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Critical Thinking and Legal Culture

Abstract:
We often lack clear procedures for assessing statements and arguments advanced in everyday conversations, political campaigns, advertisements, and the other multifarious uses to which ordinary language can be put. Critical thinking is a method for evaluating arguments couched in ordinary, non-formal language. Legal education should foster this argumentative skill as an ability to assess the open-end variety of arguments that may arise in legal disputes. I will argue that the ability of critical thinking helps lawyers to thrive even in legal cultures that are hostile to critical thinking. There is, therefore, a happy harmony between professional and moral reasons to teach critical thinking at law schools: it promotes epistemic as well as instrumental rationality.

> "Individuals who take an internal point of view [to the rules of a game] indeed have accepted the rules, for what reasons ever, and will subsequently apply them as standards of correct behavior. But, nobody 'must' take an internal point of view. A participant can very well plan his moves in a game from an external point of view. He does not accept the rules of preexisting institutional structures but merely exploits his knowledge of the institutional facts in predicting what is going to happen within the game. The game of arguing is no exception to this. Arguments may be strategic moves that are planned from a purely instrumental external point of view like those of the attorney at court or the Sophist in politics. In particular there are no 'logical' reasons why individuals must take an internal point of view and therefore there are no logical reasons why they should be honest participants in this sense." (Kliemt 1990, 23f.)

1. Introduction

Do lawyers and other users of legal argument benefit from thinking critically in a legal culture hostile to critical thinking? Should law schools foster a disposition to think critically in such a culture? The discipline known as 'critical thinking' or 'informal logic' has been growing over the last two decades. In the English-speaking world, many undergraduate programs include courses on critical thinking. Moreover, widely used tests for admission in university programs largely probe the critical-thinking skills of applicants, and test designers have found a positive correlation between test scores and various measures of suc-

cess at graduate school (see Graduate Record Examinations 2008). I will argue in this paper that critical-thinking courses provide law students with an additional benefit: they help lawyers thrive *even* in legal cultures that are hostile to critical thinking to the point of rewarding certain patterns of flawed public reasoning and penalizing certain patterns of sound public reasoning. I will further contend that there is a happy harmony between pedagogical and moral reasons to teach critical thinking at law schools, even if the prevailing legal culture is not informed by it. My argument can be seen as a way of spelling out Harmut Kliemt's suggestion, in the epigraph, that a rational agent will find 'the game of arguing' as more or less worth playing, depending on his choice situation and preferences. Kliemt's remark is compatible with recognizing, as I will argue we should, that *thinking* critically is, at the most fundamental level of practical deliberation, non-optional for agents who are both epistemically and instrumentally rational.

2. What Is Critical Thinking?

Critical thinking is a method for assessing arguments couched in ordinary, nonformal language. Formal disciplines, such as mathematics and logic, contain explicit rules for constructing 'well-formed' sentences or propositions (I will use these terms interchangeably, although they have different meanings in more technical discussions) and for accepting and rejecting well-formed sentences (*rules of inference*). In contrast, we often lack crystal-clear procedures for assessing statements and arguments advanced in everyday conversations, political campaigns, advertisements, and the other multifarious uses to which ordinary language can be put. To be sure, we *would be able to* achieve definite assessments *if* we could translate ordinary sentences into a formal language. Unfortunately, however, our ability to translate an ordinary sentence into a formal language depends on our previously identifying that sentence's structural features (its *logical form*, in technical jargon), and we typically cannot identify *those* features on the basis of fully statable rules. One chief function of critical thinking is to help us make such translations from the ordinary to the formal. Critical thinking performs this function by making us aware of the speaker's intention, the context, and certain types of interpretive problems. Rather than well-defined recipes for good reasoning, recipes which are at home in formal contexts, critical thinking involves the kind of judgment that allows us to see the relative weights of a variety of discursive factors in a particular context.[1]

A *valid deductive argument* is defined as an argument whose conclusion *must* be true if its premises are true. A *correct inductive argument* gives us reasons to accept its conclusion, yet it does not guarantee that its conclusion is true, even if the premises are true—it only makes the conclusion probable. *Sound* arguments

[1] For an overview of critical thinking, including a discussion of the distinction that some authors make between informal logic and critical thinking, see Groarke 2008.

(whether deductive or inductive) are valid, or correct, and have true premises. The notions of validity and correctness apply to descriptive contexts, but they can be extended to normative contexts; of course, such an extension is crucial to legal argument. According to a widespread view, normative statements (e.g., 'Shut the door', 'It is morally impermissible to kill an innocent person for fun') are neither true nor false. The semantic status of legal sentences is complicated by the fact that they seem akin to commands when issued by competent authorities (imagine a legislature passing a statute providing that 'Individuals whose taxable income is above $1,000,000 a year shall pay a tax of 50 percent on income'), whereas they seem akin to descriptive sentences when stated by law professors (imagine a law professor teaching that 'Individuals whose taxable income is above $1,000,000 a year shall pay a tax of 50 percent on income'). Further complications arise with regard to legal sentences that are neither authoritative nor (exclusively) informative, such as the legal sentences invoked by lawyers to persuade judges that someone is or is not legally responsible for a certain behavior (imagine that, in the course of an argument trying to persuade a court that the defendant is guilty of tax evasion, a district attorney says, 'Individuals whose taxable income is above $1,000,000 a year shall pay a tax of 50 percent on income').[2] For present purposes, we can bypass such complications by stipulating that normative sentences to which the predicates 'true' and 'false' are inapplicable can be more or less 'acceptable', 'reasonable', or (now in an absolute, black-and-white sense) 'valid', in a sense of 'valid' that differs from the one applicable to deductive contexts, since here it is intended to apply to rules or principles, rather than to arguments composed of descriptive sentences. The notion of deductive validity could now be expanded to capture both descriptive arguments where truth is necessarily carried from premises to conclusion and normative arguments where those other virtues of acceptability, reasonability, or validity are necessarily carried from premises to conclusion. Thus, a sound judicial decision (e.g., a conviction for murder) is the conclusion of a valid (in the expanded sense) deductive argument whose premises are valid (in the second sense) legal rules (e.g., a ban on murder enacted by Congress) and true propositions (e.g., a proposition stating that the defendant murdered someone).

