CRITICAL THINKING AND LEGAL CULTURE

Guido Pincione

I. INTRODUCTION

I appreciate Dean Pérez Perdomo’s kind invitation to explain the contribution that my course on critical thinking makes to legal education in Argentina. I gladly received this invitation, largely because the topic has interesting connections with grand jurisprudential issues that are indeed closer to my area of expertise than critical thinking itself is. A reflection on the role of critical thinking in legal education naturally leads to deep questions about legal reasoning and the moral dimension of law. So I came up with the following rather philosophical thoughts on the relationships between critical thinking and a legal culture.

Critical thinking has been growing as an academic discipline 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 success at graduate school.\(^1\) In this paper, I want to argue 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. I will further contend that, despite its value-neutrality, critical thinking is less contingently related to the attainment of worthy goals than to the production of evil. There is a happy harmony between professional and moral reasons to teach critical thinking at law schools, even if the prevailing legal culture is not informed by it. In the course of my argument, I hope to shed light on the jurisprudential issues that I mentioned in the previous paragraph.

II. WHAT IS CRITICAL THINKING?

Critical thinking is a method for the assessment of arguments that are couched in ordinary, non-formal language. “Formal” disciplines, such as mathematics and logic, contain explicit rules for the construction of statements (well-formed sentences) and for the acceptance and rejection of statements (rules of inference). In contrast, we lack mechanical procedures for the assessment of 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 could proceed to the clear-cut sort of assessment attainable in formal disciplines if we showed that the piece of speech at issue is translatable into a formal language. Unfortunately, however, translations from ordinary

language into a formal language presuppose diagnoses of the original’s structural features (its logical form, in technical jargon), and those diagnoses are typically not governed by clear-cut rules. One function of critical thinking is to help us make such translations from the non-formal to the formal. Critical thinking performs this function by making us aware of the speaker’s intention, the context, and interpretive problems, none of which can be easily captured by mechanical rules. Rather than clear-cut recipes for good reasoning, which are at home in formal contexts, critical thinking involves judgment. Hence the term “informal logic,” sometimes used as a synonym for “critical thinking.”

A valid deductive argument is defined as one that guarantees that its conclusion would be true in case its premises were true as well. A valid inductive argument gives us reasons to accept its conclusion, but it does not guarantee that its conclusion is true. Sound arguments (whether deductive or inductive) have true premises. These notions, applicable to descriptive contexts, can be extended to normative arguments—an extension that is crucial to legal argument. According to a widespread view, a sound legal argument does not carry truth from premises to conclusions but rather other virtues, such as acceptability, reasonability, or validity (this latter term now being used in an entirely different sense, for here it is intended to apply to rules or principles rather than to arguments composed of descriptive statements). Thus, we can say that a sound judicial decision (e.g., a conviction for murder) is the conclusion of a valid (in the first 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., the defendant murdered someone). We usually seek to produce sound arguments, since we are usually interested in true or (normatively) valid conclusions. Sound deductive arguments must meet a relatively small set of rules of inference (though it’s not always possible to prove logical validity mechanically\(^2\)) and their premises must be true or (normatively) valid, whereas the soundness of inductive arguments depends in addition on background assumptions whose contents and acceptability cannot 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.

A sound analogical argument will of course not only instantiate this pattern. In addition, 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 mentioned in the premises must be relevantly great. Whether these conditions are met depends on background assumptions.\(^3\) Thus, what is to count as a relevantly great number of similarities turns on intractable questions about property individuation. Are two shades of

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\(^2\) As I said in the previous paragraph, formal logic furnishes mechanical rules for the assessment of formal arguments, but this is compatible with formal logic providing no mechanical procedures for constructing proofs of validity. A proof may be composed of steps whose validity is mechanically decidable, but devising the whole proof (the sequence of steps) may require creativity. Thus, proof building in predicate logic (unlike proof building in propositional logic, e.g. through truth-tables) is a matter of creativity.

\(^3\) See Merrilee H. Salmon, *Introduction to Logic and Critical Thinking* (Fort Worth: Harcourt, 1995), pp. 118-120.
yellow different properties? Likewise, “positive relevance” to the similarity stated in the conclusion is a notion whose applicability often depends 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 take some steps towards an answer by making students reflect about concrete examples.

