on problems like that is necessary, it is impossible even for a practical philosopher to provide an algorithmic, productive answer. The answer must be action, always undertaken by a particular doer, under conditions of uncertainty.

45 Marcus T. Cicero, *On the Ideal Orator*, trans. James M. May and Jakob Wisse (New York–Oxford: Oxford University Press, 2001), 133.

46 Aristotle, *Poetics*, trans. Joe Sachs (Newburyport: Focus Publishing/R. Pullins Co., 2011), 32.

of their occurrence,"[47] notices Thomas C. Powell. For this reason, historical knowledge is hardly *knowledge*. In accordance with the standard introduced by Aristotle, *knowledge* must be universal enough to be used to achieve some good, to allow living well.[48] The particularity of history precludes any possibility of universalisation. Consequently, the historian is a craftsman whose works are of use to an erudite person at best, one who enjoys entertaining others by citing curiosities found in the past. Such works do not contain anything that could enrich our cognizance of human affairs as they are and should be practiced.

Poetry is also a craft. The work of a poet is a product of his own making. But art, according to Aristotle, imitates nature. A poet who understands his craft properly is able to present his subjective narrative as a plot in which *human* action comes to the fore. Aristotle explained:

> A story is one, not, as some people suppose, if it is about one person, for many – countlessly many – things are incidental attributes of one person, with no unity taking in some of them. […] But Homer, just as he excelled in other respects, also seems to have recognized this beautifully, whether by art or by nature. For in making an *Odyssey*, he did not make it out of all the things that happened to the man […], things of which none was necessary or likely to happen because of another thing that happened, but the *Odyssey* is organized around one action of the sort we are speaking of.[49]

That is what makes poetry serious. Poetic narrative, though fictious, draws on human nature and so it is aimed at revealing some truth about human action as such. "It is what is universal, the sorts of things that a certain sort of person turns out to say or do as a result of what is likely or necessary, that poetry aims at, even though it puts names on people," stated Aristotle.[50] Offering *some* truth about human action, poetry encourages deliberation on human affairs and contributes to the improving of human *praxis*. What is of great significance, moving the imagination of the audience, poetry allows for a complete though passive experience, with its crucial emotional component, but without risk entailed in actually performing actions in reality, where painful mistakes cannot be undone. The aesthetic experience is *experience*, and according to Aristotle only an experienced person can hope to become practically wise.[51] It is impossible to gain enough experience only by acting by oneself. Not

47 Thomas C. Powell, "Why Aristotle Has No Philosophy of History," *History of Philosophy Quarterly* 4, no. 3 (1987): 346.
48 Aristotle, *Nicomachean Ethics*, 5.
49 Aristotle, *Poetics*, 31.
50 Aristotle, *Poetics*, 32.
51 Aristotle, *Nicomachean Ethics*, 105.

only would such experience be too modest, but also much too risky. Poetry, especially tragedies in the times of Aristotle, inspired thinking about what was possible and what was necessary without any personal risk. Following the plot, the audience observed the doer in an environment that was beyond his control and by observing him they got a chance to understand better what it meant to act and how different actions were received and judged. Aristotle insisted that narratives of this kind, though fictional, improve ethical and political judgement with the help of imagination. Not without significance is the sensual (emotional) element of the aesthetic experience, as cultivating appropriate emotions (including by "bleeding" them at the moment of *katharsis*) is important in the process of forming a mature (virtuous) character.

There are numerous parallels between Aristotle's account of history and the program of scientific history, which was developed by prominent German historians Barthold D. Niebuhr and Leopold von Ranke.[52] This program also shaped the emergence of legal history as an autonomous scientific discipline.[53] In the 19th century, the approach that Aristotle had previously criticised – the particularity of history – was embraced as a virtue. The sciences of that time rejected the metaphysical assumption that the immutable truth to be observed (*theoreia*) resides outside the material world. Instead of rational contemplation (Plato) and dialogical deliberation on what to choose from many possibilities (Aristotle's practical reasoning), an empirical investigation was advanced, and so history could become science easily – an idiographic science, but still a science. However, this scientific image of history is accused of being much too modest, or even misleading, in the present day. One of the most compelling arguments against this approach is directly Aristotelian in nature. When it comes to knowledge, history (and legal history) is deemed to be useless and impractical. The only thing it can teach us would be something akin to the following: "The past is a foreign country; they do things differently there."[54] Unless historians become poets, which is, again, an idea present in *Poetics*.[55]

There are historians who advocate joining the poetry side to make the past experience more serious and relevant for contemporary societies, and such trends have grown in importance ever since Hayden White overtly admitted that a historical narrative is close to literature: "stories in turn are made out of chronicles by […] 'emplotment.'"[56] The problem is, however, that poetry is no longer serious according to Aristotle's criteria. It does not provide any knowledge as it is not obliged to reach anything universal enough to anchor

52 Chris Lorenz, "Scientific Historiography," in *A Companion to the Philosophy of History and Historiography*, ed. Aviezer Tucker (Oxford: Blackwell Publishing 2009), 393.