We usually look for sound arguments, since we are usually interested in true or reasonable conclusions. Sound deductive arguments conform to certain structural rules or *logical forms*, such as the rule that allows us to derive proposition q from the propositions *If p, then q*, which states in its most general form the proposition known as a 'conditional', and p.[3] The soundness of inductive argu-

[2] For a nuanced analysis of the semantics of legal statements, which combines descriptive and normative elements, see Raz 1979, 122–145.

[3] Indeed, we can mechanically prove the validity of the logical form 'If p, then q, and p, then q', namely, by showing with a truth-table that the conditional that has 'If p, then q' as antecedent and 'q' as consequent is a tautology (i.e., it is true under all combinations of the values 'true' and 'false' for p and q). I should note, however, that formal logic sometimes lacks mechanical procedures to prove validity. Thus, proofs of validity in predicate logic, in which the units on which validity depends are not propositions (as is the case in propositional logic, to which the above tautology pertains) but rather structural components of propositions (such as the expressions 'All'

ments depends in addition on *background assumptions* whose relevance and acceptability cannot in turn be mechanically ascertained. Thus, sound arguments by analogy—a type of inductive argument—must instantiate the following pattern:

> Objects of type X have properties F, G, H, and so on.
> Objects of type Y have properties F, G, H, and so on,
> and also an additional property Z.
> Therefore, objects of type X have property Z as well.

An analogical argument may instantiate this pattern and still be unsound. This is so because the similarities stated by its premises must be positively relevant to the similarity stated in its conclusion. Moreover, the number of similarities and the variety of the objects of type Y must be relevantly great. Whether these conditions are met depends on background assumptions (see Salmon 2002, 133–136). Moreover, what is to count as a *relevantly* great number of similarities turns in part on intractable questions about property individuation, e.g. whether the property of being a certain shade of yellow is different from the property of being another shade of yellow. Claims of positive relevance to the similarity stated in the conclusion depend in turn on complex causal assumptions. Will color and shape similarities render it likely that this tennis ball will taste the same as this lemon? If not, can you state a counterexample-free *criterion* of positive relevance? Critical-thinking textbooks provide some clues to answering these sorts of questions by making students reflect on concrete examples, alerting them about common fallacies—i.e., unsound yet persuasive arguments—and drawing their attention to factors on which soundness commonly—though not mechanically—depends.

For present purposes, the following difference between critical thinking and formal logic is worth stressing. As I have already said, one obvious difference is that critical thinking is about arguments stated in ordinary language, whereas formal logic works with a formal language. We have also seen, though, that critical thinkers should be sensitive to the structural features on which soundness depends: good translations into the sort of semi-formal language illustrated by the above pattern of analogical argument are often effective tools for assessing the strength of arguments. In a sense, then, critical thinking precedes, or is a step toward, formal logic. Still, good critical thinkers do not have to *know* formal logic. In particular, they do not have to be able to state the rules of formation of sentences and the rules of inference of the formal language that underlies non-formal contexts, let alone to prove theorems in that formal language. For example, formal logic employs *truth-tables* to prove that compound sentences instantiating the logical form $(((P \supset Q) \,\&\, P) \supset Q)$[4] are *tautologies* (i.e., true sen-

and 'Some', or variables standing for particular objects, properties, or relations), require creativity.

[4] The following is a possible translation of this conventional notation into ordinary language: 'If proposition P entails proposition Q, where 'P' and 'Q' stand for any proposition, and P is true, then Q is true.' So we have here a conditional within another conditional. See note 3 and accompanying text.

tences, whatever sentences $P$and Q stand for). It can also be proved in formal logic that such tautologies yield deductively valid arguments when we take $P \supset Q$ and P as premises, and Q as a conclusion. Now *whether* a piece of ordinary language is meant to instantiate that logical form may be a complex issue that, among other things, turns on the speaker's intentions—something that is often difficult to ascertain, given the pervasiveness of ambiguity and vagueness in ordinary language. Critical thinking addresses such preliminary interpretive questions, and for this reason it requires a great deal of judgment, in contrast to the rule-governed procedures used by formal logicians to ascertain validity and other structural features of the language which they work with.

It should now be clear that we should expect good critical thinkers to possess a *generic* ability to produce sound reasoning. The choice to think critically is open to us at every moment, whether we deal with everyday problems or with problems pertaining to any systematic field of inquiry. One can think critically about all kinds of arguments, whether biological, political, mathematical, legal, etc., and one can do so in settings at least as diverse as commercial advertising, electoral campaigns, op-eds, judicial opinions, and scholarly books. Since we can think critically about any subject matter, there is a sense in which critical thinking is formal rather than substantive—though, as we saw, it is not formal in the sense in which formal logic is.