It is instructive to wonder how critical thinking differs from formal logic. One obvious difference is that critical thinking is, as I have already said, 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 fact that sound arguments depend on structural features: critical thinkers can produce good translations into semi-formal language of the sort illustrated by the above pattern of analogical argument. We can say that critical thinking precedes, or is a step towards, formal logic. But good critical thinkers do not have to know formal logic. Thus, 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 things in that formal language. For example, formal logic employs truth-tables to prove that compound statements instantiating the form \((P \supset Q) \land P \supset Q\)4 are tautologies (i.e., true statements, whatever propositions we substitute for \(P\) and \(Q\)). It also proves that such tautologies yield deductively valid arguments when we take \(P \supset Q\) and \(P\) as premises, and \(Q\) as conclusion. But whether a piece of ordinary language is meant to instantiate that form may be a complex issue that turns on, among other things, ascriptions of intended meaning—something that is often a difficult task, given the pervasiveness of ambiguity and vagueness in ordinary language. Critical thinking addresses such interpretive, preliminary questions, and for this reason it requires a great deal of judgment, in contrast to the rule-governed steps of logic.

Notice that our ability to ascertain logical validity need not go hand in hand with our ability to ascertain soundness, especially in non-technical contexts. Thus, a (rare) lawyer capable of devising complex logical proofs of solutions to legal cases5, but (less rarely) unfamiliar with basic propositions of economics, will be prone to propose laws (say, banning employers from reassigning workers to different tasks) that defeat their stated purpose—say, reducing unemployment. If (as is the case in Argentina) the constitution guarantees a right to work, violation of the constitution would then arguably compound higher unemployment rates. It is critical thinking, not merely logic, that can put us on the alert to the background information needed to devise sound arguments for legislative change. Such information encompasses not only particular facts but also theories (in the present example, labor economics) in the light of which we interpret the facts.6

Despite the discipline’s youth, there is by now widespread agreement on a critical-thinking syllabus.7 Over the last eleven years, I have been teaching a course on writing and

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4 A translation of this conventional notation into ordinary language is this: “If any proposition \(P\) entails a proposition \(Q\), and \(P\) is true, then \(Q\) is true.”

5 For applications of formal logic to legal problems, see Carlos Alchourrón and Eugenio Bulygin, Normative Systems (New York-Wien: Springer Verlag, 1972).

6 Fernando Tesón and I discuss the many ways in which public deliberation on legal and political issues is distorted by the systematic appeal to faulty theories. See our Rational Choice and Democratic Deliberation: A Theory of Discourse Failure (Cambridge: Cambridge University Press, 2006).

7 For an overview of approaches to informal logic, and a discussion of the distinction that some authors make between informal logic and critical thinking, see Leo Groarke, "Informal Logic," The Stanford Encyclopedia...
critical thinking to second-year law students at Torcuato Di Tella University, Buenos Aires. The course covers the following subjects:

a. The nature of arguments.
c. Deductive arguments. Logical form.
d. Inductive arguments: statistical arguments, arguments from analogy, arguments based on samples.
e. Causal arguments: Mill’s methods. The ambiguity of “cause.”
f. Fallacies.
g. Defending an original thesis: the structure of a scholarly paper.

I usually assign chapters of Merrilee H. Salmon’s textbook Introduction to Logic and Critical Thinking, 3rd ed. (Fort Worth: Harcourt, 1995), which provides clear and engaging discussions of items a-f. It also contains quite a few exercises. Some exercises have no definite answers but rather aim at stimulating the discussion of the theoretical tools. The book includes suggested solutions for half the exercises. To discuss item g, I supplement my own writing suggestions with chapters of books on philosophical writing. I like to believe that my choice of books on philosophical writing is not only due to my attraction towards philosophy, which is really my field of research, but also to the fact that philosophers are disproportionally represented among authors of critical-thinking books focused on argumentative writing. Indeed, improving our students’ writing is a major official goal of my course, whose name is “Investigación y Redacción” (Research and Writing). This year (2006) I assigned Lewis Vaughn’s Writing Philosophy: A Student’s Guide to Writing Philosophy Essays (New York: Oxford University Press, 2006).

