VIRTUE AS THE END OF LAW: AN ARETAIC THEORY OF LEGISLATION[*]

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"Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution."[1]

INTRODUCTION: NORMATIVE THEORIES OF LEGISLATION

An aretaic theory of legislation claims that the aim of law should be to promote human flourishing, consisting of lives of social and rational activities that express the human excellences or virtues. A theory of legislation can be virtue-centered in two senses. First, the conceptual framework of the theory focuses our attention on the role of character and virtue in general legal theory. Second, the central claim of the theory is that the promotion of virtue is the most important aim of legislation. An aretaic account of legislation does for normative legal theory what virtue ethics does for moral philosophy.[2]

Normative theories of legislation aim to provide guidance to lawmakers, answering the question, "What should be the end of law?" Theories of legislation are many and varied, but they can usefully be sorted into three familiar families: consequentialist, deontological, and aretaic.

Consequentialist theories maintain that the end of law is the maximization of good consequences. Members of this family include welfarism and utilitarianism, and it is characteristic of such theories that they assume an *ex ante* stance, evaluating present actions on the basis of future states of affairs.

Deontological theories hold that the end of law should be understood as the implementation of a system of moral rules or principles, for example, the prohibitions of moral wrongs and the protection of moral rights.[3] Examples of deontological theories include Kant's theory of law.[4] Dworkin's theory, law as integrity, may also be a member

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[1] *Constitution of Pennsylvania* § 45 (1776). Similar provisions are found in other early state constitutions.

[2] For an introduction, see Lawrence B. Solum, "Law and Virtue" in *Routledge Companion to Virtue Ethics* (Lorraine Besser-Jones & Michael Slote, eds. Routledge 2015). For a helpful critique of aretaic theories of legislation from a public choice perspective, see Donald J. Kochan, "The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective" 58 *Saint Louis University Law Journal* 295 (2014).

[3] *See* Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2002).

[4] *See* Arthur Ripstein, "Private Order and Public Justice: Kant and Rawls" 92 Virginia Law Review 1391–1438 (2006).

of this family.[5] Characteristically, members of this family evaluate actions *ex post*; the justness of future actions depends in large part on the past.

Aretaic theories of legislation are neither consequentialist nor deontological, but a virtue-centered theory of the ends of law can incorporate flourishing as a good to be promoted and justice (or rights) as a constraint. The aretaic family of theories of legislation can be further subdivided, corresponding to different views about the nature of the human excellences or virtues. The family includes Neo-Aristotelian, Stoic, Confucian, and Humean variants, but for the purposes of this essay, we will assume: (1) that humans flourish by living lives of rational and social activities that express the human excellences or virtues, (2) that the virtues are dispositional qualities of mind or character, and (3) that the virtues are both intellectual (including theoretical and practical wisdom) and moral (including courage, good temper, justice, and temperance).

The idea that virtue is the end of law is an old one. For example, the Vermont Constitution of 1777 provided, "The House of Representatives of the Freemen of this State, shall consist of persons most noted for wisdom and virtue, to be chosen by the freemen of every town in this State, respectively."[6] Virtue plays a central role in some versions of civic republicanism, and even liberal theories of the ends of law may incorporate the promotion of virtue as a legitimate purpose of government.

One more comment about the idea of a normative theory of legislation. We can distinguish two very different but interconnected kinds of theories about legislation. One type of theory looks at the aims of legislation: that is the kind of theory on offer here. Another type of theory looks at the institutional structures that are most likely to achieve these aims: such theories might be called "normative constitutional theories" if we understand "constitution" in the broad sense that refers to the basic institutional structures of a given community.[7] One component of constitutional regimes in the broad sense could be a written or unwritten "constitution" in the narrow sense. This essay does not offer an institutional or constitutional theory of legislation—although a few suggestive remarks about such a theory will be made in the penultimate Part of the essay.

Finally, an aretaic theory of legislation forms a part of "virtue jurisprudence," a general theory of law. A complete statement of virtue jurisprudence must address all the topics of normative legal theory (e.g., judging and executive action) as well as the questions about the nature of law.