3. Critical Thinking and Legal Reasoning

Notice that our ability to determine whether an argument is deductively valid need not go hand in hand with our ability to determine whether an argument is sound. Thus, a legislator or judge unfamiliar with basic propositions of economics will be prone to advocate laws or judicial interpretations that defeat their stated purposes, even if he is capable of devising complex logical proofs of solutions to legal cases.[5] Imagine, for instance, that a legislator submits a bill depriving employers from the legal power to reassign workers to different tasks. She grounds this proposal by saying that such a power jeopardizes workers' opportunities for rewarding jobs—a goal that most economists would deem unattainable through regulations that render hiring less profitable, as such a bill arguably is. Indeed, if the Constitution guarantees a right to work,[6] one can argue that such a bill flouts the Constitution, on the plausible assumption that constitutional rights generate actionable claims to a legal system that promotes certain interests or choices—here, the unemployed's interest in getting a rewarding job, an interest that a dynamic labor market (and the resulting general prosperity) is more likely to further. It is through critical thinking, not merely through logic, that we stay on the alert for the background information needed to devise sound legal arguments. Such information is not only about the

[5] For a formal analysis of legal reasoning, see Alchourrón and Bulygin 1972.
[6] As is the case, for instance, under the Argentine Constitution, article 14 bis.

facts of the case, narrowly conceived, but also about theories (in the present example, labor economics) in the light of which we explain and predict facts such as increases or decreases in opportunities for rewarding jobs.[7]

We can now see why lawyers and other users of legal argument are *especially* in need of critical thinking. Most disciplines have a fairly well-defined subject matter, and correspondingly well-defined argumentative techniques. Thus, students of biology are exposed from the beginning to certain patterns of description, evidence-gathering, and assessment of theories. They deal with empirical propositions and use widely accepted standards of empirical reasoning. To be sure, there is considerable philosophical disagreement about the logical structure of such reasoning and the degree to which it supports its conclusions, yet such disagreements do not prevent biologists from converging on a mostly well-defined set of propositions, and on methods of inquiry that put a premium on theories that fit the empirical data. All of this is in sharp contrast to the study of law. Even a cursory inspection of a standard law program suffices to show the variety of *types* of argument that law students are exposed to. There are lots of deductive argument—e.g., arguments purporting to show that a certain case falls within a legal rule, or arguments purporting to show that a legal rule conforms to the Constitution—along with lots of empirical reasoning—e.g., arguments purporting to determine the strength of the evidence for conviction in a criminal case. Indeed, legal problems import all the complexities attendant to the full range of empirical disciplines as these are potentially relevant to ascribing civil or criminal liability—think of the relevance of physics and physiology in malpractice suits where lawyers and judges are confronted with conflicting expert testimonies on the stability of a bridge's foundations or the side effects of a drug. Of course, law students are not expected to master, or even to possess an above-average expertise on, empirical disciplines, but they must be able to arbitrate in principled ways conflicting expert testimonies—and judges are legally bound to do so.[8] Moreover, it is in the nature of legal problems to involve rules and principles, and this fact calls for interpretive techniques that are often opaque to lay persons. This raises special problems for critical thinkers. For example, the extent to which common-law reasoning resembles empirical analogical arguments is debatable:[9] we have here a meta-problem about relevant similarity which compounds the above first-order problems raised by empirical analogical arguments (see previous section). In short, legal questions potentially involve all subject matters and call for diverse *types* of arguments, including meta-arguments about the applicability of standard critical-thinking criteria to normative contexts. Pedagogical pressures toward instilling *generic* argumentative skills, skills that enable lawyers to identify, from among a great variety of standards for argumentative soundness, those applicable to a given

[7] Tesón and I (2006) discuss the many ways in which public deliberation on legal and political issues is distorted by the systematic appeal to faulty theories.

[8] For a discussion of the role of empirical sciences in legal proceedings, see Goldman 1999, 304–311.

[9] For a classical discussion of analogy in common-law reasoning, see Levy 1949.

legal problem, are distinctive of high-quality legal education. Hence the special importance of critical thinking in legal studies.

The claim that lawyers need generic argumentative skills gains further support from the fact that legal, and specially constitutional, interpretation is a matter of persistent debates. Judges, lawyers, and legal scholars do not confine their arguments to drawing inferences from legal materials: they also argue about the very *method* of ascertaining the meaning of those legal materials. They argue, for instance, about whether they should abide by the original intent of the framers of the Constitution, or rather by current ordinary meanings. Or consider the references to moral notions such as reasonableness, fairness, due care, and cruelty that we find scattered throughout legal materials. It is obvious that such notions render legal argument moral in nature.

In their everyday work, judges and lawyers confront such interpretative and moral questions, and to that extent the *practice* of law—let alone legal theorizing—involves philosophical questions that have no parallel in the everyday work of the empirical scientist.[10] If we add to this the fact, already indicated, that the practice of law requires far more varied argumentative skills than biology and other empirical sciences do, it is tempting to conclude that judges and lawyers confront on average more difficult problems than other scientists. I take no sides on this issue, though—perhaps judges and lawyers deal with a greater variety of easier problems. My point here is that users of legal argument need especially *generic* argumentative skills due to the variety of the arguments they work with. As we have seen, the discipline of critical thinking is precisely about such skills. Helping law students develop them is therefore especially urgent.