53 Thomas Gil, "Leopold Ranke," in *A Companion to the Philosophy of History and Historiography*, ed. Avierez Tucker (Oxford: Blackwell Publishing 2009), 386.

54 Leslie P. Hartley, *The Go-Between* (New York: Alfred A. Knopf, 1953), n.p.

55 Aristotle, *Poetics*, 33.

56 In: Robert H. Canary, Kieran Egan, and Henry Kozicki, eds., *The Writing of History: Literary Form and Historical Understanding* (Madison: University of Wisconsin Press, 1978), 46.

particular narratives in some common ground of human (ethical) nature. And so, this new attitude often leads to attempts to satisfy the tastes of a particular audience.

The tendency to make the past useful in (and for) the present allows different individuals and groups to act backwards on history, with a clear intent to "consume" [57] it rather than learn from it. Such "consumption" of the freely chosen elements of the past results in "pluralising pasts,"[58] which often divides particular consumers of history, turning them into political competitors in the present. Each of such "pasts" is produced to satisfy the particular needs of the present "doers."

In the field of law, the poetisation (or rather "poietisation") of history is also possible. In his critique of the historical argument employed in the *Texas v Johnson* case (the "flag burning case"),[59] Calvin R. Massey demonstrates that it is not based on facts but becomes an "emotion-laden poetic fantasy" that "debases historical coin," as well as "cheapens the process of constitutional adjudication."[60] The same reasons for the criticism are tangible also in the words of Richard Posner: "the legal profession's use of history is a disguise that allows the profession to innovate without breaching judicial etiquette, which deplores both novelty and a frank acknowledgement of judicial discretion and likes to pretend that decisions by nonelected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment. Since the most convincing deceptions are those rooted in self-deception (because then the deceiver is not in danger of giving himself away), one is not surprised that many lawyers and judges think of law as the application to the present of the lessons of the past."[61] As Posner suggests, when lawyers draw on history, they are, in fact, producing fictions. These are not at all serious fictions, and, although such fictions may be beneficial tools in judicial activity, there are more effective alternatives available for contemporary judges. Consequently, Posner recommends that the legal profession should adopt a more pragmatic approach. This entails favouring a pragmatic judge who "wants to decide cases in the way that will best promote, within the constraints of the judicial role, the goals of society."[62]

No matter how convincing his criticism of history is, Posner's pragmatic approach, when viewed through the lens of Aristotle's practical philosophy, may be equally self-deceiving. Focusing upon the present, it tends to equate

57 Jerome De Groot, *Consuming History: Historians and Heritage in Contemporary Popular Culture* (London: Routledge 2009).

58 See: Gregory J. Ashworth, Brian J. Graham, and John E. Tunbridge, *Pluralising Pasts: Heritage, Identity and Place in Multicultural Societies* (London: Pluto Press, 2007).

59 *Texas v Johnson*, 491 U.S. 397 (1989).

60 Calvin R. Massey, "The Jurisprudence of Poetic License," *Duke Law Journal* 38, no. 4 (1989): 1052.

61 Posner, "Past-Dependency, Pragmatism, and Critique of History," 581.

62 Posner, "Past-Dependency, Pragmatism, and Critique of History," 593.

practical knowledge with productive knowledge. If the role of lawyers is merely to advance the goals of society and resolve perceived problems, without engaging their expertise in the wider discourse on the relationship between these goals and human life as such, then their ethical and political responsibility is no greater than that of a carpenter. Lawyers end up being craftsmen, which was the function assigned to them at the beginning of the modern era. Admittedly, there have been many innovations in the performance of this craft. First of all, it is no longer possible for legal professionals to claim that their activity relies merely on a "theoretical grasp" of the nature of law. However, assisting society in "coping with the present" does not imply judging the goals aimed at by particular groups in such a manner that the future will have a chance to be our common, *human* future.

1.5 Conclusion: In Defence of the Seriousness of History

The word "development," if applied to the world of human affairs, raises doubts nowadays, as it brings to mind the modern progressivist dreams of reaching the final stage of history with the help of science. One of such possible "ends of history" was expected to come as the result of universalisation of liberal democracy. If successful, such universalisation of politics of a certain kind, justified in ethical terms as meeting the requirements of freedom and equality, would justify equivocating productive with *phronetic* knowledge. This is because then many "things" which were practical for Aristotle and required constant and active personal care would have simply become universally approved without further deliberation and innovation. Thus, the importance of *human* action (the individual action in which the knowledge on how to live together well is displayed) would be diminished. Although this particular attempt to finish with history by universalising the political part of human *praxis* failed, the feeling that history is coming to an end is still present. The still often used prefix "post-" (post-modernism, post-history, post-democracy) reflects the sense of the present being the product of the past with no future – a present in which the most practical human choice should be to delve into interpersonal and intergroup differences to allow particularities to speak and to act for themselves so they can at least enjoy public recognition.