I hope it’s clear by now that critical thinking is 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 any systematic field of inquiry. One can think critically about all kinds of arguments, whether biological, political, legal, mathematical, or whatever, and one can do so in all kinds of settings, whether advertisements, electoral campaigns, op-eds, or pleas before a court. This is why the exercises contained in critical-thinking textbooks, including Salmon’s, pertain to a wide variety of topics and settings. To that extent, critical thinking is formal rather than substantive—though, as we saw, it is not formal in the sense in which formal logic is.

III. CRITICAL THINKING AND LEGAL REASONING

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. Students of biology are exposed from the beginning to certain patterns of description, evidence-gathering, and theory
acceptance and rejection. Most of the time, they deal with empirical propositions and therefore must abide by usual standards of inductive reasoning. To be sure, there is considerable philosophical disagreement about the logical structure of such inductive processes and the degree to which they confer credibility to their conclusions. But apparently such disagreements do not prevent biologists from converging on a fairly definite, “mainstream” 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 with the study of law. Even a cursory inspection of a standard law program suffices to show the variety of the types of argument that the law student is exposed to. There are lots of deductive argument—e.g., arguments purporting to show that a certain case falls within a law whose applicability is in turn entailed by further laws which in turn conform to the Constitution—along with lots of inductive reasoning—e.g., arguments purporting to ascertain the strength of the evidence for conviction in a criminal case. Indeed, legal problems inherit 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. In addition, legal problems essentially involve rules and principles, and interpretive techniques of their own. This raises problems of applicability of usual critical-thinking techniques, which had been largely concerned with empirical contexts. For example, the extent to which common-law reasoning resembles empirical analogical arguments is debatable; we have here meta-problems about relevant similarity which compound the above first-order problems raised by empirical analogical arguments. In short, legal questions potentially involve all subject matters and call for diverse types of arguments.

The fact that lawyers need generic argumentative skills can be further supported by the persistent debates on constitutional interpretation, that is, on the very method of ascertaining the content of constitutional law. Or consider the references to moral notions such as reasonableness, fairness, due care, and cruelty that we find scattered throughout legal materials. In their everyday work, judges and lawyers confront such interpretive and moral questions, and to that extent the practice of law involves philosophical debates that have no parallel in the practice of biology. Moreover, the practice of law requires, as we saw, far more varied argumentative skills than biologists do. This is not to say that lawyers deal on average with more difficult problems than biologists do. Perhaps lawyers deal with a greater variety of easier problems—I take no sides on this issue. The point here is that lawyers need more generic argumentative skills due to the variety of the arguments they

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11 Ronald Dworkin has persuasively argued that legal interpretation—surely a skill that law schools should promote—is inescapably intertwined with moral philosophy. See Ronald Dworkin, *Law’s Empire* (London: Fontana Press, 1986), pp. 45-86 and 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.
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.

The upshot of all this is that legal issues are peculiarly varied. They are much less self-contained than, say, biological issues. The example of biology is here instructive again, for biology may look interdisciplinary in a way that undermines the distinction that I am trying to make. Biology largely relies on chemistry, which in turns is ultimately reducible to physics. But, as we saw, all these disciplines share criteria for accepting and rejecting propositions, notwithstanding the persisting philosophical disagreements as to how to reconstruct such criteria. Biology students must take a number of courses outside the field conventionally classified as “biology”—say, chemistry and physics—but this is no reason for them to leave behind the basic types of reasoning they employ in dealing with narrowly-defined biological problems. To be sure, as they cross conventional disciplinary boundaries they experience differences in degree, e.g. in how much math they need to solve problems. But 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 different modes of reasoning.

I conclude that legal education should foster generic argumentative skills—an ability to assess the boundless variety of arguments that may come up in legal disputes. Being applicable to all subject matters and types of arguments, a good training in critical thinking is then especially suitable to the study of law. This almost completes my case for the claim that critical-thinking courses are a boon for law students, and as a result for future lawyers and judges.12 I write “almost” because someone may object that critical thinking need not provide legal practitioners with competitive advantages in legal cultures that put a premium on (certain patterns of) unsound legal argument. In replying to this objection in the next section, I hope to clear the way for the other claim that I promised to defend, namely, the claim that critical thinking enhances the moral value of a legal culture.