Legal issues are therefore less self-contained than those of most, if not all, other conventional disciplines. It is hard to find counterexamples. Consider again biology, a field that may look interdisciplinary in a way that undermines the distinction I am trying to make. Biology largely relies on chemistry, which in turns is ultimately reducible to physics. Notice, however, that biologists, chemists, and physicists employ the same criteria for accepting and rejecting propositions. They all reason inductively, hypothetico-deductively, or according to any other more or less explicit rules (philosophers of science of course disagree on how to reconstruct those rules, yet it does not seem debatable that biology is a rule-governed activity). To be sure, biology students must take a number of courses outside the field conventionally classified as 'biology'—say, courses in chemistry and physics—but this gives them no reason to change the *basic types* of reasoning they employ in dealing with narrowly-defined biological problems. As they cross conventional disciplinary boundaries they experience

[10] Ronald Dworkin has persuasively argued that legal *interpretation*—surely a skill that law schools should promote—is inescapably intertwined with moral philosophy. See Dworkin 1986, 45–86, 225–275. Notice that those legal 'positivists' who claim that *external observers* can describe a legal system without thereby committing themselves to moral views need not deny Dworkin's thesis, which is persuasive when it comes to *judicial* interpretation, though I guess Dworkin himself will probably dispute *this* interpretation of his views.

differences in degree, e.g. in how much math they need to solve problems, yet they never abandon the territory of empirical methodology. By and large, forays into chemistry or into physics do not force biology students to shift to fundamentally different styles of reasoning.[11]

The moral of all this is that legal education should foster generic argumentative skills—an ability to assess the open-ended variety of arguments that may come about in legal disputes, even if we circumscribe these to cases brought before the courts. Legislative activity requires even more generic argumentative skills, if only because legislators typically face complex causal problems ('Which sort of law will best achieve our political goals?'). Being applicable to all subject matters and types of arguments, a good training in critical thinking is then especially appropriate to a law curriculum. This almost completes my case for the claim that lawyers, judges, legal academics, and more generally citizens concerned with legal interpretation or change should excel in critical thinking. I write 'almost' because someone may object that critical thinking will not provide legal practitioners with competitive advantages in legal cultures that put a premium on *un*sound legal argument. Many countries do not enjoy the benefits of the rule of law. Arbitrariness, rather than sound argument, is there the source of laws and judicial decisions. It would seem that in such systems political connections and other sorts of non-argumentative factors will determine success or failure in the legal profession. In replying to this objection in the next section, I hope to clear the way for the other claims that I promised to defend, namely, the claim that there is a happy harmony between professional and moral reasons to teach critical thinking at law schools, and the claim that thinking critically is non-optional for agents who are both epistemically and instrumentally rational.

4. A Relativist Objection

Here is one possible challenge to my thesis that thinking critically about the law will benefit judges, lawyers, and other users of legal discourse. A legal culture may be hostile to critical thinking to the point that unsound arguments enjoy rhetorical advantages. Imagine that those who are widely regarded as legal experts or authorities are unwilling to change their views (at least, their officially stated views) if exposed to the fallacies on which such views rest. We can even imagine that lawyers, legislators, and judges display patterns of argument that entitle them to condemn the rules and standards of critical thinking as fallacious, irrelevant, or otherwise flawed. Still, they see themselves as playing the *same* argumentation game as that played by critical thinkers. A game is defined by rules that apply only to those willing to play it—it lacks authority over those who decide to play a different game. Crucially, critical thinkers *are* willing to

[11] In other words, there is a level of abstraction at which all those disciplines share a method, despite their obvious differences in techniques of research, design of experiments, etc. General theories about the method of empirical sciences purport to reach that level of abstraction, as illustrated by such works as Newton-Smith 1981.

play the prevailing game, under a suitably abstract characterization of it; after all, by denouncing the prevailing fallacies, critical thinkers see themselves in turn as making moves in the argumentation game that members of the prevailing legal culture play too. Critical thinkers are here in the position of those soccer players who sincerely criticize all of the referee's calls yet nevertheless keep playing. Therefore, they would lack a foothold in the prevailing legal culture to break it down, since they endorse rules and standards for assessing arguments that the prevailing culture rejects. We may even assume that the legal culture I am imagining is in rhetorical equilibrium. That is, users of legal discourse react to a structure of incentives that rewards those who publicly engage in (certain patterns of) truth-insensitive reasoning, and penalizes those who don't: given what others do, it is best for each to keep reasoning as they do.[12] Rewards and penalties may take a variety of forms, from better or worse job opportunities in legal academia or the courts to the ratio of won over lost cases. Such a structure of incentives engenders the legal culture that I am imagining, i.e. the prevailing practices of legal argument in judicial proceedings, academia, the media, congressional debates, and so on. Let us call a culture like this a *corrupt* legal culture. Reflection on a corrupt legal culture may prompt a *relativist* objection to my thesis that critical thinkers will do better in the variety of roles performed by legal experts. For how can critical thinkers succeed in legal cultures that embrace rules and standards of reasoning under which critical thinking, as I understand it, is systematically misguided?

In a corrupt legal culture, truth-sensitive strategies fail.[13] Still, no one is *forced* to play the game in which such a culture consists, with its available strategies, players, and payoffs. But for states that force everyone to play an Orwellian argumentation game, the very existence of a corrupt legal culture creates a market for criticism. Academics and journalists, for example, will find it profitable to write books and op-ed articles challenging the prevailing culture. Intellectual impostures make denunciatory markets attractive, and widespread intellectual impostures make those markets even more attractive. In those denunciatory markets, rewards and penalties are reversed—critical thinkers have competitive advantages there. Social criticism has always and everywhere proved to be a marketable commodity.[14] Though in a corrupt legal culture it attracts, by hypothesis, a relatively small number of consumers, their interest in the *demys-*

[12] For stylistic reasons, here and elsewhere I use the term 'truth' and cognate words broadly, meaning to encompass reasonability, validity, and other widely-held virtues of normative reasoning.