In certain respects, Aristotle's perspective is arguably more radical. In seeking the most universal point of reference, which would enable the differentiation between *poiesis* and *phronesis*, he pointed to the individual human being. This is not an obvious choice. If we think about the world of human affairs, individuals are its most particular and the weakest elements, seemingly lacking knowledge and power to alter what has already been done and produced. Confronting the "things" present in our practices, we take them for something solid enough not to be consciously and deliberately practiced but simply used. For Aristotle, however, things were different. Quite convincingly, he argued that an individual is neither the most particular nor the weakest element of *praxis*. Aristotle's naturalist position suggests that each of us has direct

access to the most universal aspect of humanity, namely, human nature. Not only are human beings capable of producing various things (*mimesis* is the key to any craft), but they can also manifest human nature via *phronetic* actions.

Phronimoi, apart from exercising their professional capacities, perform the universal normative standard of living together and living well in their own, very particular way. They are able to recognise this standard in themselves. They use their imagination and reason not only to find an efficient solution to some imposing problem, but also to judge all possible solutions and to opt for the one that can be justified as not only efficient but also good and just. Perceiving the tension between what is and what should be, they try to bridge it while acting. The greater the discrepancy, not only the more distinguishable their actions against the background of many other productive ones, but also the greater the risk that eventually such actions could be rejected rather than followed. Therefore, *phronimoi* must keep the balance between the short-term and the present-focused perspective of *poiesis* and the long-term, future-oriented perspective of *phronesis* to increase the possibility that their activity will gain wider recognition as something good.

Attempts to identify a third kind of knowledge, which would simultaneously be more practical and more human (with the direct political and ethical overtones this adjective implies), extend far beyond Aristotle's works. Furthermore, since his metaphysical account of nature lost its initial persuasiveness, then perhaps also his criticism of history as impractical can be questioned. In my opinion – and it is simply an opinion (*doxa*) – the wide interest in *phronesis* provides an opportunity for traditional legal historians to show that they can also contribute to the identification of a crucial but vague line that separates productive from phronetic knowledge. Blurring this line might be inadvisable, including in the field of law, as it encourages to judge some things as good only because they are already produced or producible.

As Marc Bloch insightfully observed, history is not so much the science of the past as it is the science of men in time, and a historian knows that "wherever he catches the scent of human flesh, there his quarry lies."[63] This quotation makes it clear that historians cannot ignore human actions, even if they refrain from seeking any universality in them.

The study of the past prescribes caution in the use of the criterion of effectiveness in evaluating human action. Increasing the effectiveness of an action requires reducing the temporal perspective to the minimum, thereby enabling the doer to exercise full control over the situation and to rely on cause-and-effect relationships that guarantee success. The short-term goals of productive activities are not *practical* in the Aristotelian sense, even if they refer directly to the language of ethics and concepts like justice or freedom. They are at best means to an end, which for every human being should be living well with others. Adolf Hitler and Joseph Stalin were highly effective in their political

63 Marc Bloch, *The Historian's Craft*, 22–27.

actions. According to Isaiah Berlin, they possessed a keen "sense of reality,"[64] enabling them to exploit the specific circumstances of a given time and place in order to seize power. They employed this power to govern effectively for some time. Nonetheless, their impact on human *praxis* proved to be profoundly destructive over time, including for their own societies. *Phronesis* requires much more than a sense of reality. It also requires a sense of the possible and a sense of the good.

The example of Hitler and Stalin also highlights an additional problem related to the presence of ethical values in the human world. They are things to be done and not the things to be produced. Yet, history shows that in the world of human affairs it is surprisingly easy to poeticise them and even to use them as tools. In the hands of skilful craftsmen, concepts like freedom and justice may serve not to facilitate cooperation between human beings but to deepen mutual hostility, as evidenced, for instance, in the cruelty of the Jacobins or Bolsheviks. Again, history suggests caution whenever the language of ethics is used, not only in politics, but also in social science. In this respect, historical observations are extremely serious, and so should they be treated also by practical philosophers and social researchers. As much as history helps to demonstrate that productive knowledge may mask itself as *phronesis*, it can also help to demonstrate that *phronesis* often desires to become productive knowledge, which is equally unwise.