FRAMEWORK: ASSUMPTIONS AND LIMITATIONS

This essay provides a sketch of an aretaic theory of legislation. This is a large topic. A full exploration and defense of the various assumptions that ground a virtue-centered approach to a normative theory of legislation is beyond the scope of this essay. Instead, key assumptions will be identified and stated.

[5] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

[6] *Constitution of Vermont*, Chapter II, Section VII (1777).

[7] This distinction is sometimes expressed by contrasting "constitution" with "constitutionalism" or by differentiating the "large *C* Constitution" from the "small *c* constitution." *See* Mark Tushnet, "The Possibilities of Comparative Constitutional Law" 108 *Yale Law Journal* 1225–1309 (1999) 1270.

Assumption: The Model Theory of Human Flourishing and the Virtues

The development of an aretaic theory of legislation requires a theory of the virtues. Among the possible approaches are accounts of virtue drawn from Aristotle, the Stoics, Hume, and Confucius.[8] In this essay, my strategy will be to adopt a model theory of the virtues that draws on Neo-Aristotelian ideas, incorporating modified versions of Aristotle's account of flourishing and the virtues. The model theory is a simplified version of ideas from contemporary virtue ethics—and owes a great debt to work by Rosalind Hursthouse[9] and Gavin Lawrence.[10] The model theory is merely laid out: no attempt is made to provide arguments in support of this account.

What is human flourishing (or *eudaimonia*)? Human flourishing consists of lives of rational and social activities that express the human excellences. Thus, flourishing is a characteristic of whole lives and not of individual moments. Flourishing is a function of activity. This means that mental states, such as pleasure or satisfaction are not themselves flourishing—although flourishing may produce such positive mental states. Flourishing requires rational activity, because humans are creatures that reason and can act on the basis of reason. Flourishing requires social activity, because humans are social creatures who communicate and interact with one another. Finally, flourishing involves activities that express the human excellences or virtues.

What are the human excellences? They are the dispositional qualities that are partly constitutive of human flourishing. Following Aristotle, we can identify moral and intellectual virtues. Although Aristotle classified the virtue of justice as a moral virtue, I will treat justice as a distinct category.

The moral virtues, including courage, good temper, and temperance, are dispositions with respect to morally neutral emotions, respectively fear, anger, and desire. Thus, a courageous human is disposed to feel the emotion of fear in a way that is proportionate to the threat or danger that elicits the fear and to respond to the emotion properly. The vice of cowardice characteristically involves the disposition to disproportionate or exaggerated fear. The vice of rashness characteristically involves a disposition of fear that does not adequately reflect the danger, and hence is associated with inappropriate risk-taking. A similar patter exists with respect to the emotion anger and the associated virtue of good temper, and the emotion of desire and the associated virtue of temperance. In each case, the virtue is a disposition to the mean with respect to a morally neutral emotion with associated vices of excess and deficiency.

The intellectual virtues are dispositional qualities of mind. Among the intellectual virtues are *sophia* or theoretical wisdom and *phronesis* or practical wisdom. Theoretical wisdom is roughly the ability to think well about complex and abstract matters. Thus theoretical wisdom facilitates the mastery of mathematics or complex legal doctrines. Practical wisdom can be understood in various ways, but the model theory adopts the perceptual account offered by Nancy Sherman. Humans with *phronesis* are able to perceive the morally salient aspect of a choice situation and to identify workable responses.

[8] For exploration of a Confucian approach, see Lawrence Solum and Linghao Wang, "Confucian Virtue Jurisprudence" *Law, Virtue and Justice* (Amalia Amaya & Ho Hock Lai, eds., Oxford, Hart Publishing, 2012).

[9] Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press 1999).

[10] Gavin Lawrence, "Human Excellence in Character and Intellect" *A Companion to Aristotle* 419–470 (Georgios Anagnostopoulos, ed.) (2013).