[13] Tesón and I (2006, 44–50, 53–64) indicate the incentives that induce politicians, academics, and other participants in political deliberation to publicly endorse positions at odds with reliable social science.

[14] I do not mean to suggest that the sort of intellectual activity sometimes characterized as 'social criticism' has always, or even mostly, been informed by critical thinking. Social criticism may well be dogmatic, inattentive to facts, disdainful of valid rules of inference, or otherwise inimical to the rules and standards that define critical thinking (see Section II). Indeed, Tesón and I (2006, 35–37, 53–64) argue that typical forms of social criticism, *including* academic social criticism, tends to display certain patterns of error that critical thinkers would avoid.

tifying power of critical thinking will in all likelihood grow with the expansion of the corrupt legal culture.

Corrupt legal cultures give rise, then, to markets for demystification. A number of lawyers willing and able to think critically will find it profitable to work outside the corrupt legal culture—say, in journalism, think thanks, or as freelance writers. If they are lucky to live in a country where entry to markets for legal education is reasonably free, as opposed to burdened by barriers to competition with the law schools and research institutions of the prevailing legal culture, they might as well find a place in the academia. Some law schools will hire them in proportion to the (by hypothesis tiny, but as we just saw intense) demands for demystification by the media, think tanks, political parties, and other organizations that demand experts in public legal discourse.

The emergence of a market for demystification raises in turn the opportunity cost of playing the prevailing game. A spread of critical thinking about legal issues will raise the personal cost of publicly endorsing unsound legal arguments. To be sure, the corrupt legal culture I am imagining lacks *internal* penalties for unsound reasoning (e.g., appellate reversal of ill-grounded trial-court decisions, with adverse effects on the careers of trial-court judges), yet the *opportunity cost* of playing the corrupt game, measured by the expected benefit of shifting to the critical-thinking game, will raise. Because corrupt legal cultures spawn markets in which critical thinkers possess competitive advantages, a legal education that fosters critical thinking both facilitates the emergence of such a market and benefits from it, even if its size remains small relative to the prevailing legal culture.[15] The relativist objection fails, then, on two counts: (i) a corrupt legal culture makes markets for demystification profitable, with critical thinkers enjoying competitive advantages in those markets, and (ii) critical thinking sets a limit to the indefinite expansion of a corrupt legal culture.

I have imagined a legal culture where unsound *public* discourse pays. I did not mean to suggest that members of such a culture couldn't benefit by *thinking* critically. The fact that a corrupt legal culture rewards unsound public discourse does not undermine critical thinkers' ability to determine what a winning strategy will be in *that* game. On the contrary, we should expect critical thinkers to excel at discerning the *patterns of argument* accepted by a corrupt legal culture. At a fundamental level, critical thinking *must* be always and everywhere useful, if only to pick rhetorically advantageous bad arguments.[16]

[15] The patterns of error that Tesón and I diagnose (2006, 21–40) make it unlikely that legal education alone significantly upset a corrupt legal culture, especially if, as we argue on pp. 53–64, academic settings themselves are affected by truth-insensitive factors. Still, a few small law schools may find it profitable to cater for the (tiny) markets for critical legal thinking that emerge in reaction to the prevailing culture.

[16] Even though the Argentine legal culture is not particularly friendly to critical thinking (see some examples below in this section), our law students at Torcuato Di Tella University, Buenos Aires, have in general better placements than students at other Argentine law schools. The analytical abilities of Di Tella lawyers are in general highly praised in the job market. All the lawyers who graduated from UTDT between 2001 and 2005 were able to get job offers on graduation; 59 percent work in big law firms, while the other 41 percent work elsewhere (firms, notary's offices,

Another possible objection to a legal education based on critical thinking takes advantage of the fact that, by definition, critical thinking is instrumental to truth. Now agents may put truth at the service of evil. Unless we have reasons to believe that an agent's ends are legitimate, we'd better keep instruments of evildoing from him, and truth would be no exception. Certain sorts of non-critical education, religious or otherwise, may fare better than critical thinking at inducing him to behave morally. A related suggestion is that our duty to tell the truth may on occasion give way to other duties, such as our duty to help our country win a just war. In short, the objection here is that a legal education animated by critical thinking might lead students to overrate truth-telling to the detriment of higher, or more urgent, ideals.

Consider the following example. Economists say that current (2009) Argentine inflation, which reaches a yearly amount of about 17 per cent,[17] is caused by the following factors: (i) the government's attempt to keep, through the purchase of dollars with printed pesos, the nominal exchange rate higher than the real exchange rate; (ii) the devaluation of Argentine currency in 2002, whose inflationary effects were cushioned for a few years by the depression ensuing the financial crisis of 2001–2002, and became visible once firms started to re-utilize their idle productive capacity; (iii) the high increase in welfare state handouts and bureaucratic waste in the previous years; (iv) the decline in investment brought about by legal uncertainty and statism (e.g. price controls, nationalizations, bans on exports of meat and other highly demanded goods for which Argentina has comparative advantages), vast confiscations (e.g., of private accounts of social security in 2008); and (v) the sovereign debt default in 2001, which blocked international credit.[18] For present purposes, it is important to notice that this *causal* analysis entails, given ordinary assumptions about agency, ascriptions of *responsibility*: when exposed to the above explanation of inflation, we naturally end up blaming the government.