IV. A RELATIVIST OBJECTION

Here is one possible challenge to my thesis that law students have a special need for critical thinking. The prevailing legal culture may embrace truth-insensitive13 patterns of reasoning. Unsound arguments may enjoy rhetorical advantages, and to that extent displace sound ones. Moreover, legal experts may be 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 the very argumentative patterns to which legal practitioners, including legislators and judges, lend allegiance regard standard rules of critical thinking as fallacious. Nevertheless, in the legal culture that I have in mind legal practitioners see themselves as playing the same argumentative 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. The legal practitioners I am imagining feel

12 Of course, the case is especially strong regarding law students who had not been previously exposed to such courses, as is the case with our law students in Argentina.
13 For stylistic reasons, here and elsewhere I use the term “truth” and cognate words broadly, comprising reasonability, validity, and other widely-alleged aims of normative reasoning. I shall briefly discuss the relationships between truth- and value-sensitive arguments in Section IV.
themselves authorized to dismiss critical thinkers as systematically mistaken. A corollary of this picture is that critical thinkers would lack a foothold in the prevailing culture to break it down, since it is the very authority of critical thinking that the prevailing legal culture calls into question. We have here, then, a relativist objection, in one of the senses of this word. It is an objection that challenges my thesis that critical thinking improves the professional prospects of law students. For how can they succeed in legal cultures that are hostile to critical thinking? Of course, the objection, if valid, would also undermine my related thesis that critical thinking holds out hope of improving the moral quality of a legal culture.

The legal culture I have just imagined is, we may also assume, in a rhetorical equilibrium. Users of legal discourse react to a structure of incentives that rewards those who follow truth-insensitive rules of reasoning, and penalizes those who don’t. Given what others do, it is best for each to keep reasoning as they do. Rewards and penalties may take a variety of forms, from success or failure in a judicial or academic career to success or failure in lawyering. We might say that this structure of incentives—this game, now in the more technical sense that this word has in decision theory—generates the legal culture that I have just imagined. Let us call this culture a corrupt legal culture.

By hypothesis, a corrupt legal culture penalizes those who make truth-sensitive moves within the game—those who, e.g., challenge long-standing legal doctrines that rely on bad economics. But no one is forced to play that game. The very existence of a corrupt legal culture creates a market for those intent on challenging it. Academics and journalists, for example, will find it profitable to write books and op-eds denouncing the prevailing culture. Unless free speech has been curtailed, intellectual impostures make denunciatory markets attractive, and widespread intellectual impostures make those markets all the more attractive. In those markets, rewards and penalties are reversed—critical thinkers have competitive advantages there. Unless a totalitarian state forces everyone to play an Orwellian argumentative game, social criticism has always and everywhere proved to be an attractive commodity sold in usually tiny, but intense, markets. Corrupt legal cultures create markets for public intellectuals capable of meeting demands for demystification. Lawyers willing and able to think critically may choose to work outside the corrupt legal culture, in think tanks, journalism, 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 regulated to the benefit of the corrupt legal culture, they might even hope to find a place in the academia: some law schools will demand them in proportion to the (ex hypothesi tiny, but intense) demand for demystification through journalism, think tanks, and the other venues in which legal expertise is required.

The emergence of a market for demystification raises in turn the opportunity cost of playing the corrupt game. Only when the marginal costs and benefits of remaining in the corrupt legal culture are equal will agents be indifferent as between playing the corrupt game and the demystification game. A spread of critical thinking about legal issues will

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14 Fernando Tesón and I offer examples of such doctrines, and point out the incentives that induce politicians, academics, and others to publicly endorse them. See our *Rational Choice and Democratic Deliberation*, op. cit., esp. pp. 44-50 and 53-64.

15 I do not mean to suggest that social criticism is inherently friendly to critical thinking. What I do believe is that critical thinkers will succeed in some markets for demystification of a corrupt legal culture, even if public critiques of that culture are themselves largely hostile to critical thinking. In *Rational Choice and Democratic Deliberation*, op. cit., pp. 35-37 and 53-64, Tesón and I argue that social criticism, including academic social criticism, tends to display certain patterns of error traceable to truth-insensitive factors.
thus raise the personal cost of publicly endorsing unsound legal arguments, even if the penalties threatened by the prevailing legal culture are held constant. Or, to put it differently: although the corrupt legal culture I am imagining lacks internal penalties for unsound reasoning (e.g., appellate reversal of unsound trial-court decisions, with adverse effects on the careers of trial-court judges), the opportunity cost of playing the corrupt game, measured by the expected earnings in critical-thinking games, will raise. The process is self-enforcing: corrupt legal cultures spawn markets in which critical thinkers possess competitive advantages. A legal education that fosters critical thinking may well smooth the emergence of such markets, although I tend to believe that their sizes will remain small relative to the prevailing legal culture. The relativist objection fails, then, on two counts: (i) a corrupt legal culture makes demystification markets profitable, and critical thinkers will have competitive advantages in those markets, and (ii) critical thinking curbs the expansion of corrupt legal cultures.