The virtue of justice is especially important to virtue jurisprudence. More will be said about justice below, but at this stage, the key idea is that justice is a disposition to internalize widely shared and deeply held social norms (or *nomoi*) that govern human interaction. We can call this conception of justice, "Justice as Lawfulness," (hereinafter capitalized to mark the sense of the phrase stipulated here) where the term lawfulness is understood in a wide sense that includes social norms and positive enactments—to the extent that such enactments are recognized as authoritative by the relevant social norms.

Assumption: The Consistency of the Model Theory with Cognitive and Social Science

The model theory makes empirical assumptions. Thus, the model theory assumes that humans are rational and social creatures. This assumption should not be controversial. Evidence that humans use reason and that they are naturally social is ubiquitous. But the account of the virtues offered here has been challenged empirically, notably by John Doris in his monograph, *Lack of Character*.[11] Doris draws on social psychology, and in particular on the view called "situationalism," to challenge the existence of the dispositional states (or character traits) that the model theory of the virtues assumes. The most radical version of situationalism posits that human behavior is entirely a product of situations; every individual would behave in the same way if they were placed in an identical situation. Doris's work has given rise to a vigorous debate in philosophy, and at the same time, situationalism has been criticized by psychologists who argue for the existence of character traits.

This essay simply assumes that a Neo-Aristotelian account of the virtues is correct. This assumption seems consistent with common sense and widely shared human experience. Most adults have encountered someone who seems to have an anger management problem or to lack control over their desires and others who are good-tempered and prudent.

Assumption: Naturalist Metaethics

Virtue ethics is a moral theory and as such it rests on metaethical foundations. For the purposes of this essay, I will assume a simple version of naturalist metaethics. That is, I will assume that morality is a natural phenomenon, subject to a kind of investigation that is continuous with the natural sciences. Thus, we can ask the question what sort of life is good for humans in the same way that an ethologist can ask what kind of life is good for eagles or salmon. A good eagle life involves successful hunting and reproduction. As a consequence, eagles need keen eyesight and strong wings to flourish. A good human life is much more complicated, because humans are rational and social creatures. The model theory offers an account of the good life for humans and of the characteristics that humans need to lead a flourishing life. This account of metaethics draws on the ideas of Philippa Foot and Michael Thompson.[12]

The naturalistic-metaethics assumption raises questions about the relationship of the model theory to evolutionary biology. The model theory assumes that human individuals

[11] John Doris, *Lack of Character* (Cambridge University Press 2005).

[12] Philippa Foot, *Natural Goodness* (Oxford University Press 2003); Michael Thompson, *Life and Action: Elementary Structures of Practice and Practical Thought* (Harvard University Press 2012).

and communities are the relevant subjects of the virtues, but one can imagine another version of naturalism that focuses on genomes or genes or that the naturalistic interpretation of human flourishing is reproductive success. These concerns may be important, but on this occasion they are simply bracketed.

Assumption: A Partially Ideal Theory

Normative legal theories can be ideal or non-ideal. Following Rawls, let us define an ideal theory as one that assumes (1) that citizens are willing to comply with the general requirements of the theory, and (2) that social and material conditions are such that the theory can be implemented. We engage in non-ideal theory when we relax these assumptions.[13] In the discussion that follows, I will simply assume that conditions are such that the requirements of a virtue-centered theory of legislation could be implemented. That is, I will assume that political and social conditions are such that a legislature could legislate with the aim of bringing about human flourishing and that material conditions are such that widespread human flourishing could be achieved.

In the actual world, these assumptions are likely to be controversial. Thus, some versions of social choice theory assume that legislators are inherently self-interested and hence that the notion of legislation that deliberately aims at the flourishing of human individuals and communities is "pie in the sky" or bad utopianism.[14] This essay meets this challenge indirectly. We begin with ideal theory, and this opens the door to further questions about institutional design under non-ideal conditions.[15]

THE ROLE OF LEGISLATION IN THE PROMOTION OF VIRTUE

The model theory of human flourishing and the virtues has an obvious implication for the normative theory of legislation. Legislation should aim at the promotion of human flourishing. Human flourishing requires peace and prosperity, so legislation should aim at the elimination of violence and poverty. Human flourishing requires lives of rational and social activity, so legislation should aim at creating vibrant communities with opportunities for meaningful work and play that engage our rational capacities. Human flourishing requires the virtues, so legislation should aim at creating the conditions for healthy emotional and intellectual development.