That was not the prevailing interpretation of the facts, though. The Argentine government managed to divert the public's rage over inflation onto 'greedy

national or international agencies, academia, etc.) or are doing postgraduate studies at renowned universities in the US and Europe. Statistics available from UTDT Law School on request. A distinctive mark of our law program is the incidence of courses informed by critical thinking. Thus, we have quite a few mandatory courses in analytical philosophy and economics—much more than other Argentine or American law schools do. While critical thinking permeates such disciplines, the Argentine doctrinal legal treatises and law journals are scarcely argumentative—certainly, much less argumentative than their American counterparts. Our doctrinal treatises adopt an approach called 'legal dogmatics', which is in essence a more or less systematized description of the legal materials, coupled with interpretations largely supported by alleged doctrinal authorities. It is therefore tempting to infer that the respects in which we most differ from more traditional law schools (i.e., the incidence of critical thinking), rather than the respects in which we coincide (i.e., courses on legal dogmatics) play some role in explaining why our students get better placements.

[17] This figure is based on private estimates. The accuracy of the official rate of inflation is widely contested. See, for example, Mercopress 2009. No doubt, inflation would be higher if it were not for the current recession.

[18] See the articles published by Roberto Cachanosky in *La Nación*, Buenos Aires, since 2003, http://buscar.lanacion.com.ar/Cachanosky. For an overview of Argentina's economic policies in recent years, see Roberts 2008.

businesspersons'. Since inflation reappeared in 2006 after fifteen years of price stability, there were widely publicized presidential meetings with big businesspersons, officially aimed at striking 'price agreements', which were in effect price controls enforced through various sorts of threats, from 'spontaneous' pickets in front of recalcitrant firms to selective prosecutions for tax evasion. The fact that the current president, Cristina Fernández de Kirchner, was elected in October 2007 to succeed her husband, Néstor Kirchner, and continue his allegedly successful economic policies, suggests that inflation, which had reached 20 per cent in 2008, meant no political cost to the administration. Indeed, Néstor Kirchner took great care at being perceived by the public as someone who led the fight for 'fair prices' against the 'greedy businesspersons', the above 'price agreements' being part of this strategy. Let me next show how the objection under consideration (that critical thinking is morally neutral and as such sometimes dispensable for the sake of worthier goals) might appear to gain support from the kind of public rhetoric that has been surrounding Argentine inflation in recent years.

Everyone benefits from using critical thinking to determine what their best means to their (sometimes evil) goals are, governments bent on misleading voters to win elections being no exception. Some of those means are rhetorical in nature: in the present example, the means adopted by the Argentine government consisted in advocating a theory according to which greedy businesspersons, rather than the government, brought about inflation. Moreover, ordinary citizens *rationally* embraced that theory instead of the more reliable one offered by economists. *Given* the citizen's time constraints and personal costs of getting political information that in any event will be of negligible impact in political outcomes (the probabilities that any individual vote will affect the outcome of an election are vanishingly small),[19] the ordinary citizen embraces political views on the grounds of low-cost 'information' (including false theories and data). Politicians' and rent-seekers' rational response to citizen's ignorance is, then, to invest heavily in political propaganda and 'information' easily available to the ordinary citizen, especially if such 'information' fits the (often false) social theories that rationally ignorant citizens tend to embrace (e.g., visible-hand, conspiracy theories, rather than the invisible-hand, impersonal processes theorized by economists). By being instrumentally rational (i.e., by selecting their personally least costly means to their goals, given their beliefs) and epistemically rational (i.e., by forming their beliefs through valid or correct rules of inference from the available 'information' and prior theoretical beliefs), both governments and citizens converge upon a rhetorical equilibrium where falsehood, and the corresponding ascriptions of responsibility, prevail. The more reliable, but less vivid, explanations of inflation that we find in economics textbooks are at a systematic rhetorical disadvantage. The apparent upshot is, then, that critical thinking is sometimes socially harmful: the government's rhetoric, which results from its thinking critically about means to win elections, induces or reinforces the public's support for bad *policies*, as judged by the public's own preferences for

[19] The seminal work on the rational-ignorance effect in politics is Downs 1957.

political *outcomes* (e.g., a preference for price stability and general prosperity). It is crucial to see that such support is sanctioned by widely accepted methods of critical thinking, *given* the theoretical and factual beliefs held by rationally ignorant citizens.[20] One might also conclude, conversely, that a disposition to hold beliefs non-critically may well be socially beneficial. If we could induce citizens to support effective anti-inflationary policies on the grounds of inconsistent or otherwise ill-grounded premises, it would seem that we have a moral duty to do so.

To be sure, unsound arguments *may* lead citizens to support good policies. But sound arguments *must* lead citizens to support good policies *if* citizens aim at *valuable* social outcomes. This follows from the definition of 'sound argument': a sound argument, recall, carries the truth (validity, acceptability, etc.) of its premises to its conclusion. ('Our goal is G and M is the least personally costly means of achieving G, so we ought to use M' is a sound form of argument, if we in fact have goal G and M is in fact the least personally costly means of archieving G.) Can we also say that sound arguments are *needed* to *increase our chances* of picking good policies? There are two apparent counterexamples. First, *public adoption* of unsound arguments, such as the appeal in primitive societies to supernatural forces to justify taboos on eating certain foods, may bring about good social outcomes, such as the avoidance of certain diseases. Closer inspection reveals, however, that critical thinkers have better chances of determining *whether* the public adoption of flawed reasoning is socially beneficial in a given occasion; thus, benevolent policy-makers had better engage in sound reasoning if they are to increase their chances of picking rhetorically effective, but not necessarily sound, public arguments. Second, a sound argument may lead me to a decision that makes me worse off than I could have been otherwise. Suppose, for example, that I am offered a lottery with two possible outcomes: $100 if I choose alternative A and a 50% chance of winning $1,000 if I choose alternative B. Assuming I am risk neutral, the rational decision for me to make is to choose B. It turns out that I lose. Shall I then say that critical thinking led me in the wrong direction? Surely not. My finally ending up with $0 does not change the fact that my decision maximized my *expected* gains, i.e. the payoff I get in case of winning discounted by the probability of winning. The assumption of risk neutrality means precisely that my aim was to maximize my expected gains, and I fulfilled *that* aim by choosing alternative B whatever the outcome. Critical thinkers need not bring about their preferred outcomes, yet they are more likely to achieve them than non-critical thinkers are: critical thinking is not a success notion, but a procedural one—it applies to our decision-making procedure. This point can be generalized to moral decision making: in the long run, we reach our moral objectives (general welfare, improving the lot of the poor, freedom for all,