I have imagined a legal culture where unsound public reasoning 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 arguments does not deprive critical thinking of its power 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 ascertain the rhetorical force of bad arguments. Interestingly, our law students at Di Tella have in general better placements than students from other Argentine law schools. The analytical abilities of Di Tella lawyers are in general highly praised by law firms, even though the Argentine legal culture is not particularly friendly to critical thinking. Far be it from me to claim full credit for our students’ performance in the job market. A distinctive mark of our law program is the proportion of courses informed by critical thinking. Thus, we have quite a few mandatory courses of analytical philosophy and economics—much more than other Argentine law schools do, and certainly more than American law schools do. Needless to say, such disciplines are exemplars of critical thinking, especially when compared with our doctrinal treatises, which tend to be 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 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) explain why our students get a better placement.

A quite different objection to critical-thinking courses in legal programs is moral in character. By definition, critical thinking is instrumental to truth. To be sure, we can think

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16 The patterns of error that Tesón and I diagnose in *Rational Choice and Democratic Deliberation*, op. cit., pp 21-40, make it unlikely that legal education alone can significantly upset a corrupt legal culture, especially if, as we argue, academic settings themselves are vulnerable to truth-insensitive factors.

17 59 percent of lawyers who graduated from UTDT between 2001 and 2005 work in big law firms, whereas the other 41 percent work elsewhere (firms, notary’s offices, national or international agencies, academia, etc.) or are doing postgraduate studies. Statistics available from the Assistant to the Dean.

STATISTICS. Even a cursory inspection indicates that American casebooks are vastly more argumentative than their Argentine counterparts (“textbooks” and “treatises”). The differential incidence of sound arguments is even greater if we compare American and Argentine law journals.
critically about normative issues (see my remarks on analogical arguments in Section III), but the fact remains that agents may be seeking evil, and to that extent they need **accurate** judgments about the best means to achieve their goals. The suggested point is that, just like any other instrument, critical thinking may serve evil. 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. Too much critical thinking may lead us, so the objection proceeds, to overrate truth-telling to the detriment of higher moral values. For example, imagine a government hiring marketing experts capable of **accurately** predicting citizens’ political errors. That government can then use those predictions to its electoral benefit by implementing widely acclaimed policies which will (predictably, also) bring about perceived losses after election day. Crucially, such predictions will be all the more useful if they rely on critical thinking. Current anti-inflationary policies in Argentina (July 2006) are a case in point. Economists say that inflation is the consequence of the administration’s attempt to keep, through the purchase of dollars with printed pesos, the nominal exchange rate higher than the real exchange rate. This policy allows the administration to collect significant taxes on exports. Its downside is inflation, as a result of the combination of money printing and reduced domestic supply. Notice that this **causal** analysis entails, given ordinary assumptions about agency, ascriptions of **responsibility**—government is held responsible for the inflation. Anticipating such ascriptions of responsibility, the Argentine government so far managed to divert the public’s rage onto “greedy businessmen”. The Argentine TV frequently broadcasts presidential meetings with big businessmen to strike “price agreements,” which are in effect price controls informally enforced through various sorts of threats, from tax persecution (something which is much of a threat in a country with very high nominal tax rates that are exceptionally and discretionally enforced) to “spontaneous” pickets in front of recalcitrant firms. If we are to believe the pools, inflation is now a political benefit, rather than a cost, to the administration. The president managed to be generally perceived as leading the fight for “just prices” against greedy “capitalists.” Examples like this suggest how a moral objection to critical thinking may be mounted: everyone, including governments eager to win elections by misleading voters, will benefit from critically thinking about their best means to their (sometimes evil) goals. Such means sometimes consist in **unsound public reasoning**—in this case, demonstrably false theories of inflation. Someone might conclude, then, that we’d better instill unsound arguments in the public, such as appeals to a Vatican’s encyclical that advocates free markets (i.e., a fallacious appeal to authority), rather than letting them decide, through critical thinking, which of the candidate explanations (the one offered by serious economists or the official rhetoric) is best—something that the public will not have the time to investigate, to the detriment of the more reliable, but less vivid, explanations of inflation that we find in economics textbooks.\(^\text{18}\) On this view, then, critical thinking may well be socially harmful: the government’s rhetoric, selected by critical thinking, generates public support for bad policies, unless citizens un**critically** held mistaken views.