In this Part of the essay, I address the question of how legislation can accomplish these goals. I begin with peace and prosperity, the preconditions of human flourishing.

Promoting the Preconditions of Human Flourishing

Happiness or *eudaimonia* consists in "living well and doing well" as Aristotle is sometimes translated.[16] Peace and prosperity are (usually and in some sense, almost

[13] John Rawls, *A Theory of Justice* (Harvard University Press 1971).

[14] This kind of objection is pressed in Kochan, *supra* note 2.

[15] For an exploration of these issues, see Lawrence B. Solum, "The Aretaic Turn in Constitutional Theory" 70 *Brooklyn Law Review* 475–532 (2004/2005).

[16] For the Greek, see Aristotle, *Nicomachean Ethics* Book I, Chapter iv, 1095a15–20 (H. Rackham trans. Loeb Classical Library, Harvard University Press, rev. ed. 1934). Irwin as well as Broadie and Rowe use "living well and doing well." *See* Aristotle, *Nicomachean Ethics* 97 (Sarah Broadie & Christopher Rowe trans. Oxford University Press 2002); Aristotle, *Nicomachean Ethics* 5 (Terence Irwin trans. Hackett 1985).

always) preconditions for lives lived well. It seems uncontroversial that peace and prosperity are conducive to a flourishing life. Violence and poverty limit human possibilities in significant ways. Pervasive violence will result in significant pain and suffering, disabling injuries, and death. Severe poverty can result in malnutrition, starvation, and many other afflictions. Even if peace and prosperity were not preconditions for the development of the human excellences, legislation would still properly aim at the creation and maintenance of these conditions as constituent elements of flourishing human lives.

But peace and prosperity are also important because of the role they play in the development of human capacities. Emotional and intellectual growth is likely to be stunted under conditions of pervasive violence and poverty. Children who grow up in chaotic and violent conditions are likely to suffer from emotional problems that make the acquisition of courage, good temper, and temperance less likely. Disorder undermines the processes of intellectual growth that produce practical and theoretical wisdom. And it seems likely that poverty will have similar effects. Extreme deprivation during childhood and adolescence is not conducive to healthy emotional or intellectual development.

Finally, peace and prosperity create the conditions in which rational and social human activities are likely or possible. Of course, many different activities are rational or social, or both. The lives of a craftsperson, merchant, engineer, computer programmer, scholar, or public servant all can involve rational and social activities that express the human excellences. Both vocations and avocations can involve such activity: playing a musical instrument, painting, photography, sport, and perhaps even participation in a fantasy football league, as well as countless other activities outside of work, can form parts of flourishing human lives. Peace and prosperity facilitate these activities by creating opportunities for meaningful employment and by creating the time and resources that enable meaningful avocational pursuits.

How can legislation promote peace and prosperity? For the most part, this important question is outside the scope of this essay. Some answers to this question are obvious. The criminal law should forbid and punish violence. The law of nations should forbid aggressive wars. Other answers are more controversial. What institutional arrangements are conducive to the kind of prosperity that enables flourishing? Some believe that the answer to this question involves a minimalist state that creates the conditions for laissez-faire markets and private ownership of the means of production and that maximizes free choice by consumers and workers. Others believe that market capitalism results in harsh conditions for workers and the promotion of mindless consumption that is inconsistent with capitalism. There are many other possibilities, but the choice between the feasible alternatives depends on the answers to complex empirical questions that are far outside the scope of this essay.

Nonetheless, an aretaic theory of legislation can and should address questions about the kind of peace and prosperity that is conducive to human flourishing. It might be the case that stability could be maximized and violence minimized by an authoritarian social order that would undermine flourishing in other ways. Certainly, flourishing would be undermined by a police state that controls violence through fear and intimidation created by a system of secret police, informants, and mass surveillance. Likewise, the kind of prosperity that enables human flourishing might differ from simple maximization of gross domestic product. Legislation should aim at the right kind of peace and prosperity.