[20] For a detailed argument for the convergence of instrumental and epistemic rationality onto a political rhetorical equilibrium where falsehood prevails, see Pincione and Tesón 2006, 8–86. If Tesón and I are right, the public rhetoric that accompanied Argentine inflation in recent years illustrates a general barrier to a citizen's understanding of political issues, even assuming instrumental and epistemic rationality.

equality of resources, or whatever else the reader may deem appropriate) most effectively by *reasoning* critically—though this may sometimes lead us to *publicly* endorse unsound arguments, depending on how much intellectual integrity weighs in our total system of goals. Law schools can help students reason critically. If students happen to be public-spirited, critical thinking will help them achieve their lofty goals; if they aren't, I doubt that critical thinking will make things comparably worse than non-critical or unreflective methods of belief formation will.

The social cost of a corrupt legal culture may reach a threshold of visibility beyond which it becomes transparent to even rationally ignorant citizens. The prevailing legal discourse may then start to crumble, giving way to a new rhetorical equilibrium. Of course, the move from one equilibrium to the other is possible only if exogenous factors intervene—this is of the nature of equilibrium. Political rhetoric in times of inflation serves again by way of illustration. The 1989 Argentine *hyper*inflation made it transparent to most citizens that decades-long price controls were ineffective. Given the emphatic constitutional provisions that "all the inhabitants of the Nation are entitled to the following rights: [...] to trade" (art. 14), that "property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law", and that "expropriation for reasons of public interest must be authorized by law and previously compensated" (art. 17), the sanction of price controls by the courts required a watering down in the concept of private property which informed the framers' intent. Under the original interpretation, price control violates the constitutional guarantee of private property and the contractual freedom which was taken to be entailed by that guarantee. The Supreme Court upheld this interpretation since the promulgation of the Constitution in 1853 up to the 1920s.[21] From the mid 1940s, politically-selected judges, along with law professors working at state-funded, or at any rate heavily regulated and politicized law schools, embraced a 'social' idea of property under which price control and myriad anti-competitive regulations came to be seen as compatible with the constitutional protection of private property. Governments became in this way constitutional authorized to yield to electoral incentives to print money to subsidize well-organized groups, to introduce regulations protecting politically connected firms from domestic and foreign competition, and to engender a huge bureaucracy which was largely composed of political clients. The economic and legal doctrines prevailing in universities furnished academic credentials to the public's vivid beliefs in businesspersons 'abusing' their property rights by selling above 'fair' prices. Inflation was widely seen as their fault.[22]

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[21] A turning point was the Supreme Court ruling in 'Ercolano c/ Lanteri' (1922), 'CSJN, Fallos, 136:164', which upheld rent control laws. See Berensztein and Spector 2003, 331–348. Juan Bautista Alberdi, the framer of the 1853 Constitution, unambiguously interpreted the constitutional protection of property as referring to the classical liberal, full-ownership conception of property, which clearly rules out price control. See Alberdi 1854, 7–91. For a seminal analysis of the classical liberal conception of private property, see Honoré 1961.

[22] For a general explanation of the public's *rational* acceptance of this kind of rhetoric, see Pincione and Tesón 2006, 8–44.

In 1989, *hyper*inflation disrupted this rhetorical equilibrium. Citizens found it hard to believe that a conspiracy of millions of firms and retailers were responsible for the huge, simultaneous, and everyday price increases. Notice that no exception to the rational ignorance effect was involved here: the facts were so visible that no investment in political information was needed. The warnings of a few economists and the so far unpopular politicians inspired by them against money printing and government waste (primarily through state-owned public utilities, railroads, and the oil company) as major culprits of inflation started to make sense to millions of citizens who had been persuaded by the most vivid, conspiracy explanation of inflation. A number of slogans more or less in tune with scholarly explanations of inflation in terms of money supply ('The government should stop printing money to finance political clients', 'Public enterprises are wasteful because bureaucrats do not expend their own money') made some steps among journalists and politicians toward superseding a rhetorical equilibrium where monetary explanations of inflation had competitive disadvantages in electoral politics. I submit that such a mutation in public opinion must have played an important role in the wide popular support for deregulation and privatization in Argentina between 1989 and 1995.[23] Perhaps not coincidentally, an economically informed legal literature emerged, along with the introduction of courses on economic analysis of law at law schools.[24] While an equilibrium cannot possibly be disrupted endogenously, the statist rhetorical equilibrium prevailing for decades in Argentine politics, and its manifestation in the legal culture that I have outlined, faced an exogenous countervailing force—hyperinflation, with its fast transmission of inexpensive information that undermined, in the public's eyes, the conspiracy theories that had prevailed so far.[25]