To be sure, unsound arguments _may_ lead us to good policies—provided we are lucky. But sound arguments _must_ lead us to good policies _if_ we aim at good social outcomes. This follows from the definition of “sound argument,” for a sound argument

\(^{18}\) If Fernando Tesón and I are right, this example illustrates a general barrier to a citizen’s understanding of political issues, even assuming perfect rationality. See our *Rational Choice and Democratic Deliberation*, op. cit., pp. 8-44.
carries the truth (validity, acceptability, etc.) of its premises to its conclusion. Can we also say that sound arguments are needed to increase our chances of selecting good policies? There are two apparent counterexamples. One is the case, illustrated by the encyclical example, in which public adoption of unsound arguments is causally conducive to good social outcomes. Closer inspection reveals, however, that critical thinking is here needed at a meta-level: benevolent policy-makers have to reason soundly to correctly identify what a rhetorically effective, but not necessarily sound, argument would look like. The second apparent exception occurs in probabilistic contexts. A sound argument may lead me to a decision that makes me worse off than I could have been had I made another decision. Suppose, for example, I am offered a lottery with two possible outcomes: $100 for sure if I choose alternative A and 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 alter the fact that my decision maximized my expected gains, i.e. the utility I derive from my choice discounted by the probability of bringing about the desired outcome. The assumption of risk neutrality means precisely that my aim was to maximize my expected gains. Critical thinkers need not bring about their preferred outcomes, though 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. The 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, equality of resources, or whatever) most effectively by reasoning critically—though this may sometimes lead us to publicly endorse unsound arguments. Law schools can help students reason critically about legal issues, and so promote lofty values more effectively. If those students happen to be public-spirited, critical thinking will help them realize those values; if they aren’t, I doubt that critical thinking will make things comparably worse.

Even corrupt legal cultures may occasionally be sensitive to critical thinking. Unless free speech has been seriously curtailed, the social cost of a corrupt legal culture may reach a threshold of visibility beyond which it becomes transparent to the electorate. The prevailing legal rhetoric may then start to crumble, giving way to a new rhetorical equilibrium. Of course, the move from one equilibrium to another is possible only if exogenous factors intervene—this is of the nature of an equilibrium. To illustrate again with price control in Argentina, the 1989 hyperinflation made it transparent to most citizens that decades-long price control was ineffective. The case for the constitutional legitimacy of price control, despite the solemn statement that “property is inviolable” (art. 17 of the Argentine Constitution) and the takings clause (translated from the US takings clause), required a watering down in the concept of private property which informed the framers’ original intent. Original intent had been upheld by the Argentine Supreme Court from the enactment of the Constitution up to the 1920s.19 Politically-selected judges, along with legal scholars working at state-funded, or at any rate heavily regulated and politicized law schools, promptly devised a convenient, “social” idea of property under which price control