Facilitating the Development and Acquisition of the Virtues

Legislation should facilitate the development and acquisition of the virtues. How can this be accomplished? Again, this is a complex empirical question. To give a fully adequate answer, we would need to understand the cognitive, social, and developmental psychology of the virtues. Given the current state of neuroscience, cognitive science, and the social sciences, it seems likely that there is a good deal of uncertainty about the mechanisms by which the virtues are acquired. Given the current state of the social sciences, there may be even greater uncertainty about role of law in facilitating the processes of emotional and intellectual development that lead to the acquisition of the virtues.

Despite this uncertainty, we may be able to develop working hypotheses. It seems likely that nurturing family environments facilitate healthy emotional development by children. Therefore, legislation should aim at conditions in which children are attached to stable, loving family environments. Similarly, the law should aim to prevent domestic violence and child abuse. Moreover, nurturing families may be fostered by generous family leave policies and undermined by working conditions that do not permit parents (and other caretakers) to spend time with children. How best to achieve these conditions is an empirical question.

The primary strategies for facilitating the development and acquisition of the virtues seem likely to be indirect. One can imagine a more direct approach. The law might command parents to engage in childrearing activities that will promote healthy intellectual and emotional development by children. Or the law could command that a certain number of hours per week be spent by parents in particular ways: two hours of reading stories, four hours of adult–child playtime, seven hours of family mealtime, and so forth. An army of social workers might employ electronic surveillance and instructional home visits to enforce these commands. But it seems unlikely that the direct approach would actually work. Common sense suggests that laws mandating specific parenting practices would likely do more harm than good.

Establishing the Infrastructure for Meaningful Work and Recreation

How can the law promote rational and social activities that express the human excellences? Again, the answer depends on complex empirical questions. The goal is to provide a social structure that supports meaningful work and play.

Human history suggests that some forms of economic organization are better than others in meeting this goal. Modern developed societies (e.g., France, Japan, and Norway) may have serious flaws, but they seem to do a better job at providing opportunities for rational and social activities that express the human excellences than did the feudal societies of Europe in the so-called Dark Ages or the Soviet Union under Stalin. But there is likely to be substantial debate about the comparative merits of Scandinavian-style social democracy versus the more market-oriented approach in the United States. From the perspective of an aretaic theory of legislation, the relevant question is which form of social organization best supports human flourishing.

An aretaic theory of legislation sets the goal—providing opportunities for rational and social activities that express the human excellences. Various configurations of employment law, labor law, property law, and so forth will do better or worse at meeting

this goal. The question as to which configuration is best will depend on the answers to empirical questions that are outside the scope of a normative theory of legislation.

Legislation and the Virtue of Justice as Lawfulness

The discussion so far has excluded consideration of the virtue of justice. But if justice is a virtue, then it surely has implications for the ends of law. But what is the content of the virtue of justice? My strategy for answering this question begins with the rejection of two accounts of the virtue of justice that I believe are mistaken. This leads to a third account, which I shall call "Justice as Lawfulness." I then turn to the implication of this third view of justice for an aretaic theory of legislation.

If justice were like the other moral virtues, it would be a disposition to the mean with respect to a morally neutral emotion. But what emotion? One possibility is that justice is connected with the vice of graspingness or wanting more than one's share—this possibility inspires the first account of justice. There are well-known difficulties with this possibility. Graspingness can have many emotional causes—aiming for more than one's share can be caused by fear, anger, or intemperance, but these emotions are connected with other distinctive virtues. Moreover, if graspingness were a vice of excess, the question arises as to what is the corresponding vice of deficiency. Aiming for less than one's proper share is not usually considered injustice. Moreover, the virtue of justice can be exercised by executives and judges, but official injustice may have nothing to do with greed.