Hyperinflation had a further adverse impact on the statist rhetorical equilibrium: in the early 90s, it became electorally convenient for President Carlos Menem to privatize and deregulate vast sectors of the economy in order to internalize the immediately perceived benefits of price stability, such as the end of social unrest (the 1989 Argentine hyperinflation brought about social unrest, including massive violent plundering shops in Buenos Aires and other big cities) and the expansion of consumer credit. In contrast, typical measures against *moderate* inflation harm in the short run well-organized groups (such as public employees and state suppliers) which stand to lose from reductions in public spending, with no offsetting electoral benefits in the short run. The government was therefore able to internalize the political benefits of fighting hyperinflation

[23] I do not mean to suggest that most Argentines who came to support privatization and deregulation in those years did it *for good reasons*. My analysis only implies that hyperinflation offset the rational-ignorance effect by providing for free evidence for the claim that the government *must have had something to do* with huge, simultaneous, and everyday price increases—it looked against common sense to attribute such increases to conspiracies among millions of firms and retailers. See Pincione and Tesón 2006, 98–105.

[24] See, for example, the collection edited by Spector (2004).

[25] For a fuller discussion of this example in connection with citizens' rational ignorance, see Pincione 2008. For a general theory of rhetorical political equilibria, see Pincione and Tesón 2006, 8–64.

through measures that in ordinary times externalize political benefits (in terms of general prosperity, avoidance of *future* social unrest, and long-term reduction of poverty) to other administrations in the more or less distant future. The re-election of Menem by a substantial majority in 1995 confirms this analysis.

These episodes in the Argentine political economy of the 90s and its concomitant public rhetoric suggest, I think, a moderately optimistic conclusion: even in a corrupt legal culture a government will adopt public policies that well-informed critical thinkers would support (yet perhaps for different reasons[26]), and the courts will uphold such policies,[27] provided that exogenous forces make the social costs of the current laws and judicial decisions visible to electorally decisive coalitions. The 2001 Argentine financial crisis (which was in turn largely the result of keeping a currency board even though public spending skyrocketed in the 90s[28]) can be seen as an exogenous force that in turn upset the market-friendly features of the economic policies of the 90s. The restored public support for a nationalistic and statist political discourse, shown by the complete absence of (at least openly) pro-globalization and market-friendly political parties in current (2009) Argentine politics,[29] confirms Tesón's and mine hypothesis that nationalistic and statist discourse has competitive advantages in politics even though the public policies thought to follow from such a discourse frustrate its stated goals, such as improving the lot of the poor or promoting general prosperity.[30] Even these recent events, however, fail to show that critical thinking is seldom effective in politics; they just show that *public political statements sanctioned by critical thinking* (at the very least, statements that are not blatantly inconsistent with reliable social sciences) may well be avoided by politicians who *think* critically in their competion for power.

This last remark points to another optimistic conclusion: at the most fundamental level of decision making, we are well advised to think critically, if only because critical thinking enables us to select our most persuasive first-order argumentative strategies, whether or not these pass muster before the canons of critical thinking. In this respect, what holds for political discourse holds for legal discourse too. Critical thinking might lead a defendant in a lawsuit to deliberately advance fallacious reasoning (she might even be morally justified, all things considered, in doing so). An argument to the effect that a fallacy will

[26] For reflections on how good policies may be supported by rational citizens for *bad* reasons, see Pincione and Tesón 2006, 98–105.

[27] The period between 1991 and 2000 featured judicial decisions at odds with the statist, interventionist doctrines of the preceding decades. For example, a federal court in Posadas upheld in 2000 the constitutionality of the Presidential decree that deregulated all industrial and commercial activities in 1991, against challenges that such a decree ran counter the 'legitimate interests' of members of the union of newspaper vendors. See *La Nación* 2000.

[28] For a nice discussion of the Argentine 2001 crisis against the background of a general theory of the economic, legal, and rhetorical aspects of economic crises, see Spector 2009.

[29] Thus, to the best of my knowledge none of the dozens of political parties that competed in the 2009 midterm elections employed a market-friendly rhetoric. On the contrary, vigorous vindications of the regulatory role of the state along with allegations that opponents supported the deregulation and privatization policies of the early 90s were central themes in the electoral campaign.

[30] See Pincione and Tesón 2006, 8–122.

be persuasive need not be fallacious itself; indeed, it *must not* be fallacious if the defendant's aim is to persuade the court. Lawyers, whose job description is to persuade the courts of the merits of their clients' cases, are well advised to think critically at the meta-level at which they select their argumentative strategies. Even if, by its very nature, we cannot significantly undermine a corrupt legal culture by showing that it systematically infringes the rules of critical thinking, we can minimize its evils—we can more effectively achieve incremental moral gains—by thinking critically. A corrupt public discourse may well coexist with morally justifiable laws, judicial sentences, and public policies, and critical thinking helps us figure out how.

5. Concluding Remarks

I have argued that corrupt legal cultures give rise to markets for demystification, and also that critical thinkers can take advantage of exogenous forces to significantly undermine a corrupt legal culture. Critical thinking is then not just a valuable tool for lawyers and judges pursuing successful careers. It enables the achievement of worthy goals without making things comparably worse if agents happen to pursue *un*worthy goals—all too often, agents who pursue unworthy goals carelessly just delay their achievement, and there is no reason to believe that they will do much good in the meantime. I want to end by suggesting that critical thinking has indeed more than that instrumental value. A community of critical thinkers is a community where everybody follows the rules of sound reasoning. When sound reasoning guides the discussion of legal issues, the community has already taken a crucial step toward the rule of law, whatever the specific contents of the legal materials. For rules, rather than persons, reign supreme in it, and nobody can create or manipulate those rules.

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