For a historian, all ethical ideals remain out of reach. Their factuality is limited mainly to their presence in language. They seem to exist out of historical time. To use Aristotelian vocabulary, they are metaphysical final causes (not efficient causes), and so they remain in the future forever. The conclusion that they are fictions comes naturally, but denying the seriousness of such fictions would be contrary to past experience. Terms like "justice," "freedom," and "equality" have always had undeniable motivational value, and this value was not rhetorical, but real and practical. It was real and practical because actions which were justice-oriented or freedom-oriented were not simple implementations of some projects based on a "theoretical grasp" of what justice or freedom was (how it was defined here or there). They were born out of very concrete experiences – the facts – of injustice and enslavement. To recognise them as such, it suffices merely to be human. One may deeply disagree with the idea of justice suggested by Karl Marx but still convincingly criticise the capitalist reality of the 19th century for doing injustice to workers.

Experiences of injustice and enslavement vary with respect to time and space, and so the imagined conditions for justice or freedom also vary, depending on the world existing at a given place and time (a particular historical context). That is why examining history we find many different, particular *concepts* of justice and freedom. That does not necessarily justify, however, the conclusion

64 Isaiah Berlin, *The Sense of Reality: Studies in Ideas and Their History*, ed. Henry Hardy (Princeton, N.J.: Princeton University Press, 2019).

that there is nothing universal in them. From the *phronetic* perspective, what gets particularised are not values as such (as they are still universal human values), but our opinions (*doxai*) on them. It is possible to judge such opinions, taking into account whether practicing them led to any changes, which – when related to their historical context – made some things better. History, with its comparative methods, allows some generalisations here. It is a peculiar feature of truly *phronetic* opinions that they can be contextualised or universalised with similar ease. It is no accident that when reading historical records (if one happens not to be a historian) it is so easy to become anachronistic and to perceive the past as being close at hand and ready to be used.

History contributes to the search for practical knowledge rather indirectly, but it is not a small contribution. Historians do their best to deal with *res factae*, but doing this they often approach the line (or rather a vast border area) behind which the realm of action lies. They are able to elucidate this realm and to gather evidence which shows that, quite often, human actions determine our common future. Having enough experience as craftsmen in the field of history, they can also venture to become its *phronimoi*. Not necessarily becoming full-fledged poets, they may use historical experience to improve our taste for actions which are value-oriented.

A legal historian does not have to become a philosopher or a theoretician to engage in a dialogue on the specificity of human activity and terms like "justice," "freedom," and "equality" in areas such as law. Perhaps he even should not. In his youth, Frederic Maitland wrote a thesis with a long title: *A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge*, with which he hoped to win the Fellowship of Philosophy in Cambridge at the age of 25. It was not a fortunate work, and the author himself admitted that it "should have been 'wiped up' like the products of the infant Grotius."[65] Maitland ended up becoming a legal historian who himself did much to make history matter for lawyers, and – if one can trust his opinions and the opinions of his biographers – in a quite *phronetic* manner. On the one hand, he deplored the tendency to aim for "wider and wider generalisations"[66]; yet, "he combined the philosopher's power of analysis with the faculty of seeing everything in the concrete"[67] and moved "from the general to the particular and vice-versa with astonishing ease."[68] To him "the history of law was the history, not of forms, but of

65 In: Cecil H.S. Fifoot, *Frederic William Maitland. A Life* (Cambridge, Mass.: Harvard University Press, 1971), 49.

66 Frederic W. Maitland, *A Historical Sketch of Liberty and Equality: As Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge* (Indianapolis: Liberty Fund, 2000), 200.

67 Charles H. Haskins, "Frederic William Maitland (1850–1906)," in: *A Historical Sketch of Liberty and Equality*, Frederic W. Maitland (Indianapolis: Liberty Fund, 2000), 3.

68 The words of James Holt, in: Jonathan Rose, "Studying the Past: the Nature and Development of Legal History as an Academic Discipline," *The Journal of Legal History* 31, no. 2 (2010): 115.

ideas."[69] At the beginning of the 20th century, Maitland wrote: "It may be noted, too, that strenuous endeavours to improve the law were not impeded, but forwarded by a zealous study of legal history. […] Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."[70] In the end, it may be interesting to compare Maitland's words with the motto of Titian's *Allegory of Prudence:* "from the experience of the past, the present acts prudently, lest it spoil future actions."

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69 Haskins, "Frederic William Maitland (1850–1906)," 3.

70 Frederic W. Maitland, *The Collected Papers of Frederic William Maitland,* vol. 3, ed. Herbert A.L. Fisher (Cambridge: Cambridge University Press, 1911). Accessed June 23, 2025. https://oll.libertyfund.org/titles/fisher-the-collected-papers-of-frederic-william-maitland-vol-3.

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