A second account of justice is inspired by the thought that justice is simply the disposition to do the just thing as specified by an independent theory. On this account, justice as a virtue differs in kind from the model of a disposition to the mean with respect to a morally neutral emotion. Instead, the content of justice is given by a theoretical account of just actions, and the virtue is simply the disposition to act in accord with the requirements of the theory. The difficulty with the second view is that this account of the virtue of justice threatens to undermine the rest of virtue ethics. This can be seen by imagining that the content of the theory of justice is provided by one of the familiar views, for example, by some form of deontology or consequentialism. If the virtue of justice were the disposition to act in accord with Kantian deontology, then that theory (and not virtue jurisprudence) would specify the aim of legislation.

The third account of justice is Justice as Lawfulness. The core idea is that justice is a disposition to be lawful, but in a special sense that departs from the idea that lawfulness reduces to a disposition to obey the positive law. This departure is illuminated by substituting a stipulated concept of a *nomos* for the notion of positive law. Let us use the term *nomoi* in this stipulated sense to refer to the deeply held and widely shared social norms of a community with human flourishing. The positive laws of a given community can play a role similar to the *nomoi* to the extent that they are promulgated by institutions or persons whose authority is recognized by the relevant social norms and so long as the content of the positive laws is consistent with substantive content of the system of *nomoi*. Many positive laws correspond directly to widely shared and deeply held social norms: laws prohibiting murder and theft are like this.

Other positive laws create new conventional rules that are consistent with the *nomoi*, but not required by them, for example, the traffic laws requiring that automobiles be driven on the left in the United Kingdom and on the right in most other nations. Once established

as positive law by authority-recognizing *nomoi*, these rules may be internalized and become *nomoi* (widely shared and deeply held social norms).

Yet another possibility is that the positive law may directly conflict with the *nomoi*: in this case, there are further possibilities, corresponding to different ways in which the *nomoi* and the positive law can interact. The positive law may act as a technology of normative change—dislodging entrenched social norms through coercion, education, or some other mechanism. But another possibility is that the positive law may coexist with contrary social norms. Again, various consequences may follow. The positive law may simply fail to function to guide behavior: in the extreme case, even officials may subvert the positive law. Or the positive law may function imperfectly with a subgroup of officials complying with (or even internalizing) the positive law while most members of the community resist, disobeying the law except in cases where the threat of punishment is sufficient to coerce compliance.

There is no guarantee that the social norms of a particular community at a particular time are consistent with human flourishing. From the perspective of virtue jurisprudence, we might say that these social norms are not true *nomoi*—they are social norms that undermine the function of law: the promotion of human flourishing. The problem of distinguishing true from false *nomoi* is a problem of knowledge and epistemic virtue. In some cases, even fully virtuous humans (the *phronomoi* who possess all the virtues including practical wisdom) may have mistaken empirical beliefs, but lack knowledge of the facts that would correct their mistakes.

When the law undermines human flourishing but we lack access to knowledge that would reveal this state of affairs, even the wise may internalize social norms that operate causally to undermine human flourishing. Perhaps this has been the case with utopian communities who believed in good faith that their social experiments would promote human flourishing and then learned that the opposite was true. In other cases, the wise may understand that a social norm is contrary to human flourishing while most (or even almost all) of the community believes the opposite. Perhaps this has been the case with oppressive but deeply entrenched social norms—such as the norms that supported slavery in the ancient world or the antebellum southern United States. Under these circumstances, a fully virtuous agent with access to knowledge of the true relationship between the law and human flourishing should cooperate in actions that will facilitate normative change. One technology of normative change may be political action that transforms the positive law first and then brings social norms into harmony with a combination of coercion and education. But in some circumstances, nonviolent civil disobedience or violent revolution may be the best response to oppressive legal and social norms.