19 A turning point is the Supreme Court ruling in “Ercolano c/ Lanteri” (1922), “CSJN, Fallos, 136:164.” Juan Bautista Alberdi, the major framer of the Constitution, unambiguously interpreted the constitutional protection of property as committed to the classical liberal, full-ownership conception of property—a conception that clearly rules out price control. See Juan Bautista Alberdi, “Sistema Económico y Rentístico de la Confederación Argentina según su Constitución de 1853,” in “Obras Completas,” vol. 14, Joaquín V. González ed. (La Facultad: Buenos Aires, 1929), pp. 19-147.
and other myriad regulations became constitutional. As I have already suggested, price control aimed not so much at controlling inflation but at diverting public attention from governmental waste (in turn largely responsive to electoral incentives) to the alleged greed of firms and merchants.\textsuperscript{20} Widely acclaimed economic and legal doctrines held that businessmen “abused” their property rights by bringing about inflation. Once hyperinflation exploded, however, even badly informed citizens found it hard to believe that a conspiracy of millions of firms and merchants underlay huge and simultaneous price increases. The long-forgotten admonitions of mainstream economists against excessive public spending became more credible in the eyes of citizens. We have here a case where sound economics, which is an instance of sound critical thinking, made some steps towards superseding a rhetorical equilibrium where monetary explanations of inflation had competitive disadvantages in electoral politics. Between 1989 and 1995, citizens widely supported deregulation and privatization policies.\textsuperscript{21} Perhaps not coincidentally, an economically informed legal literature emerged, along with the introduction of courses on the economic analysis of law at law schools.\textsuperscript{22} An exogenous force was needed to upset the corrupt legal culture, and hyperinflation played that role.\textsuperscript{23}

The upshot of all this is that critical thinking can win the day even amidst corrupt legal cultures, provided that exogenous forces make the social costs of current policies, including laws and judicial decisions, visible to electorally decisive coalitions.\textsuperscript{24} At the very least, critical thinking helps us maneuver \textit{within} the rules of the prevailing culture to minimize its evils. Critical thinking is our best higher-order recipe: it alerts us against fallacious reasoning at a \textit{fundamental} level, and sometimes it does so by leading us to pick persuasive \textit{first-order} fallacies. We need critical thinking to, e.g., select the most effective ad hominem fallacy against an unjust judicial decision, and arguing in this way may be morally justified, \textit{all things considered}, including the relative weights of sincerity and justice in a given occasion. Of course, an argument to the effect that an ad hominem fallacy will be persuasive in a certain context need not be fallacious itself; indeed, it \textit{must not} be fallacious if our aim is to persuade others. Lawyers, whose job description is to \textit{persuade} courts of the merits of their clients’ cases, will be well advised to think critically at the meta-level at which they select their argumentative strategies.

\textsuperscript{20} For an explanation of the public’s \textit{rational} belief in this rhetoric, see, again, Pincione and Tesón, op. cit., pp. 8-44.
\textsuperscript{21} I do not mean to say that \textit{in all cases} the Argentine public favored better policies \textit{for good reasons}. See Pincione and Tesón, op. cit., pp. 98-105.
\textsuperscript{22} Examples of Argentine literature on law and economics are Jorge Bustamante, \textit{Desregulación} (Buenos Aires: Abeledo-Perrot, 1999), and Horacio Spector ed., \textit{Elementos de Análisis Económico del Derecho} (Buenos Aires: Rubinzal, 2004). Di Tella Law School led this trend since its inception in 1995. The Law School has been offering undergraduate courses in law and economics. In 2001, it launched a Master Program in Law and Economics. See the University’s home page at http://www.utdt.edu.
\textsuperscript{23} See, for a fuller discussion of this example in connection with the electorate’s incentive to acquire political information, my contribution to the volume in honor of Carlos Nino, Marcelo Alegre ed. (Buenos Aires: Buenos Aires University, forthcoming 2006), in file with author. For a general theory of rhetorical equilibria, see Pincione and Tesón, op. cit., esp. pp. 8-64.
\textsuperscript{24} The 2001 Argentine financial crisis was arguably a new exogenous force that in turn upset the incipient, timid move in the 1990s towards legislative sensitivity to long-run and dispersed economic effects. The renewed public support for a nationalistic and anti-business political discourse confirms Tesón’s and mine thesis that economically-informed policies are systematically disadvantaged in the rhetorical “market.” See Pincione and Tesón, ibid.
V. CONCLUDING REMARKS

Critical thinking raises the opportunity cost of maneuvering within a corrupt legal culture. Exceptionally, it may exploit exogenous forces to undermine a corrupt legal culture. Critical thinking is then not just a valuable tool for lawyers and judges pursuing successful careers. It helps people achieve worthy goals without making things comparably worse if they happen to pursue unworthy goals—all too often, careless pursuit of an unworthy goal just delays its emergence, there being no reason to believe that much good will be done in the meantime. Ideally, a community of critical thinkers is a community where everybody abides by common rules of reasoning. To that extent, it is a community that has taken a crucial step towards the rule of law: rules, rather than persons, reign supreme in it.