From the perspective of virtue jurisprudence, the virtue of Justice as Lawfulness enables us to see justice as a natural human virtue that (imperfectly) promotes human flourishing and is itself a constitutive element of such flourishing. Given the circumstances of justice (scarcity and partiality), the internalization of social norms is necessary for the flourishing of individuals and their communities. Given the limitations on human knowledge of the complex causal effects that norms produce, the social norms of any given community at any given point of time are likely (or sure) to be imperfect. Virtuous agents internalize the widely shared and deeply held social norms of their community so long as the agents believe these norms are consistent with human flourishing. This entails the internalization of norms that are suboptimal—a better norm might be theoretically feasible—but a

virtuous agent will nonetheless internalize the existing norm. The alternative is for each agent to make his own judgment about what norms should govern, but that alternative is incapable of achieving the very great goods that result from the rule of law and its attendant functional benefits: stability, certainty, uniformity, and predictability of the system of social interaction. In complex societies, authority-recognizing norms play a particularly important function. In communities of communities, disagreement about social norms is inevitable and the complexity of life requires the legal institution of conventional solutions to problems of social interaction.

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Comment [1]: Or "her"—whichever you prefer.

Affirming Justice as Lawfulness has many implications that cannot be discussed on this occasion. It implies that an action can be just in one community and unjust in another—where the two communities have adopted inconsistent conventional solutions to a complex problem of social interaction. It implies that justice is primarily a function of social groups and not individual judgments of conscience. In these ways and others, Justice as Lawfulness conflicts with ideas that are central to some deontological and consequentialist views about the right and the good.

Promoting Virtuous Activity, Discouraging Vicious Action

Virtue cannot be legislated or directed. If we stipulate that a virtuous action is an action that would characteristically be performed by a virtuous agent and that a vicious action is one that would characteristically be performed by a vicious agent, then the law can require many kinds of virtuous actions and forbid many kinds of vicious actions, but the law cannot require agents to perform the right action for the right reasons or forbid the performance of the right action for the wrong reasons. Motives or reasons for action are not subject to direct legal control.

Requiring virtuous action and forbidding vicious action is neither a necessary nor a sufficient condition for the inculcation of virtue. The virtues might be acquired by a child raised to adulthood by nurturing parents in a society with bad laws. And a child raised to adulthood by neglectful or abusive parents might fail to acquire the virtues—even in a society where the law requires all virtuous actions and forbids all vicious actions.

Nonetheless, the laws of a well-functioning community will surely forbid many vicious actions and require many virtuous ones. This is not because there is some rule of virtue that requires that the positive law mirror the virtuous agent. Such a rule would be inconsistent with the structure of an aretaic theory of law, which identifies human flourishing as the ultimate normative standard.

Sometimes human flourishing will best be promoted by permitting vicious actions or by failing to require virtuous ones. Take the example of drug prohibition. Let us assume that that the use of certain drugs, for example crystal meth, is inconsistent with human flourishing. These drugs interfere with rational and social activities that express the human excellences. They damage physical, emotional, and intellectual health. Nonetheless, it might be the case that the legal prohibition of such drugs will undermine rather than promote human flourishing. Criminalization may result in unintended consequences that are worse than permitting legal use of these substances. For example, criminalization might (1) create black markets characterized by violence, (2) cause some users to disengage from healthy communities and affiliate instead with an unhealthy drug subculture, and (3) make the drug use less safe because of impurities, dirty needles, and so forth. In addition, criminalization may not be effective in reducing the use of the harmful

substances. And criminalization is likely to result in the imposition of punishments that have harmful effects that exceed the harms caused by use of the substances. Under these circumstances, the best way for the law to promote virtue may be decriminalization or legalization accompanied by programs of education and treatment. The law might support *nomoi* that discourage use of these substances with informal social sanctions and that encourage addicts to seek effective treatment.

Of course, the best course will depend on the empirics. And the empirical questions may be difficult to answer. In those circumstances, we may be unsure what legal regime is best, but nonetheless support the legal regime we have—for reasons of lawfulness.

COMPARISON WITH OTHER NORMATIVE THEORIES OF LEGISLATION

A full comparison of an aretaic theory of legislation with its competitors cannot be accomplished in a short essay. The alternatives would need to be developed in their strongest forms. Comparison would require consideration of a wide variety of legal problems: even if a deontological theory did a better job handling the problem of criminal punishment and a consequentialist theory was superior for competition law, it might nonetheless turn out that a virtue-centered theory of the ends of law is best, all things considered.

Virtue versus Welfare

Nonetheless, some points of comparison may be illuminating. When we compare a virtue-centered approach to welfarism, some similarities and differences are immediately visible. The view that human flourishing is the end of law might be characterized as eudaimonist consequentialism, but this label would be misleading as applied to an aretaic theory of legislation that takes the virtue of justice as a constitutive element of human flourishing. Because justice acts as a constraint on legislation, the kind of theory sketched here does not take the maximization of flourishing as the sole criterion for the goodness of legislation.

In some versions of normative law and economics—*Pareto* efficiency and Kaldor Hicks are examples[17]—direct interpersonal utility comparisons are ruled out. Welfarism allows for the weighting of preferences, but takes preferences as they are—they are the ultimate standard of value and not themselves subject to normative evaluation. An aretaic theory of legislation takes the shaping of preferences as one of the primary functions of law. Flourishing humans prefer to engage in rational and social activities that promote the human excellences—so a virtue centered approach to legislation aims to promote preferences that are consistent with flourishing and to discourage preferences that undermine flourishing. This is a deep theoretical difference.

Justice as Lawfulness assigns value to the promotion of the *nomoi*—that is, it values the development of communities that encourage the internalization of the widely shared and deeply held social norms that are consistent with human flourishing. Welfarism takes such norms into account to the extent they are reflected in individual preferences, and to the

[17] For discussion of the various forms of normative law and economics, see Matthew D. Adler, "Beyond Efficiency and Procedure: A Welfarist Theory of Regulation" 28 *Florida State University Law Review* 241–338 (2000).

extent that conformity to such norms instrumentally promotes preference satisfaction, welfarism will take that into account. But this approach is fundamentally different from the stance taken by an aretaic theory of legislation that incorporates the lawfulness account of justice. The account offered here values lawfulness as a constitutive element of human flourishing.

Virtue versus Fairness

Deontological theories of legislation take the promotion of fairness or the protection of rights as the fundamental (or even the only) aim of legislation. An aretaic theory of legislation takes fairness on board via the virtue of justice, but the role of fairness (or rights) is transformed. Considering a simplified and simplistic deontological theory brings out the difference. Let us stipulate that "strong libertarianism" is the deontological theory of legislation that holds that the only aim of law is to protect the property and personal rights of individuals: no other aim is permissible. Strong libertarianism rules out legislation that aims at the promotion of virtue—although the adherents of this view might argue that the libertarian state will do a better job of inculcating virtue than would a more parentalistic "nanny state." An aretaic theory has a role for the state in protecting personal and property rights, but liberty is a supporting character and not the lead actor. The aretaic conception allows legislation that aims at directing the promotion of virtue and would permit the modification or qualification of rights, if so doing were required for human flourishing.

CONCLUSION: THE ARETAIC TURN IN NORMATIVE THEORIES OF LEGISLATION

Modern normative legal theory reflects ideas in modern moral philosophy. For most of the twentieth century, deontological and consequentialist theories of the ends of law have dominated general jurisprudence. Virtue ethics is a relatively recent development. Elizabeth Anscombe's famous essay "Modern Moral Philosophy," published in 1958, was a starting point.[18] The work of Peter Geach,[19] Philippa Foot[20] and others in the 1960s represents another important step. Work accelerated in the 1970s and 1980s. Over the course of the last quarter century or so, aretaic approaches to moral theory have come to be seen as serious rivals of consequentialist and utilitarian approaches.

Normative legal theory has lagged behind. Serious work on virtue jurisprudence began in the 1980s, and it is only in the past decade or so that a substantial body of scholarship has emerged. An aretaic theory of legislation is an essential part of virtue jurisprudence. The aim of this short essay has been to provide a glimpse of the kind of work that has just begun.

[18] Elizabeth Anscombe, "Modern Moral Philosophy" (1958) 33 *Philosophy* 1–19 (1958).
[19] Peter Thomas Geach, *The Virtues* (Cambridge University Press 1977).
[20] *See* Philippa Foot, *Virtues and Vices* (University of California Press 1978).